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VIA EMAIL

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RE: Request for Comments – Amendments to Toronto Stock Exchange Company Manual
Subject: Prospectus Offerings

Thank you for the opportunity to comment on the proposals of the Toronto Stock Exchange (the “TSX”) set forth in the December 1, 2022 Request for Comments of the TSX regarding certain proposals to amend Section 606 of the TSX Company Manual in respect of prospectus offerings (the “**Proposed Amendments**”).

Our comments below address some, but not necessarily all, of the potential concerns derived from the Proposed Amendments. In addition, some of our comments regarding the Proposed Amendments are general in nature and made at a high level, and consequently incomplete as to details.

The comments provided herein reflect the views of the authors of this letter and certain other individual members of our firm that participated in the preparation of this letter, do not reflect the views of our firm or of our clients, and are submitted without prejudice to any position that may in the future be taken by our firm on its own behalf or on behalf of any client.

Fasken Martineau DuMoulin LLP is a leading international law firm that has a history dating back to 1863. Fasken has extensive experience on advising issuers and their financial advisors on national, international and cross-border corporate finance and M&A transactions. Our clients



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include, among others, public companies involved in a multitude of industry sectors, investment funds, investment dealers and brokers, financial institutions and financial advisors.

Terms used but not otherwise defined herein have the meanings ascribed thereto in the Proposed Amendments.

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

We generally agree with the approach of the TSX, and support the TSX in seeking to provide greater clarity, predictability and transparency in the application of the TSX policies vis-à-vis prospectus offerings. However, the following are Fasken comments regarding certain aspects of the Proposed Amendments.

(i) Broadly Marketed

The Proposed Amendments seek to add a definition of “Broadly Marketed” to the TSX Company Manual.

Under the first test for a prospectus offering to be “Broadly Marketed”, the Proposed Amendments provide that the agent or the underwriter must distribute the offered securities to at least 50 purchasers. As an initial matter and assuming our comments below regarding insider participation are adopted by the TSX in some manner, we suggest that minor clarification language be added to prong (i) of the definition of “broadly marketed” to clarify that the distribution must be to at least 50 purchasers, exclusive of insiders.

In addition, with respect to the first test, we respectfully submit that given the nature of the Canadian capital markets, which has a large concentration of small-cap and mid-cap issuers, it is not always possible for an agent or underwriter to distribute offered securities to at least 50 purchasers. Accordingly, for various reasons including market conditions and despite an agent’s or underwriter’s best efforts, from time to time it may be that an offering is marketed to 50 or more investors, but the number of purchasers will be less. Accordingly, we recommend that the TSX consider adding an additional test to the definition of “Broadly Marketed” whereby the agent or the underwriter has marketed the offered securities to at least a minimum number of bona fide investors (e.g., at least 50 investors, excluding insiders), but has only distributed the offered securities to a lesser number of purchasers (again excluding insiders – please see our comments below regarding insider participation). We submit that adding this additional test to the definition of “Broadly Marketed” will facilitate the completion of public offerings where the offering has, in fact, been broadly marketed but, due to the circumstances, is completed with a lesser number of purchasers.

Under the second test for a prospectus offering to be considered “Broadly Marketed”, the Proposed Amendments provide that the agent or underwriter is required to make the offer known to the selling group and/or equity capital market desks at all Canadian investment dealers. However, the Proposed Amendments do not provide guidance as to what steps need to be taken to make the offer known to the selling group or equity capital market desks at Canadian investment dealers. For example, would the filing of the prospectus and issuance of a press release be considered by the TSX to be a sufficient step for the TSX to consider this requirement satisfied? Or do the agent or

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underwriter need to disseminate an inter-dealer communication to facilitate making the offer known to other dealers? In addition, the Proposed Amendments require that the offer is made known to the selling group and/or equity capital market desks at “all” Canadian investment dealers. The reference to “all” Canadian investment dealers creates uncertainty, as it is possible that the agent or underwriter for an offering misses some Canadian investment dealers in its communications (for example, if there is a newly registered investment dealer to which the communication is not made), and it also does not recognize that a prospectus may not be filed in each Canadian province and territory (and therefore the securities may not be offered on a public basis in those provinces and territories where the prospectus was not filed). Accordingly, we recommend that the TSX consider revising this test for whether a prospectus offering is “Broadly Marketed” to focus on the agent or underwriter for an offering making a bona fide attempt to notify the selling group or equity capital markets desks at other Canadian investment dealers in the provinces and territories where the prospectus for an offering is filed, using one or more than customary inter-dealer methods of communication, of the offering.

