

June 4, 2012

John Stevenson
Secretary of the Commission
Ontario Securities Commission
20 Queen Street West
Toronto, ON
M5H 3S8

Email: comments@osc.gov.on.ca

Dear Mr. Stevenson:

Re: Maple Group Acquisition Corporation Notice and Request for Comment of the Ontario Securities Commission dated May 3, 2012 (“Notice and Request for Comment”)

FAIR Canada is pleased to offer a submission to the Ontario Securities Commission (“OSC”) on the Proposed Recognition Order for Maple, TMX Group and TSX (the “Proposed Recognition Order”), set out at Appendix A to the Notice and Request for Comment.

1. Listing Regulation Conflicts of Interest Needs to be Addressed

1.1. **FAIR Canada believes that specific and sound measures to manage the conflicts of interest between the listing regulation responsibilities and listing business operations of the Canadian for-profit exchanges are long overdue.** Since the TMX demutualized and went public a decade ago, its primary motivation has been value maximization for its shareholders, not the public interest nor the best interest of the Canadian capital markets. Major exchanges and regulators in other developed markets have recognized the problems arising as a result of conflicts between their exchanges’ business and regulatory functions and have taken steps to manage for these conflicts¹.

1.2. **The TSX is a regulatory outlier of developed country exchanges in that it has not acted to adequately manage the conflicts of interest in its listings business and regulatory mandates.** The listing regulation function is an important regulatory and standard-setting role that has a significant impact on market integrity and investor protection². The TSX believes that the goals of maintaining the profitability of the business and regulatory standards are congruent and there is no conflict³. This approach ignores the many ways that the conflict can manifest itself, such as in

¹ John W. Carson, “Managing Conflicts of Interest in TSX Listed Company Regulation” (2010), prepared for FAIR Canada July 23, 2010 (the “FAIR Canada Report”). Available online at: FAIR Canada <http://faircanada.ca/wp-content/uploads/2008/12/TSX-Listings-Conflicts-final-report-23-Jul1.pdf> at 28.

² The listings regulatory role includes setting requirements in order to be listed on the exchange, continuing listings requirements, rules applicable to additional issues of existing listed securities by a listed issuer and other changes in its capital structure including rules regarding approval of minority shareholders in certain cases. See the FAIR Canada Report, *supra* at 15.

³ The FAIR Canada Report at 47.

lowering standards of supervision of compliance in order to maintain relationships with listing customers; pressure being applied by significant listing customers that can result in a biased administration of the rules; and tensions that can exist between business development needs and regulatory responsibilities which impact regulatory policy initiatives, to name just a few⁴.

- 1.3. **The Maple acquisition provides securities regulators with the opportunity, and imposes an obligation, to finally put in place adequate safeguards which meet the minimum international ‘best practice’ standard⁵.** FAIR Canada believes that the Proposed Recognition Order does not address the conflicts of interest adequately and does not institute an approach which meets the minimum international ‘best practice’ standard and, therefore, needs to be rethought. Now is the time to take concrete steps to put into place the appropriate structure and mechanisms in order to safeguard market integrity and investor protection.
- 1.4. **The current structure is not providing sufficient oversight and protection. An example of the conflicts of interest has been illustrated in the TSX and TSX-V’s marketing efforts to attract China listings over the last decade, absent a satisfactory evaluation of whether the regulatory framework in Canada is adequate to ensure sufficient oversight and protection.** Recent events involving Sino-Forest and, more than a dozen TSX-V issuers, that are also emerging market listings, have resulted in billion dollar losses for investors, and in particular, retail investors. These events clearly demonstrate that the TSX and TSX-V have not properly considered the risks or the public interest in their campaign to increase their China listings. **In fact, they appear to continue to ignore the risks as the TSX announced this past November that it has opened an office in China in order to attract new China listings, which appears to show that the TSX is not deterred by widespread fraud and other major regulatory problems with China listings. It is critical that the TSX, under Maple control, chart a different course.**

2. Findings in Emerging Markets Issuer Review Indicate Need to Address Listings Regulation Conflicts of Interest

- 2.1. The Emerging Markets Issuer Review (“Review”) conducted by the OSC examined the role of various players, including exchanges, and identified the lack of transparency regarding the application of the exchanges’ listing requirements, and, in particular, a lack of transparency in the use of the exchanges’ discretion in applying the listing requirements, including waiving certain criteria. The Review recommended that exchanges determine whether additional listing requirements are needed and provide greater transparency regarding any waivers of listing requirements. FAIR Canada believes that this lack of transparency is no more than a symptom of the failure to address the conflict of interest between the exchanges’ two distinct mandates: its listings regulation responsibilities, and commercial listings operations.

