Stikeman Elliott

Stikeman Elliott LLP
Barristers & Solicitors
1155 René-Lévesque Blvd. W.
41st Floor
Montréal, QC Canada H3B 3V2

Main: 514 397 3000
Fax: 514 397 3222
www.stikeman.com

January 31, 2023

Without Prejudice
By E-mail

Ms. Danielle Mayhew
Legal Counsel, Regulatory Affairs
Toronto Stock Exchange
100 Adelaide Street West, Suite 300
Toronto, Ontario M5H 1S3
Email: tsxrequestforcomments@tsx.com

Dear Ms. Mayhew:

Re: Comment on Public Interest Amendments to Section 606 – Prospectus Offerings of the TSX Company Manual

We submit the following comments in response to the Request for Comments (the **Request for Comments**) published on December 1st, 2022 with respect to the amendments to Section 606 – Prospectus Offerings (the **proposed amendments**) of the TSX Company Manual (the **Manual**).

This letter represents the general comments of certain members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

1. Do you agree with TSX's overall approach with respect to how it proposes to view public offerings under Section 606 of the Manual as described herein?

Yes. As a general principle, we agree that deference should be given to a company and its board of directors when determining the pricing of a public offering. In addition, given common market price, turnaround times for the pricing of public offerings and the increasing number of Canadian issuers that are also listed on U.S. stock exchanges (which generally do not regulate discounts in offerings), we believe that the current formulation of Subsection 606(b) and the various determinations required thereunder in the absence of formally stated guidelines often give rise to unduly difficult situations for issuers and TSX staff alike and may in certain circumstances prevent issuers from seizing financing opportunities. This is particularly the case in the context of U.S. cross-border offerings intended to be sold primarily in the United States, led by U.S. investment dealers who structure the offering in accordance with U.S. rules, for investors who expect the types of discounts allowed in their home jurisdiction. As such, we welcome the intention to provide clarity, predictability and greater transparency of TSX policies while providing greater deference to issuers and their board of directors.

More specifically, we support the reasonable flexibility that would be afforded under the proposed amendments to allow for bona fide public offerings at a discount in excess of a10% discount to market price. We believe such flexibility would contribute to correct an imbalance under TSX policy, whereby issuers looking to raise capital in challenging market conditions would in practice need to enhance their original offering with generous warrant "coverage" to successfully raise capital in a manner that meets the permissible discount threshold. Such use of warrants may give the appearance of a more moderate discount at the outset, but may ultimately be more dilutive to existing shareholders on a pro forma basis and add complexity to the issuer's capital structure. Similarly, there are significant limitations and

drawbacks associated with the use of rights offerings or the reliance on the “financial hardship” provisions of the Manual. Accordingly, rights offerings are a rarely used tool for Canadian issuers.

That being said, in respect of the proposed amendment to replace “Market Price” by “Closing Price”, we are of the view that the issuer should have the discretion to refer to the lower of the “Market Price” or the “Closing Price”, as has been allowed by TSX from time to time in applying the current formulation of Subsection 606(b), to better account for various financing structures. For example, in the context of a broadly marketed public offering with a concurrent private placement in respect of which the Private Placement Rules apply (in whole or in part), the issuer would have to use the Market Price for the portion of the transaction in respect of which the Private Placement Rules apply. Allowing for reference to the Market Price in the public offering component of the transaction would avoid circumstances where the concurrent offerings were subject to competing pricing restrictions.

We also think it would be beneficial for the rules to clarify that where a private placement is effected concurrently with a broadly marketed public offering, at a subscription price which is the same as the offering price in the public offering, the Private Placement Rules will not apply to any portion of the concurrent private placement (subject to insider participation which shall be treated as stated in the proposed amendments).

Lastly, we submit that the proposed amendments should offer further clarity on when there should be a reset of the closing price to be used in discount calculations in the context of a public offering that is marketed over a number of days. To that effect, we note that as part of the Request for Comments it is suggested that the same policy concerns may not apply where “bona fide public offerings have been marketed for a period of time that allowed for price discovery”.