(ii) Offering Price

Under the Proposed Amendments, the TSX proposes that it will accept the offering price of securities offered under a prospectus, regardless of the discount, as long as the offering is Broadly Marketed and there is no insider participation. While we are in general agreement with the TSX’s approach to offering price, we note that insider participation in offerings is generally permitted under securities laws and the rules of the TSX (e.g., the TSX private placement rules) and such participation often facilitates aligning the interests of director and officer insiders with those of other purchasers. Accordingly, we recommend that the TSX consider allowing some level of minimal insider participation in a prospectus offering (e.g., up to 5% of the offering, or such other percentage as the TSX deems appropriate) while still allowing for the board to determine the offering price and applicable discount, provided that the offering is Broadly Marketed.

With respect to the reference price for determining the discount under a prospectus offering, the Proposed Amendments provide that the offering price discount would be based off the closing price during the most recently completed trading session. While we generally agree that the last closing price is more likely to be the relevant reference price, we are also cognizant that there could be an abnormal trades which result in a skewed closing price, therefore causing an issuer to delay the launch of an offering. Accordingly, to avoid such circumstances, we recommend that the TSX adopt an approach whereby an issuer can determine whether to base the discount off of the Market Price or the last closing price. Such an approach would provide flexibility to an issuer’s board of directors, but remain in line with the TSX’s deference to boards in fulfilling their fiduciary duties. In particular, this approach would be consistent with general corporate and common law, as ultimately an issuer’s board will have to determine the price of securities under an offering, and in doing so the board will have to consider and balance factors such as the appropriate reference market price (i.e., Market Price versus last closing price), appropriate discount and considerations regarding the timing of raising capital and the potential impact of an aborted financing.

(iii) Insider Participation

The Proposed Amendments propose to regulate insider participation in prospectus offerings. We believe that the policy rationale for limiting insider participation in public offerings is driven by concerns that insiders may potentially increase their ownership interest at discounted prices on an

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opportunistic basis to the detriment of other investors. However, we also believe that the TSX policies should also weigh the foregoing against the fact that many small-cap and mid-cap issuers in the Canadian market benefit from some level of insider participation in a prospectus offering.

Accordingly, as an alternative to Proposed Amendments which prescribe pro rata insider participation if there is any insider participation in a public offering no matter how limited it may be, we recommend that the TSX allow a level of insider participation in public offerings without introducing special rules such as pro rata participation, provided that certain conditions are satisfied. This approach would also be consistent with the approach taken by the TSX in respect of insider participation under private placements.

For example, if an offering is Broadly Marketed and the pricing discount is less than or equal to 15% (being the minimum private placement discount), if insider participation is more than a prescribed minimal amount (see our comment (ii) above) but less than or equal to a prescribed maximum level of participation (e.g., 10% of the number of offered securities), and assuming that such participation would not materially affect control of the issuer, then the TSX should consider allowing insider participation even if it is not on a pro rata basis. However, any insider participation above such maximum level would then be limited to maintaining an insider's pro rata interest in the issuer prior to the offering, and any participation beyond pro rata would be reviewed under the Private Placement Rules.

We submit that allowing a limited level of insider participation for a Broadly Marketed public offering with a maximum 15% discount without imposing special rules will facilitate capital formation, in particular by small-cap and mid-cap issuers where insider participation may be helpful or even necessary to complete a financing or raise a certain amount of proceeds. We also believe that allowing such insider participation would not derogate from the public policy concerns that mandate limiting insider participation, on the basis that a Broadly Marketed public offering with limited insider participation is unlikely to result in a material increase in the insiders' ownership of an issuer at a discounted price. In addition, the TSX would still retain its ability to deal with concerns regarding insider participation in any particular prospectus offering pursuant to Sections 604(a) and 604(b) of the TSX Company Manual.

(iv) Clarification re Application of Private Placement Rules

In Scenario 5 of the Request for Comment, the TSX states that in respect of a prospectus offering in which there is insider participation, a greater than 15% discount to the Closing Price and that has not been "Broadly Marketed", the Private Placement Rules will apply only to the insider purchases. We request that the TSX clarify whether in applying the Private Placement Rules, issuers can disregard the application of Section 607(g)(i) of the Private Placement Rules.

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Thank you in advance for your consideration of the above commentary. Should you have any questions or wish to discuss the above commentary, please contact the undersigned.

Yours truly,

(signed) “John M. Sabetti”

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