

**Summary of Comments and Responses re: Proposed Aequitas NEO Exchange (“NEO”) Listing Manual Amendments, November 2, 2017 concerning Emerging Market issuers (“EMIs”).**

One comment letter was received from Canadian Foundation for Advancement of Investor Rights (“FAIR Canada”).

**Issues raised, comments and responses**

**1. General Comments**

- A. FAIR Canada recommends that Canadian securities regulators conduct a follow up review of EMIs that are listed on Canadian exchanges and have significant business operations in emerging market jurisdictions...[See FAIR Canada comment letter, section 1, paragraphs 1.1-1.8 and 1.11-1.12]

NEO Exchange Response

FAIR Canada has made a number of recommendations to the CSA suggesting that they review current EMIs, their impact and current oversight of EMIs by exchanges and regulators. This is beyond the scope of our request for comments, and NEO Exchange does not list any EMIs currently, but we will provide any requested assistance or information should the CSA decide to undertake such a review.

- B. FAIR Canada recommends that EMIs not be listed unless there are adequate arrangements between Canadian and the EMI’s principal securities regulator to ensure the ability of Canadian regulators to effectively investigate and take enforcement action if necessary. [Paragraph 1.9]

NEO Exchange Response

Even where arrangements are in place among securities regulators, there is no guarantee that the results of an enforcement action in a foreign jurisdiction will be similar to those that would follow in Canada. It is NEO’s view that if a jurisdiction has a potentially different legal and/or regulatory structure or enforcement approach that makes Canadian investigation and enforcement more challenging, it is fundamentally a disclosure issue. This is also a driver behind EMI rules, which go beyond the requirements for foreign issuers generally.

- C. Fundamentally, the question should be asked as to what have been the costs and benefits of listing EMIs in Canada for Canadian investors versus what have been the costs and benefits to the EMIs, and the Canadian financial industry and the integrity of Canadian capital markets? Ultimately, is the damage to confidence in the integrity of our markets and regulatory system worth the benefits of listing EMIs and have Canadian investors, overall,

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benefitted in terms of attractive investment opportunities or have they experienced negative returns and/or significant losses from EMIs listed in Canada? [Paragraph 1.10]

### NEO Exchange Response

NEO Exchange acknowledges that a risk of financial loss is present in respect of any investment and it may be argued that, on balance, there is a higher risk for EMIs. The proposed solution implies that investors should not be able to make their own risk-return evaluation; however, this is the purpose of the Exchange's enhanced disclosure for EMIs.

## **2. Specific Comments**

- A. The Consultation Paper states there will be no impact on capital markets or there will only be a positive impact resulting from its listing of EMIs. FAIR Canada requests that the exchanges and the CSA examine whether providing EMIs the ability to choose to list amongst a greater number of exchanges within Canada will benefit our capital markets and foster greater market integrity and monitor the ongoing impact of listed EMIs. [Paragraph 2.1]

### NEO Exchange Response

We remain of the view that the ability of EMIs to list on NEO Exchange (which would lead to a greater number of exchanges listing EMIs) will be either neutral or beneficial to the capital markets/market integrity due to our disclosure-based approach generally.

Since all recognized exchanges are overseen in a similar way by the CSA, and all but one with the same lead regulator, we would suggest that any limitation on the way in which exchanges may carry out any particular listing activities (that are appropriately regulated) would be a constraint on competition.

- B. FAIR Canada recommends that all listed EMIs be required to have a minimum level of comprehensive directors and officers' insurance (provided by an insurer in Canada) so that there is financial recourse available in the event of malfeasance or other non-compliance resulting in significant financial losses to investors. [Paragraph 2.2]

### NEO Exchange Response

Thank you for your comment. It is not consistent with our general approach to dictate to issuers the details of how they must manage their business activities outside of what is required under corporate or securities law. We appreciate the purpose behind the suggestion, but it would lead to issues such as what the appropriate amount should be, which we view as outside of an exchange's ambit.

**3. Definition of Emerging Market**

- A. FAIR Canada questions whether each exchange should be able to define for itself what is an Emerging Market or whether there should be one consistent definition for all the exchanges and ideally, for all the different provincial and territorial securities regulators as well. It is confusing to investors for an issuer to be categorized as being from an Emerging Market by one exchange or regulator and not by another... [Paragraphs 2.3 and 2.4]

NEO Exchange Response

We agree with this in principle, but the challenge inherent in including the definition in securities law is that it cannot be amended in a timely way to respond to changing global environments and it is difficult to assess all jurisdictions at all times. The current definitions in place at exchanges and our proposed definition allow both exclusions and inclusions, which can be adjusted in a much simpler way.

- B. NEO's definition of Emerging Markets provides a list of countries or geo-political regions that are not Emerging Markets and, therefore, a country is an Emerging Market if it is not found on the list. NEO's definition appears to result in a definition of Emerging Markets that is narrow and excludes such countries as Mexico, the Republic of Korea, Taiwan and South Africa from the definition. The definition also gives NEO the discretion to exclude other jurisdictions from the definition and adjust the list based on very broad factors such as participation in international organizations such as APEC and the G20. This could result in several countries generally accepted as being Emerging Markets being excluded from the definition, for example Argentina and China. FAIR Canada believes a broad definition of what constitutes an Emerging Market fosters better investor protection and integrity of our markets and should be adopted pending a harmonized definition being determined. [Paragraph 2.5]

NEO Exchange Response

We have attempted to create a relatively small list of countries that are not considered Emerging Markets while providing some flexibility for including others, based on factors we do not consider to be overly broad, such as inclusion in the G20, and we note that we did not include a sector-wide exemption for resource issuers.