2. **In determining what level of discount exists, where insiders receive standby or commitment fees, or do not purchase via underwriters and subsequently the issuer does not pay the underwriting fee on the insiders’ purchase, TSX intends to consider the net proceeds received by the issuer from the prospectus offering, rather than the discounted price paid by the subscriber. Pursuant to this proposed approach, TSX would require disclosure by the issuer of the actual proceeds paid by subscribers benefiting from receiving fees or who are exempt from underwriting fees. Note that where the net proceeds received by the issuer from insiders are, in fact, less than other subscribers, TSX would take the view that this is a different purchase price and therefore would apply the Private Placement Rules to the insider purchase, rather than regard it as part of the prospectus offering. Is this approach appropriate? Are there concerns with the perception that insiders are offered securities at a lower price than other subscribers?**

We are of the view that the proposed requirement to disclose the actual proceeds paid by subscribers benefiting from receiving fees or who are exempt from underwriting fees is consistent with current market practice and applicable securities laws.

In respect of insider purchases where a standby or commitment fee is payable to the insider, we are of the view that there are situations where the payment of a fee to an insider is both appropriate and necessary, including without limitation where capital is committed in advance of announcement of the broader offering and commitment by the public investors, whether to support the issuer’s ability to finance an acquisition, project or otherwise.

In such cases, we believe issuers should have the flexibility to pay such fees without the Private Placement Rules applying to the insider’s participation (up to the insider’s pro rata interest in the issuer), provided the public offering is broadly marketed and the net price paid by the insider is within a 15% discount to the closing price.

We do not believe there should be concerns with the perception that insiders are offered securities at a lower price than other subscribers, provided the net proceeds received by the issuer from insiders are equal to or greater than the net proceeds received by the issuer from the underwriters in respect of other subscribers in the public offering.[1]

As mentioned above, we believe that deference should be given to the issuer and its board of directors in determining whether standby or commitment fees are appropriate in a particular offering, including in respect of their quantum. When determining whether it is commercially reasonable and in the best interests of the issuer and its security holders to pay a commitment fee to an insider in order to secure financing, directors are required to give careful consideration to all relevant facts and circumstances, weighing several factors and considerations specific to the issuer, in the exercise of their fiduciary duties under applicable law. In that context, commitment fees may appropriately be paid to insiders in consideration for the substantial benefits realized by the issuer as a result of the insider's commitment to support its proposed public offering. Such benefits, combined with some or all of the factors below, may as the case may be substantially alleviate and outweigh any potential perception that insiders are offered securities at a lower price than other subscribers:

- in marketing a public offering, an insider's additional investment shows long-term commitment and support for the issuer's business strategy and the merits of the offering, which in some cases is necessary for the issuer to successfully access capital in challenging market conditions;

- it is commercially reasonable to compensate an insider for the commitment of substantial funds during the pendency of an offering, potentially for an extended period of time, as (i) the insider is often wall-crossed with privileged information and therefore restricted from trading in the issuer's securities during that time, and (ii) such committed funds cannot be committed to other investments during that time;

- where the quantum of a standby or commitment fee to insiders is equal to or less than the underwriting fee paid to the underwriters in the public offering, this leads to at least as much net proceeds for the issuer than if the public offering had been sold entirely to non-insiders;

- where the quantum of the capital commitment fee to an insider mirrors the amount of the underwriters' fee, the insider's purchase effectively represents capital obtained on arm's length terms, since the terms of the public offering are determined by negotiation between the issuer and the underwriters;

- since the insider may have to acquire the securities in reliance on an exemption from the prospectus requirement under applicable securities laws, the negotiation of a commitment fee

[1] For clarity, in an underwritten public offering (where the underwriters, as principals, purchase the securities for resale, whether on a "bought deal", overnight marketed or other marketed basis, and which is the overwhelmingly prevalent transaction structure for public offerings by non-venture issuers), the calculation of the "net proceeds received by the issuer from subscribers in the public offering" should consider the underwriting fee, commission or discount. As such, the net proceeds received by the issuer from subscribers in the public offering should be the discounted price paid by the underwriters, net of the underwriting fee or commission (and we note that, to the extent the underwriters decrease the offering price after having made a reasonable effort to sell all of the securities at the initial offering price disclosed in the prospectus, the compensation realised by the underwriters will be decreased, without affecting in any way the net proceeds received by the issuer; this risk being particularly relevant in the context of "bought deals" which are by nature priced before announcement and without price discovery). Under that construct, to the extent the quantum of the standby or commitment fee payable to insiders is equal to or lower than the underwriting fee paid to the underwriters, in circumstances where the insiders do not purchase via underwriters and subsequently the issuer does not pay the underwriting fee on the insiders' purchase, our view is that the net proceeds received by the issuer from insiders are, in fact, the same or greater than the proceeds received from other subscribers in the public offering.

