

**TORONTO STOCK EXCHANGE
REQUEST FOR COMMENTS
AMENDMENTS TO TORONTO STOCK EXCHANGE COMPANY MANUAL**

Toronto Stock Exchange (“**TSX**”) is publishing certain proposed amendments (the “**Proposed Amendments**”) to the TSX Company Manual (the “**Manual**”). The Amendments provide for public interest changes to Section 606 – Prospectus Offerings of the Manual.

Comments should be in writing and delivered by January 31, 2023 to:

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A copy should also be provided to:

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Comments will be made publicly available unless confidentiality is requested. The Proposed Amendments will only become effective following public notice and comment and approval by the OSC.

Background

TSX is considering the Proposed Amendments as described below in order to reduce the burden faced by issuers and their agents when raising capital via a prospectus offering by providing clarity, predictability and greater transparency of TSX policies.

Section 606 of the Manual sets out certain rules applicable to issuers that are proposing to distribute securities by way of a prospectus offering (“**prospectus offering**” or “**public offering**”). TSX currently requires its listed issuers to provide notice (the “**Notice**”) to TSX of the proposed transaction. Upon review of the Notice, and pursuant to the policies set out under Section 606 of the Manual, TSX will determine if the offering is a “bona fide” public offering. Generally, if TSX determines that the offering is, in fact, bona fide, the terms of the offering are accepted by TSX, subject to the applicable provisions of Section 606 of the Manual. Where TSX determines that the offering is not a bona fide public offering, TSX will advise the issuer that the offering will be reviewed under Section 607 - Private Placements of the Manual (the “**Private Placement Rules**”), resulting in the application of additional rules on the transaction (e.g. discount and dilution restrictions).

Subsection 606(b) of the Manual states that in determining whether a prospectus offering is, in fact, a bona fide public offering, TSX will consider the following factors: (i) method of distribution; (ii) participation of insiders; (iii) number of placees; (iv) offering price; and (v) economic dilution. Subsection 606(b) does not, however, include details of how each factor, and the relative importance of how each factor, plays into the ultimate determination by TSX of whether a public offering is truly bona fide.

As stated above, Subsection 606(b) currently lists “offering price” as a factor that may indicate that a prospectus offering is not a bona fide public offering, without stating the acceptable level of discount. The absence of a stated discount was previously not generally problematic, as both stakeholders and TSX understood that up to a 10% discount to the five day volume weighted average trading price (“**Market Price**”) of such securities on TSX was customary on a bona fide public offering. In addition, historically, bona fide public offerings have been marketed for a period of time that allowed for price discovery.

The Canadian senior market has since evolved, such that the vast majority of prospectus offerings are no longer “marketed” but instead are executed by way of a “bought deal” offer by a Canadian investment dealer. In some instances, prospectus offerings are executed by way of an overnight marketed deal. Both of these methods require execution of the offering, including the determination of pricing, within a very short timeframe. TSX has also noted that, in a growing number of cases, the securities are offered at a more significant discount than has previously been seen and will often exceed the generally accepted 10% discount to the Market Price. This is particularly true for both smaller issuers and issuers in specific sectors.

Following a review of deal pricing data from 2014 to 2020 for TSX listed issuers, TSX noted that approximately 85% of prospectus offerings were completed within a 15% discount to Market Price and were acceptable without modification by TSX. For comparison, this 15% discount coincides with the lowest permitted discount available to issuers for private placements under the Private Placement Rules (i.e. a 15% discount is permitted where the price per listed security is above \$2.00). For lower priced securities, the allowable discounts are greater than 15% (see Subsection 607(e) of the Manual).

During this same period, TSX was increasingly engaged by issuers, prior to any announcement, to discuss pricing of public offerings in relation to the absence of stated pricing guidelines and an increase in the number of instances where the contemplated discount exceeded 10% to the Market Price. TSX is concerned with: (i) the increased burden placed on issuers as a result of this “pre-clearance”; and (ii) the potential for restrictions on access to capital on a timely basis.

As a result, TSX consulted with various market participants to obtain feedback to determine a more suitable policy regarding what constitutes a bona fide public offering. TSX consulted with: (i) representatives from 18 law firms in Vancouver, Calgary, Toronto and Montreal; (ii) representatives from three equity capital markets dealers; (iii) a corporate governance organization; and (iv) the TSX Listings Advisory Committee, to gather feedback on their experiences and challenges with the current prospectus offering rules as described herein.

