

# Securities Law Bulletin

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## TSX Venture Exchange Implements Amendments to Incentive Stock Option Policy

By: Sherri Altshuler and Melanie Cole\*

On May 8, 2013, the TSX Venture Exchange (the “**TSXV**”) implemented amendments to Policy 4.4 – *Incentive Stock Options* (“**Policy 4.4**”)<sup>1</sup> which are effective immediately. Most of the amendments clarify and provide guidance on existing requirements and procedures. However, certain of the amendments contain new policies, including policies which permit the grant of options to charitable organizations, and the extension of options if expiring during a “blackout period”. There are also new policies relating to shareholder and TSXV approval requirements. The primary amendments are outlined below.

### Grant of Options to Eligible Charitable Organizations

Issuers are now permitted to grant stock options to eligible charitable organizations (“**Charitable Options**”), subject to certain conditions. Previously, Charitable Options could only be granted prior to or in connection with an issuer’s initial public offering pursuant to Policy 4.7 – *Charitable Options in Connection with an IPO* (“**Policy 4.7**”).

The aggregate number of Charitable Options granted and outstanding cannot exceed 1% of the issued shares of the issuer at any time. This 1% limitation includes any options granted to eligible charitable organizations under Policy 4.7 (the “**Limitation Provisions**”).

A Charitable Option granted pursuant to Policy 4.4 may contain anti-dilution provisions to cover distributions such as stock splits or consolidations, share reclassifications or payment of stock dividends. However, the terms and conditions of a Charitable Option may not be amended or made subject to amendment after its grant other than to give effect to such anti-dilution provisions or to provide for the cancellation of the Charitable Option in order to enable the issuer to comply with the Limitation Provisions.

Charitable Options must expire after the earlier of (i) a date not more than 10 years from the grant date, and (ii) 90 days after the holder of the Charitable Option ceases to be an eligible charitable organization.

### Extension of Option if Expiring During a “Blackout Period”

The TSXV has formalized its existing practice of permitting stock option plans to contain a provision allowing for the automatic extension to the expiry date of a stock option if such expiry date falls within a “blackout period”. The expiry date of any affected stock options can be extended by no more than 10 business days after the expiry of the blackout period.

To qualify for the automatic extension of a stock option, an issuer must have formally imposed the blackout period pursuant to its internal trading policies resulting from the *bona fide* existence of undisclosed material information. The policy must provide that the blackout period expires upon the general disclosure of the undisclosed material information. If an issuer has not formally imposed a blackout period, the expiry date of options will not be automatically extended under any circumstances.

Finally, the automatic extension of options will not be permitted where the optionee or the issuer is subject to a cease trade order (or similar order under securities laws) in respect of the issuer’s securities.

### Shareholder Approval Requirements

Policy 4.4 has been substantially redrafted to clarify the shareholder approval requirements applicable to stock option plans, grants and amendments.

A fixed number option plan (a “**Fixed Plan**”) that, together with all of the issuer’s other previously established stock option plans or grants, could result at any time in the number of listed shares

<sup>1</sup> Available at [www.tmx.com/en/pdf/Policy4-4.pdf](http://www.tmx.com/en/pdf/Policy4-4.pdf).

reserved for issuance under stock options exceeding 10% of the issued and outstanding shares as at the date of implementation of the Fixed Plan, must receive shareholder approval at the time the Fixed Plan is to be implemented or amended. A Fixed Plan that, together with the issuer's other previously established stock option plans or grants, could not result at any time in the number of listed shares reserved for issuance under stock options exceeding 10% of the issued and outstanding shares as at the date of implementation of the plan (a "**<10% Fixed Plan**") does not require shareholder approval at the time the <10% Fixed Plan is to be implemented or amended, subject to certain exceptions set out in Policy 4.4.

A "rolling" stock option plan (a "**Rolling Plan**") must receive shareholder approval at the time the plan is to be implemented, as well as subsequent shareholder approval at each annual general meeting of the issuer.

The TSXV will generally require shareholder approval of any amendment to a stock option plan that is not a <10% Fixed Plan, except for amendments to correct typographical errors or clarify existing provisions that do not alter the scope, nature and intent of such provisions. Amendments to any of the following provisions of a stock option plan will be subject to shareholder approval:

- persons eligible to be granted options under the plan;
- the maximum number or percentage, as the case may be, of shares that may be reserved under the plan for issuance pursuant to the exercise of stock options;
- the limitations under the plan on the number of options that may be granted to any one person or any category of persons (such as, for example, insiders of an issuer);
- the method for determining the exercise price of options;
- the maximum term of options; and
- the expiry and termination provisions applicable to options.

Subject to certain requirements described below, the TSXV will generally permit the new or amended plan to be implemented prior to the requisite shareholder approval having been obtained and will generally permit the issuer to grant options under the new or amended stock option plan, provided, however, that the issuer also obtains specific shareholder approval for such grants and otherwise complies with the requirements of Policy 4.4 in respect of both the stock option plan and the option grants.

Shareholder approval for the implementation or amendment of a stock option plan or the grant or amendment of stock options can be given at a meeting of the shareholders after the implementation or amendment of the plan or the grant or amendment of options, provided that: (i) in the case of a new or amended plan, no options granted under the new or amended plan are exercised; and (ii) in the case of the grant or amendment

of options, the options are not exercised before the meeting and that all relevant information concerning the approvals sought has been fully disclosed to the shareholders prior to the meeting. Shareholder approval must be obtained no later than the earlier of the issuer's next annual meeting of shareholders and 12 months from the implementation or amendment of the plan or the grant or amendment of the option.

If the requisite shareholder approval is not obtained: (i) in the case of a new plan, the new plan and all options granted thereunder will terminate; (ii) in the case of an amended plan, the amended plan will terminate (the issuer will revert to its existing plan) and any options that were granted under the amended plan that could not have been granted under the existing plan will terminate; (iii) in the case of an option grant, the granted options will terminate; and (iv) in the case of an amendment of options, the amendment will be of no force and effect.

The information circular of the issuer to be provided to shareholders in respect of a meeting of the shareholders at which the approval of a stock option plan or the grant or amendment of a stock option will be sought must disclose the particulars of the plan or the option grant or amendment in sufficient detail to permit shareholders to form a reasoned judgment concerning the acceptability of the plan or the option grant or amendment. Policy 4.4 also now sets out the type of disclosure that must be included in an issuer's information circular, including a requirement to disclose the method for determining the exercise price of options.

Under the new requirements, disinterested shareholder approval must also be obtained for stock option plans where the aggregate number of shares reserved for issuance under stock options granted to insiders (as a group) exceeds 10% of the issued and outstanding shares, and where the aggregate number of options granted to any one person (including companies wholly owned by that person) within a 12 month period exceeds 5% of the issued and outstanding shares. If disinterested shareholder approval is required, the identities of the applicable insiders, the number of options held by each such insider, the current exercise price and the proposed exercise price may be required to be disclosed in the issuer's information circular.

### TSXV Approval for Amendments to Plans

Currently, issuers must receive TSXV acceptance of all stock option plans at the time of institution of the plan and, in the case of a Rolling Plan, each year thereafter. TSXV acceptance is now also required for any amendment to a stock option plan. Where shareholder approval for a stock option plan or amendment to a stock option plan is required, acceptance of the stock option plan by the TSXV will be conditional upon the issuer providing evidence of the requisite shareholder approval.

*\*With the assistance of Kevin Wentzel, an articling student at Aird & Berlis LLP*

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