3. Need Measures that Meet International Best Practices

- 3.1. FAIR Canada’s preferred approach is to transfer the listings regulation functions of all exchanges in Canada to another regulator, preferably an independent self-regulatory organization (“SRO”). This was the approach taken by Canadian regulators with respect to the TSX’s member regulation and

⁴ The FAIR Canada Report, supra note 1 at 19-20.

⁵ One of the three main approaches employed by the seven exchanges reviewed in the FAIR Canada Report to address conflicts of interest in listings regulation would meet a minimum international ‘best practice’ standard. See FAIR Canada Report, supra note at 29.

market regulation functions when the TSX demutualized. Alternatively, we recommend that there be established a regulation subsidiary company with independent governance which performs listing regulation (as the NYSE has done). These two approaches were presented in the expert report commissioned by FAIR Canada entitled “**Managing Conflicts of Interest in TSX Listed Company Regulation**” (the “**FAIR Canada Report**”)⁶.

- 3.2. Instead, the Proposed Recognition Order establishes a Regulatory Oversight Committee (“ROC”) of the Board, composed of at least three independent directors, that “...considers real or perceived conflicts of interest that may arise, including but not limited to the following contexts: ... (C) the profit-making objective and the public interest responsibilities of Maple, including general oversight of the management of the regulatory and public interest responsibilities of TMX Group and TSX”. Under the Proposed Recognition Order, the ROC “...oversees the establishment of mechanisms to avoid or appropriately manage conflicts of interest or potential conflicts of interest” but does not identify what these mechanisms will be. The ROC also “...monitors the operation of mechanisms that deal with conflicts of interest, including oversight of reporting of issuer regulation activities and conflicts of interest by TSX” and prepares an annual report on conflicts to the Maple Board and, subsequently, to the OSC, along with submitting “...reports in writing directly to the Commission on any matter that the [ROC] deems appropriate or that is required by the Commission without first requiring Board approval or notification for such reporting.”
- 3.3. **Oversight, monitoring and reporting will not be effective unless the appropriate structure or mechanisms are first put in place.** At a minimum, as set out in the FAIR Canada Report⁷, there needs to be a separation of the listing regulation department from the business operations of the exchange (including listing business development) in order to effectively perform the listings regulatory function. No amount of oversight, monitoring or reporting can provide adequate protection in the absence of stipulating the mechanisms that need to be implemented.
- 3.4. Conflicts of interest policies and procedures are usually implemented as a supplement to the best practice mechanisms and should not be relied upon in the absence of such a mechanism. There are simply too many conflicts to rely solely on written policies and procedures in order to manage them effectively. **The concentration of trading and listing activity makes it critical to address the conflict. Conflicts policies and procedures cannot, on their own, effectively manage the conflicts of interest in a manner without risk to the public and, in particular, retail investors.**

4. *Now is the Time to Implement a Best Practices Approach*

- 4.1. FAIR Canada does not believe that the OSC should take a wait and see approach in addressing this issue. While an independent governance review will take place within three years, and will examine how the ROC discharges its mandate (including whether it manages the conflicts of interest effectively and whether further measures are warranted), investors stand to lose significantly in the interim as does the reputation of Canadian markets and the regulatory system. Reconsideration of the issue down the road will likely face greater resistance as the Maple Group will have already received its approval for the acquisition and will have been in operation for some time.

⁶ Supra, note 1.

⁷ The FAIR Canada Report, at 31-32, 38-40 and 55.

5. ROC Model Needs, at a Minimum, Further Safeguards

5.1. If the OSC nonetheless defers the issue and pursues the ROC model, FAIR Canada strongly recommends that, as an absolute minimum, the OSC should take the following steps :

- 1) acknowledge in the Proposed Recognition Order that the current structure does not adequately address conflicts and is not up to international 'best practice' standard;**
- 2) expressly require a report on addressing the conflicts of interest in listings regulation within 12 months of the Proposed Recognition Order coming into effect; and**
- 3) require that the proposed new listings regulation structure set out in the report meet international best practice standards.**

FAIR Canada strongly recommends that you reconsider the provisions dealing with conflicts of interest in the Proposed Recognition Order. We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca) or Marian Passmore at 416-214-3441 (marian.passmore@faircanada.ca).

Sincerely,



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