**4. Qualifications of Management and Corporate Governance**

- A. FAIR Canada observes that the TSX requirements for an EMI include each of the CEO and CFO and, when taken as a whole, the board of directors, having adequate knowledge and experience with Canadian public company requirements whereas NEO, in section 2.10(5)(a)(i), simply requires that an EMI's senior management and board of directors, when taken as a whole, have such knowledge and experience. FAIR Canada suggests that both the CEO and CFO should each individually possess such knowledge and experience and that NEO

revise its requirements set out therein to at least the same level of that of the TSX.  
[Paragraph 2.6]

NEO Exchange Response

NEO Exchange's interpretation of the TSX policy, is based on the following text in the TSX EMI Staff Memo:

*"TSX generally expects that a sufficient number of directors and key officers (e.g. CEO, CFO, COO or corporate secretary) will have North American public company experience, to support the fulfilment of reporting and public company obligations in Canada. TSX may also consider, when appropriate, public company experience from other countries such as the United Kingdom and Australia.*

*In particular, pursuant to its ability to consider all factors related to management of a company under Section 325 of the Manual, TSX expects that the CFO and the chair of the board of directors ("Chair") of Emerging Market Issuers will have North American public company experience. See also the discussion below in the section entitled "CFO—Suitability Requirement"..."<sup>1</sup>*

NEO believes that the mandatory requirements for senior management, directors and CFOs set out in section 2.10(5)(a) and (b) are consistent with the level of knowledge and experience with Canadian requirements expected by the TSX.

- B. FAIR Canada recommends that consistent with OSC Staff Notice 51-720, section 2.10(5) should require that the board of an EMI have sufficient understanding of and experience with the cultural and business practices of the emerging market jurisdiction (rather than simply identify such experience) and FAIR Canada recommends that there be at least two independent members of the board with such understanding and experience (rather than one director who could be non-independent).

In addition, exchanges should require that EMIs have robust policies, procedures and processes designed to ensure that EMIs senior management and board of directors have adequate knowledge of cultural and business practices and have mechanisms to ensure that they do not place full reliance on local management or local board members and rather obtain input from other (independent) sources.

[Paragraphs 2.7 and 2.8]

NEO Exchange Response

The requirement is to provide the Exchange with sufficient information to determine whether the EMI's board is suitable, acknowledging that this may be accomplished in multiple ways. To dictate, with the granularity proposed by FAIR Canada, which board members must have which experience, and how they would approach gaining and retaining this knowledge and experience would conflict with NEO Exchange's approach.

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<sup>1</sup> TSX Staff Notice 2015-0001, Part II , 2.

**5. Books and Records and Material Agreements**

FAIR Canada recommends that in addition to having a certified English translation of all documents that an EMI is required to file with the exchange, that it also be required that all material agreements be translated into English or French (depending on primary language of the board) so that books and records of the issuer can easily be reviewed and understood. [Paragraph 2.9]

NEO Exchange Response

The Exchange requires all materials to be filed with the Exchange, including material contracts, to be translated in English or French. Non-public materials will be required to be handled in accordance with the EMI's communication policy and may include, where appropriate, a requirement to translate the documents into the primary language of the board.

**6. Corporate Governance**

- A. FAIR Canada recommends that there be at least two independent directors with public company experience and significant experience in the EMI's principal business jurisdiction rather than one independent director with experience in one or more Emerging Market jurisdictions generally. Such knowledge and experience should include that of the business operations of the EMI in the principal business jurisdiction along with the culture, laws, financial regulation, local business practices and political landscape of that jurisdiction. [Paragraph 2.10]

NEO Exchange Response

Our requirements in subsection 2.10(6)(d) include having at least two independent directors with relevant experience in a non-Emerging Market jurisdiction, at least one of whom is a resident of Canada and at least one independent director with relevant experience in one or more Emerging Market jurisdictions. We believe that this requirement strikes the appropriate balance between the need for qualified independent director stewardship and the flexibility necessary for the EMI to find suitable board members.

- B. FAIR Canada also recommends that independent directors of an EMI be required to carry out regular site visits, meet with the EMI's local management and advisors, including in camera sessions with local auditors. [Paragraph 2.11]

NEO Exchange Response

We appreciate the theory behind this recommendation but believe that no cost-benefit analysis would support it. We have included an annual certification by the CFO as to whether any site visits were conducted in order to get at the same issue.

**7. Corporate and Capital Structure**

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FAIR Canada recommends that an EMI's public disclosure should, in addition to describing any proposed non-traditional corporate or share capital structure and providing an explanation of why it is necessary, also provide full, true and plain disclosure of the associated risks of the structure and the evaluation of those risks by the company and the controls in place to address those risks. [Paragraph 2.12]

### NEO Exchange Response

We agree with this recommendation and will amend subsection 2.10(11) to read as follows:

*Where an EMI intends to employ a non-traditional corporate or share capital structure, including a variable interest entity or a special-purpose entity, the EMI's public disclosure should describe the proposed non-traditional corporate or share capital structure and provide an explanation as to why the structure is necessary in the given circumstances, and the risks associated with the structure.*