

January 31, 2023

By E-Mail:

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Re: Proposed Amendments to Section 606 – *Prospectus Offerings* of the TSX Company Manual

Dear Staff:

We are writing in response to your request for comment dated December 1, 2022 (the Request For Comment) regarding certain proposed amendments (the Proposed Amendments) to Section 606 – *Prospectus Offerings* of the TSX Company Manual (the Manual).

These comments are provided by the partners and counsel of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Toronto Stock Exchange (TSX) to reduce the burden faced by issuers and their agents when raising capital via a prospectus offering by providing greater clarity, predictability and transparency of TSX policies.

We agree that it is important for the TSX to set standards to clearly identify what constitutes a *bona fide* public offering. While we are generally supportive of codifying the parameters by way of the Proposed Amendments, we believe that further clarity and predictability could be achieved through the following adjustments:

- (1) Adjusting the definition of “broadly marketed” to more closely align with prevailing market practice as it relates to both branches of the proposed definition, as further described below; and
- (2) Using the new method for calculating the offering price (i.e., the Closing Price) for transactions under *both* Section 606 and Section 607 of the Manual.

1. Broadly Marketed Nature of the Offering

We support the TSX’s proposal to include the broadly marketed nature of the offering as one of the factors that the TSX will consider when assessing whether an offering constitutes a *bona fide* public offering. We further generally support the TSX’s proposed definition of what constitutes “Broadly Marketed” for this purpose.

With respect to the first branch of the proposed definition of “Broadly Marketed”, we note that at the time of launching and pricing a public offering (particularly in the case of a bought deal), and even at the time of marketing a public offering, the underwriters or agents will likely not have perfect visibility into the total

number of purchasers in the offering. In many cases, this confirmation will not be available until closing of the offering (or even shortly thereafter). Given that the issuer will be required to make representations to the TSX in the issuer's listing application that the offering satisfies the "Broadly Marketed" requirement, we would suggest that the first branch of the proposed definition be adjusted to a "good faith and reasonable expectation" by the lead underwriter(s) or agent(s) that the offered securities will be distributed to at least 50 purchasers.

Furthermore, we believe that it should be made clear that the second branch of the proposed definition of "Broadly Marketed" that requires issuers to make an "offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers" will be satisfied based on the prevailing market practices of lead underwriter(s) and agent(s) in public offerings. For instance, the TSX might consider clarifying in the definition of "Broadly Marketed" that making the offer known by means of a Bloomberg terminal announcement, selling group notice, press release issuance, or similar mechanism would satisfy this notice requirement.

2. Method of Calculating the Offering Price

We are strongly supportive of the TSX's view that deference should be given to an issuer's board of directors in fulfilling their fiduciary responsibilities when determining the price of securities to be distributed pursuant to a prospectus offering.

We also support the TSX's proposal to use the closing price as defined in Appendix F of the Manual (the Closing Price) as the reference price when calculating discounts on prospectus offerings. However, given the TSX's acknowledgement that using the Market Price is no longer appropriate and that the Closing Price is a more relevant reference price, and in light of the co-dependent nature of Sections 606 and 607 of the Manual in regard to the Proposed Amendments, we believe that it would be appropriate (and necessary to avoid misalignment) to use the Closing Price for calculating discounts for *both* public offerings and private placements under Sections 606 and 607 of the Manual. Otherwise, there is a risk that using two separate reference price calculations for a single offering could have potential unintended consequences.

By way of illustrative example, if an issuer with a share price of \$2.01 wished to proceed with a public offering at a 14% discount to the Closing Price with insider participation in excess of pro rata, the Proposed Amendments would require these excess insider purchases to be reviewed under the Private Placement Rules. While a 14% discount would generally not require shareholder approval, in the event that the issuer's share price had fluctuated over the previous 5-day period, it is possible that an acceptable discount to the Closing Price under Section 606 could exceed the maximum permitted discount to the Market Price (5-day VWAP) when calculated under the Private Placement Rules. As a result, an appropriately discounted public offering under Section 606 using the Closing Price could result in the issuer requiring shareholder approval when the discount is re-calculated using the Market Price for Section 607 purposes.

Given the TSX's acknowledgement that using the Market Price is no longer appropriate and that the Closing Price is a more relevant reference price, we believe that using a single method for calculating offering discounts (i.e., the Closing Price) across *both* public and private securities offerings would avoid this inconsistency and the potential unintended consequences that could arise when using two separate methods for calculating discounts on a single transaction.

3. Proposed Changes to TSX Staff Notice 2018-0003

Given the speed and manner in which market information is now disseminated, we strongly support the TSX's proposal of amending TSX Staff Notice 2018-0003 to reduce the number of trading days required for the dissemination of Material Information, from five trading days to one trading day, before a reference price can be used. Adopting this change will reduce the negative impact and delays caused when launching prospectus offerings and private placements.

Once again, we appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you.

Yours truly,

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John Emanoilidis
Janet Holmes
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Janan Paskaran
Karrin Powys-Lybbe
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