Following these consultations, TSX has concluded that it is advisable to set standards to clearly state what constitutes a bona fide public offering. Specifically, the following factors will be considered by TSX: (i) whether the offering has been broadly marketed; (ii) the offering price; and (iii) insider participation.

(i) Broadly Marketed

Pursuant to the Proposed Amendments, for a public offering to be considered “bona fide”, it must be “broadly marketed”. TSX is proposing to define “**Broadly Marketed**” as an offering where the agent or underwriter either: (i) distributes the offered securities to at least 50 purchasers; or (ii) makes the offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers. If a prospectus offering is not Broadly Marketed, TSX will review the offering under the Private Placement Rules, regardless of insider participation.

(ii) Offering Price

TSX is generally of the 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. As such, under the Proposed Amendments, assuming that a prospectus offering is Broadly Marketed and there is no insider participation, TSX will generally accept the offering price of the securities offered by way of prospectus, regardless of the discount amount.

Currently, TSX generally uses the Market Price of an issuer's securities when calculating the discounts for prospectus offerings and private placements. However, TSX is of the view that using the Market Price may no longer be appropriate and that it is advisable for TSX to use a more relevant reference price. Therefore, TSX is proposing to use the closing price as defined in Appendix F - Take-Over Bids and Issuer Bids Through the Facilities of Toronto Stock Exchange (“**Appendix F**”) of the Manual (the “**Closing Price**”) of the most recently completed trading session of the issuer's listed securities as the reference price when analyzing discounts on prospectus offerings.

(iii) Insider Participation

Under the Proposed Amendments, if insiders of an issuer are participating in a prospectus offering, TSX will review the offering as follows.

- If the offering is Broadly Marketed and is priced at less than, or equal to, a 15% discount to the Closing Price, TSX will accept insider participation on the offering such that, as a maximum, insiders of the issuer may maintain their pro rata interest in the issuer. Any insider participation beyond pro rata will be reviewed under the Private Placement Rules.
- If the offering price exceeds a 15% discount to the Closing Price, TSX will review all insider participation in the offering under the Private Placement Rules (which may require shareholder approval of the offering).

For example, if an issuer's listed securities had a Closing Price of \$1.00 and the proposed offering price was \$0.80 (representing a discount of 20%), all insider participation would be reviewed under the Private Placement Rules. Please refer to the table under “Application of the Proposed Amendments”.

Summary and Rationale of the Proposed Amendments

The Proposed Amendments aim to: (i) provide greater clarity and transparency to issuers as they structure prospectus financings, resulting in expanded access to capital by facilitating timely deal making; (ii) reduce the burden of pre-announcement pricing pre-clearance as described below;

(iii) address negative perceptions of insider participation at a deep discount; and (iv) allow issuers and their boards to retain the discretion necessary to price prospectus financings as required in their particular circumstances.

	Section of the Manual	Proposed Amendment	Rationale
1.	606(a)	Amend the provision by removing the requirement to include the anticipated number of purchasers under the offering in the letter required to satisfy the notice requirement in Section 606(a) of the Manual, and instead replace it with a requirement to include in the notice, whether the offering was Broadly Marketed.	<p>The Notice currently must include information on the anticipated number of purchasers under the proposed offering, a factor that TSX considers when determining whether the proposed offering is a bona fide prospectus offering (and consequently, whether the Private Placement Rules will be applied to the offering).</p> <p>TSX generally considers a prospectus offering to be “broadly distributed” where there are 50 or more subscribers. After extensive consultation with internal and external stakeholders, TSX received feedback indicating that it may not always be appropriate for TSX to consider the number of subscribers as the sole factor when determining whether an offering is broadly distributed. This requirement may not be meaningful for such a determination where, for example, 50 subscribers purchase a minimal amount of securities in order to satisfy this requirement. Instead, consideration of the marketing process and effort applied by the issuer and its underwriters is more meaningful.</p> <p>As such, TSX is proposing to require that the Notice include a written representation by the issuer as to whether the offering has been Broadly Marketed. “Broadly Marketed”, as set out above, is defined as the issuer’s agent or underwriter either: (i) distributing the offered securities to at least 50 purchasers; or (ii) making the offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers. TSX is of the view that this definition acknowledges that the number of purchasers and/or the marketing efforts are more indicative of a prospectus offering being broadly distributed.</p>

