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DELIVERED BY EMAIL

WITHOUT PREJUDICE

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-and-

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Dear Sirs/Mesdames:

Re: Toronto Stock Exchange Request for Comments - Amendments to Toronto Stock Exchange Company Manual - Section 606 Prospectus Offerings

We are pleased to provide the following comments in response to the Request for Comments (the "**Request**") published by the Toronto Stock Exchange (the "**TSX**") on December 1, 2022 with respect to proposed amendments (the "**Proposed Amendments**") to Section 606 of the TSX Company Manual (the "**Manual**").

We thank you for the opportunity to comment on the Proposed Amendments. This letter represents the general comments of certain individual members of the Securities and Capital Markets practice group of Borden Ladner Gervais LLP, as set out below. Our comments are not those of the firm generally or any client of the firm. Our comments are being submitted without prejudice to any position taken or that might be taken in the future by our firm on its own behalf or on behalf of any client.

We have organized our comments in response to the questions posed in the Request. Capitalized terms used in this letter that are not defined have the meanings attributed to them in the Request.

Comments

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 in the Request?***

We commend the TSX's proposed approach to public offerings, and more specifically, agree with the view that deference should be given to an issuer's board of directors in fulfilling their fiduciary duties when determining the price of securities to be distributed pursuant to a prospectus. An issuer's board is best suited to understand the market for the issuer's securities and the price range that will enable the issuer to successfully complete a prospectus offering.

However, while we acknowledge the TSX's desire to set standards for what constitutes a bona fide public offering, we do not believe that pricing should be taken into consideration when the TSX determines whether to accept notice of a distribution by way of prospectus. As noted by the TSX in the Request, between 2014 and 2020, approximately 85% of prospectus offerings were completed within a 15% discount to market price, suggesting that the majority of listed issuers are not seeking to issue securities at an unreasonable discount. Indeed, doing so would, in many instances, be contrary to a board's fiduciary duties and the best interest of the issuer and its stakeholders. Furthermore, when issuers do seek to price a prospectus offering at a significant discount to market price (greater than 15%), they are often doing so in an effort to ensure short-term viability. In these instances, insider participation also becomes increasingly important to the success of the offering as it is the insiders who often make investments to ensure that the issuer has met its minimum offering or funds necessary to achieve stated corporate purpose or, in some cases, to avoid a distress situation. Furthermore, it is our understanding that exchanges in other jurisdictions (for example, the NYSE or Nasdaq in the United States) do not take pricing into consideration when reviewing applications to list securities. As such, we respectfully suggest that the TSX reconsider its approach to the relationship between insider participation and discount to market price.

As an alternative, should the TSX wish to consider pricing, in a "Broadly Marketed" offering where the discount to closing price is within 15%, we question whether insider participation should be relevant at all, particularly given that the TSX's Private Placement Rules allow for a 15%+ discount to market price. As noted above, insiders are often participating in an offering to ensure that an issuer can meet its minimum offering requirements and/or raise the funds needed to achieve its goals or to avoid distress. In addition, insiders' interests are often aligned with that of the other shareholders as they typically hold (in many cases, as a requirement of the issuer) significant amounts of equity and/or share based compensation and would not want to cause share price to decline as a result of a public offering. Imposing the Private Placement Rules on any portion of an insider's investment may, among other things, result in the insider having to reduce its investment or cause significant delays to the offering. In addition, we note that there are already limits on the ability of an insider (or any other securityholder) to participate in an offering in a manner that would "materially affect control" of the issuer. As such, significant insider participation to the detriment of other securityholders should not pose a material risk in a prospectus offering. If insider participation remains a concern for the TSX, we would suggest only taking insiders into consideration in a Broadly Marketed offering where the 50 purchasers includes insiders (i.e., if an offering has 50 purchasers in addition to the insiders participating in the offering, the insider participation should be irrelevant).

Please also see our comments below (Question 6) with respect to the simplification of the TSX's acceptance process for WKSI issuers.

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 disclose 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 respectfully submit that a distinction should be drawn between the two types of arrangements referenced in this question: (1) an offering where insiders receive standby or commitment fees; and (2) an offering where insiders are not purchasing securities through the underwriters and the issuer does not pay the underwriter fee (often referred to as "President's List purchases"). In the first arrangement, the insider's purchase price per security is reduced as a result of the standby or commitment fee and the insider benefits from the arrangement; whereas in the second arrangement, the insider's purchase price remains the same and it is the issuer that benefits from reduced fees. Arguably, only the first arrangement impacts pricing. As such, we believe that the two arrangements should be treated differently by the TSX. Offerings where an underwriting fee is not paid on President's List purchases should not, by default, be subject to the Private Placement Rules merely because the issuer is not paying the underwriting fee.