can be part of agreeing to terms and conditions that are necessarily different than those available to subsequent purchasers in the public offering, including as a consequence of acquiring securities pursuant to a prospectus exemption, the securities acquired by the insider are subject to resale restrictions under applicable securities laws (including hold periods), whereas the securities purchased by subsequent purchasers in the public offering are immediately freely-tradeable and can opportunistically be sold at any time.

3. **With respect to pricing a prospectus offering where there is material undisclosed information, the Staff Notice states that TSX typically views five days as an appropriate benchmark for the dissemination of material information. However, where an abbreviated period of time is required by an issuer, TSX will take into consideration certain factors as set out in this Staff Notice. Given the speed and manner in which market information is now disseminated and TSX's desire to: (i) decrease the burden of TSX pre-clearance; and (ii) increase transparency and predictability of our policies, TSX is considering reducing the number of days required for the dissemination of Material Information (as defined in the Staff Notice) from five days to one day. Does this approach raise any concerns?**

We are of the view that the contemplated amendments to the Staff Notice would constitute an improvement compared to the current rules and that appropriate dissemination of Material Information can generally take place over a single day. In addition, we note that, assuming that the proposed amendments are adopted, in the case of public offerings not subject to discount limitations (i.e., "broadly marketed" public offerings with no insider participation), issuers should have the discretion to price such public offerings *immediately prior to* the dissemination of Material Information. While this would effectively broaden the "Pricing Exception" described in the TSX Staff Notice 2016-0006, we submit that this would be appropriate in the context of public offerings where it has been deemed that the discount to market price need not be monitored.

In this regard, we note that U.S. securities laws and stock exchange rules do not generally regulate discount to market price in the context of securities issuances. As an increasing number of Canadian issuers are or aspire to become listed on U.S. exchanges, we are of the view that it would be beneficial to align TSX rules to all extent possible with those of the U.S. exchanges.

4. **The Proposed Amendments introduce a definition for "Broadly Marketed". Is the proposed definition appropriate? Are there other measures that TSX should consider? Is "Broadly Marketed" a reasonable standard for public offerings that are led by investment dealers outside of Canada?**

We welcome the introduction of an alternative, clear standard and we believe that the reference to at least 50 potential purchasers is useful. However, we are of the view that certain additional minor clarifications could be made in the second portion of the definition. Our understanding is that the proposed concept (i.e. "makes the offer known to the selling group and/or equity capital markets desks at <u>all</u> Canadian investment dealers") is not necessarily reflective of how bona fide broadly marketed public offerings are currently marketed, where investment dealers do not systematically reach out to desks of other banks not involved in the syndicate. Rather, investment dealers typically broadly market securities through their own sales desks and broker networks. It would also be helpful to obtain further guidance regarding the meaning of "making the offer known to the selling group". Lastly, in the context of an issuer also listed on a U.S. or foreign exchange and contemplating a public offering primarily marketed in a foreign market, the second portion of the definition may not be possible to meet if there are less than 50 potential purchasers, even though the offering has effectively been broadly marketed in the primary market (i.e. the price discovery process has come to fruition).

* * * * *

Please do not hesitate to contact any of the undersigned if you have any question in this regard.

Yours very truly,

Andrée-Anne Arbour-Boucher

on my own behalf and on behalf of

Karine Bilodeau
Colin Burn
Ramandeep K. Grewal
Jeff Hershenfield
Amélie Métivier
Aniko Pelland
David Tardif

c.c. Ms Susan Greenglass, Director
Market Regulation
Ontario Securities Commission