	Section of the Manual	Proposed Amendment	Rationale
2.	606(b)	Amend the provision by:	
		(i) removing the factors set out therein with respect to criteria that TSX will consider in determining whether to apply the Private Placement Rules to a prospectus offering;	As stated above, Subsection 606(b) of the Manual enumerates certain factors that TSX considers when determining whether the Private Placement Rules apply to a prospectus offering, without any additional parameters or guidance for issuers. As such, TSX is proposing to delete such factors and replace them with more clear guidance as set out herein.
		(ii) clarifying that notice of distributions that are Broadly Marketed by way of prospectus will be accepted where insiders participate up to their respective pro rata interest and the offering price is equal to or less than a 15% discount to the Closing Price of the most recently completed trading session of the issuer's listed securities; (iii) clarifying that where the offering price exceeds a 15% discount to the Closing Price of the most recently completed trading session of the issuer's listed securities, the Private Placement Rules will apply to insider purchases; (iv) clarifying that where the offering price is equal to or less than a 15% discount to the Closing Price of the most recently completed trading session of the issuer's listed securities, the Private Placement Rules will apply to any portion of insider purchases exceeding their respective pro rata interest;	TSX is of the view that deference should be given to an issuer's board of directors regarding the pricing of prospectus offerings. However, TSX has concerns about the perception of insider participation in such offerings where the securities are priced at a greater than 15% discount to the Closing Price. As such, the Proposed Amendments focus on allowing insiders to participate up to their pro rata interest where the price of the securities is within a 15% discount.
(v) clarifying that where the prospectus offering has not been Broadly Marketed, the Private Placement Rules will apply to the offering; and	As stated above, consultation with our stakeholders revealed that it may not always be appropriate for TSX to consider the number of subscribers as the sole factor when determining whether an offering is broadly distributed. Instead, consideration of the marketing process and effort used by the issuer and its agents or underwriters is more appropriate and meaningful. Please see the rationale for Proposed Amendment #1 above.		

	Section of the Manual	Proposed Amendment	Rationale
		(vi) including a reference in Subsection 606(b) of the Manual to “closing price” as defined in Appendix F when calculating the discounts set out therein.	<p>TSX generally uses the Market Price of an issuer’s listed securities when calculating the discounts for prospectus offerings and private placements. However, TSX has been advised by market participants that, given the speed at which prospectus offerings come together, a more relevant price used for the offered securities is the price at which the last board lot for the day had been traded (i.e. the Closing Price as defined above). In addition, there are instances where there are discrepancies in the Market Price calculated by issuers and TSX resulting in increased pre-filing consultations with TSX and unpredictability when structuring an offering.</p> <p>As such, instead of using Market Price in Subsection 606(b), TSX is proposing to reference “closing price” as defined in Appendix F, which refers to the price per security at which the last trade was effected on TSX (or another recognized exchange if there were no trades on TSX) during the trading session immediately prior to the announcement of the offering. TSX is of the view that this proposed definition is appropriate and addresses the concerns raised above.</p>

TSX acknowledges that TSX Staff Notice 2018-0003 (“**Staff Notice**”) conflicts with the Proposed Amendment set out in item #2(vi) above regarding the Closing Price. The Staff Notice currently states that when pricing a prospectus offering where there is material undisclosed information, five days for the dissemination of material information is generally required, which may negatively impact and cause delays when negotiating a prospectus offering generally, and bought deals specifically. If the Proposed Amendments are implemented, TSX contemplates also amending the Staff Notice to reflect that, after one full day of trading, a valid reference price (i.e. the Closing Price) can be used.

It should be noted that the exemptions for eligible interlisted issuers as set out in Section 602.1 of the Manual and the financial hardship provisions as set out in Subsection 604(e) of the Manual would continue to be available to issuers, where applicable. In addition, the Private Placement Rules could allow for up to 10% dilution to insiders within the permitted discounts.

Text of the Proposed Amendments

The Proposed Amendments are set out as blacklined text at Appendix A. For ease of reference, a clean copy of the Proposed Amendments is set out at Appendix B.

Application of the Proposed Amendments

The following table sets out examples of various prospectus offerings scenarios to reflect how they would be viewed by TSX pursuant to the Proposed Amendments.