Further to the above, we do not anticipate any concerns with respect to the perception that insiders are offered securities at a lower price than other subscribers. As noted above, President's List purchases would not provide insiders with a discounted purchase price. Rather, the issuer receives the benefit of lower underwriting fees. In short, the President's List economics benefit the issuer (and its shareholders). Separately, and based on our experience, outside of the rights offering context, it is not common practice for insiders to receive a standby or commitment fee in a prospectus offering and these types of arrangements should be addressed by separate rules.

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 supportive of a simplified method of determining an offering price based on the "closing price" of the issuer's securities, being the price per share at which the last trade in that class of securities was effected on the TSX. We are supportive of a truncated period for determining whether Material Information has been disseminated. While we acknowledge that an offering price should be determined based on a "market price" that reflects all material information about the issuer and its securities, requiring five clear trading days post-dissemination of Material Information is impracticable in today's fast paced market. Over the last number of years, we have seen a significant increase in the use of the shelf prospectus system which allows issuers to very quickly access public markets and the decision as to whether to launch a prospectus offering and how to price a prospectus offering are determined on an expedited basis. Canadian securities legislation also aims to foster efficiency in capital markets (see, for example, the purposes enumerated in the *Securities Act* (Ontario)). The "well-known seasoned issuer" or "WKSI" system recently implemented by the CSA allows large-cap issuers are able to avoid any regulatory review or waiting period on a prospectus filing and further exemplifies both the market's and issuers' desire to access capital on a speedy basis. A five-day waiting period does not serve the objectives of Canadian securities regulation. Further, it is inconsistent with the CSA's views on the dissemination of information and general market practice as to when information is "generally disclosed".

4. ***The Proposed Amendments introduce a definition of "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 appreciate the TSX's recognition that marketing efforts should be relevant to the determination of whether an offering has been broadly distributed; however, we have some concerns with the current definition of "Broadly Marketed" as found in the Proposed Amendments.

It is our view that it may be challenging for any agent/underwriter and/or issuer to provide assurance to the TSX that an offering has been made known to the selling group and/or equity capital markets desks at all Canadian investment dealers, particularly when there are close to 200[1] registered investment dealers in Canada, many of whom would not be interested in participating the vast majority of prospectus offering. As such, we respectfully suggest that subsection (ii) of the definition of "Broadly Marketed" in the Proposed Amendments be struck in its entirety, or, in the alternative, be replaced with evidence that an offering has been syndicated and generally made known to the selling group. From our perspective, it would be difficult to argue that a syndicated offering has not been broadly marketed.

5. Other Comments – LIFE Offerings

As set out in TSX Staff Notice 2022-0003 *Listed Issuer Financing Exemption* (November 8, 2022), the TSX will review applications relying on the Listed Issuer Financing Exemption (the "**LIFE**") as a prospectus offering under Section 606 of the Manual and will deem the use of the LIFE to be a bona fide public offering. We want to highlight this Staff Notice and trust that this will be the TSX's continued approach should the Proposed Amendments be adopted. Based on LIFE filings to date, we

[1] Based on a search of "investment dealers" on the CSA's National Registration Search available at www.aretheyregistered.ca.

have seen a wide range of discount to market being used and given the intention that the LIFE provides simplified and expedited access to capital, we do not believe that compliance with the pricing parameters in the Proposed Amendments should be required in this context. Issuers should be able to price LIFE offerings at a discount up to or in excess of 15% regardless of the number of purchasers or insiders participating in the offering without triggering the Private Placement Rules and we note that certain of the Private Placement Rules are incongruous with the LIFE rules (for example, the shareholder approval requirement for private placements priced at a discount to market price where the number of securities issuable is greater than 25%). We respectfully ask that TSX amend the Proposed Amendments and/or Staff Notice 2022-0003 to clarify the treatment of LIFE offerings.

6. Other Comments – WKSI Model

As noted above, the CSA recently adopted a WKSI model to assist large and well-established issuers in efficiently accessing capital markets on an expedited basis. Given this model, we suggest that the TSX consider taking a similar approach to its prospectus offering rules. For the limited group of WKSI issuers (those with either (i) outstanding listed equity securities with a public float of $500 million or (ii) at least $1 billion aggregate amount of non-convertible securities, other than equity securities, distributed under a prospectus in the last three years, among other things), marketing of the offering and insider participation should not play a meaningful role in the TSX's determination of whether to accept the offering. Given the foregoing, we respectfully suggest that any offering by a WKSI issuer receive automatic acceptance by the TSX upon delivery of a notice of offering to the TSX.

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Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions with respect to our comments above or wish to discuss.

Sincerely,

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