Prospectus Offering	Insider Participation	Discount to Closing Price	Broadly Marketed	Applicable Provision
Scenario 1	Yes - up to pro rata interest	≤ 15%	Yes	Subsection 606(b)(i). This offering will be acceptable to TSX and the Private Placement Rules will not apply to any portion of the offering.
Scenario 2	Yes - in excess of pro rata interest	≤ 15%	Yes	Subsection 606(b)(iii). The Private Placement Rules will apply only to the portion of the insider purchases in excess of their pro rata interest.
Scenario 3	Yes (whether up to pro rata interest or in excess of pro rata interest)	≤ 15%	No	Subsection 606(iv). The Private Placement Rules will apply to the whole offering because it is not Broadly Marketed, regardless of insider participation and discount to Closing Price.
Scenario 4	No	≤ 15%	No	Subsection 606(iv). The Private Placement Rules will apply to the whole offering because it is not Broadly Marketed, regardless of the fact that there is no insider participation.
Scenario 5	Yes (whether up to pro rata interest or in excess of pro rata interest)	> 15%	Yes	Subsection 606(b)(ii). The Private Placement Rules will apply only to the insider purchases.
Scenario 6	Yes (whether up to pro rata interest or in excess of pro rata interest)	> 15%	No	Subsection 606(iv). The Private Placement Rules will apply to the whole offering because it is not Broadly Marketed.

Prospectus Offering	Insider Participation	Discount to Closing Price	Broadly Marketed	Applicable Provision
Scenario 7	No	> 15%	Yes	Subsection 606(b)(i). This offering will be acceptable to TSX and the Private Placement Rules will not apply to the offering.
Scenario 8	No	> 15%	No	Subsection 606(iv). The Private Placement Rules will apply to the whole offering because it is not Broadly Marketed, regardless of the fact that there is no insider participation.

Note: The scenarios above assume that TSX does not exercise discretion under Section 603 - Discretion of the Manual.

Expected Date of Implementation

Following receipt of regulatory approval, the Proposed Amendments are expected to be effective in Q1 2023.

Expected Impact on the Market Structure, Members and, if Applicable, on Investors, Issuers and Capital Markets

The Proposed Amendments are expected to have a positive impact on the market structure, members, investors, issuers and the capital markets. TSX believes that the Proposed Amendments are fair and reasonable, and will not create barriers to access.

Expected Impact of the Proposed Amendments on the TSX's Compliance with Applicable Securities Law

The Proposed Amendments are in compliance with applicable securities laws and do not impact fair access to markets or the maintenance of fair and orderly markets. TSX is of the view that the Proposed Amendments will support the maintenance of fair and orderly markets.

Consultations Undertaken in Formulating the Proposed Amendments, Including the Internal Governance Process

In formulating the Proposed Amendments, the TSX internal governance process for public interest changes was followed, which included receipt of senior management-level approval and consultation with all applicable groups at TSX.

As mentioned above, TSX also consulted with (i) representatives from law firms in Vancouver, Calgary, Toronto and Montreal; (ii) representatives from equity capital dealers; (iii) a corporate

governance organization; and (iv) the TSX Listings Advisory Committee to gather feedback on their experiences and challenges with the current prospectus offering rules as described herein.

Any Alternatives Considered

Based on the consultations as set out above, many different alternatives were considered. After these consultations, TSX has determined that the Proposed Amendments are the best course of action in order to promote a fair and orderly market with a high degree of integrity, while reducing the burden faced by issuers when accessing capital.

Does this Approach Currently Exist in other Markets or Jurisdictions?

Senior exchanges in Canada and the U.S. vary in their approaches to public offerings, from implementing specific rules regarding insider participation to setting out factors taken into consideration when determining whether a financing is a bona fide “public offering” for the purposes of shareholder approval rules. These factors include: type of offering, manner of marketing, number of investors and whether there is any existing relationship with the issuer, discount, and impact on control.

Questions

In responding to any of the questions below, please explain your responses.

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?
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?
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?
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?

APPENDIX A

BLACKLINE OF PUBLIC INTEREST AMENDMENTS

B. Distributions of Securities of a Listed Class

Sec. 606. Prospectus Offerings

- (a) Listed issuers proposing to issue securities of a listed class pursuant to a prospectus must file one copy of the preliminary prospectus with TSX concurrently with the filing thereof with the applicable securities commissions. The notice requirement contained in [Subsection 602\(a\)](#) will be satisfied by the filing of the preliminary prospectus, together with a letter which must state: (i) whether any insider has an interest, directly or indirectly, in the transaction and the nature of such interest; (ii) whether and how the transaction could materially affect control of the listed issuer; (iii) ~~the anticipated number of purchasers under~~ [whether](#) the offering [was broadly marketed](#)¹; and (iv) whether an "if, as and when issued" market may be requested.
- (b) (i) [TSX will generally accept notice of distributions that are broadly marketed](#) by way of prospectus. ~~TSX may, however, apply the provisions of Section 607 to a prospectus distribution. In making such a decision TSX will consider factors such as: where insiders participate up to their respective pro rata interest and the offering price is equal to or less than a 15% discount to the closing price² of the most recently completed trading session.~~
- ~~i) the method of the distribution;~~
 - ~~ii) the participation of insiders;~~
 - ~~iii) the number of placees;~~
 - ~~iv) the offering price; and~~
 - ~~v) the economic dilution.~~
- [\(ii\) Where the offering price exceeds a 15% discount to the closing price of the most recently completed trading session, TSX will apply the provisions of Section 607 to insider purchases.](#)
- [\(iii\) Where the offering price is equal to or less than a 15% discount to the closing price of the most recently completed trading session, TSX will apply the provisions of Section 607 to any portion of insider purchases exceeding their respective pro rata interest.](#)
- [\(iv\) Where the prospectus offering has not been broadly marketed, TSX will apply the provisions of Section 607 to the offering.](#)
- (c) Prior to the filing of the final prospectus, TSX will notify the listed issuer of any required additional documentation. If TSX accepts the offering, TSX will so advise the securities commissions.
- (d) The additional securities will normally be listed as soon as the prospectus offering has closed. Upon request, the listing may take place prior to the closing of the offering. TSX staff will advise the listed issuer of the requirements in this regard. Any trading that takes place prior to closing will be on an "if as and when issued" basis.

¹ ["broadly marketed" is defined as the agent or underwriter either \(i\) distributing the offered securities to at least 50 purchasers; or \(ii\) making the offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers.](#)

[2 Please see Appendix F Take-Over Bids and Issuer Bids Through the Facilities of Toronto Stock Exchange for the definition of “closing price”.](#)

APPENDIX B

CLEAN VERSION OF PUBLIC INTEREST AMENDMENTS

B. Distributions of Securities of a Listed Class

Sec. 606. Prospectus Offerings

(a) Listed issuers proposing to issue securities of a listed class pursuant to a prospectus must file one copy of the preliminary prospectus with TSX concurrently with the filing thereof with the applicable securities commissions. The notice requirement contained in [Subsection 602\(a\)](#) will be satisfied by the filing of the preliminary prospectus, together with a letter which must state: (i) whether any insider has an interest, directly or indirectly, in the transaction and the nature of such interest; (ii) whether and how the transaction could materially affect control of the listed issuer; (iii) whether the offering was broadly marketed¹; and (iv) whether an "if, as and when issued" market may be requested.

(b) (i) TSX will generally accept notice of distributions that are broadly marketed by way of prospectus where insiders participate up to their respective pro rata interest and the offering price is equal to or less than a 15% discount to the closing price² of the most recently completed trading session.

(ii) Where the offering price exceeds a 15% discount to the closing price of the most recently completed trading session, TSX will apply the provisions of Section 607 to insider purchases.

(iii) Where the offering price is equal to or less than a 15% discount to the closing price of the most recently completed trading session, TSX will apply the provisions of Section 607 to any portion of insider purchases exceeding their respective pro rata interest.

(iv) Where the prospectus offering has not been broadly marketed, TSX will apply the provisions of Section 607 to the offering.

(c) Prior to the filing of the final prospectus, TSX will notify the listed issuer of any required additional documentation. If TSX accepts the offering, TSX will so advise the securities commissions.

(d) The additional securities will normally be listed as soon as the prospectus offering has closed. Upon request, the listing may take place prior to the closing of the offering. TSX staff will advise the listed issuer of the requirements in this regard. Any trading that takes place prior to closing will be on an "if as and when issued" basis.

¹ "broadly marketed" is defined as the agent or underwriter either (i) distributing the offered securities to at least 50 purchasers; or (ii) making the offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers.

² Please see [Appendix F Take-Over Bids and Issuer Bids Through the Facilities of Toronto Stock Exchange](#) for the definition of "closing price".