

TSX introduces new standards for pricing of public offerings

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On April 20, 2023, the Toronto Stock Exchange (TSX) adopted [amendments \[PDF\]](#) (the Amendments) to Section 606 – *Prospectus Offerings* of the TSX Company Manual (the Manual) which set new standards relating to the pricing of public offerings, including when the TSX will apply the private placement provisions of Section 607 – *Private Placements* of the Manual to a prospectus offering. The new rules are substantially the same as the draft Amendments previously circulated by the TSX in December 2022.

The TSX has also issued [TSX Staff Notice 2023-0002](#) (the Staff Notice), providing guidance on pricing a prospectus offering or private placement where there has been recent disclosure of material information.

Background

Section 606 of the Manual sets out certain rules for issuers proposing to distribute securities by way of a prospectus offering and outlines factors used by the TSX in determining whether a transaction constitutes a “bona fide” public offering. Proposed transactions that do not meet the criteria for bona fide public offerings are instead subject to the more restrictive rules for private placement financings under Section 607 of the Manual, which include specific limitations on offering price discounts.

Prior to the Amendments, Section 606 of the Manual listed five factors used by the TSX in making its determination of whether an offering was a bona fide public offering without providing guidance on their relative importance or application. In particular, the list of factors included “offering price” but the Manual did not specify what was an acceptable level of discount. This led to uncertainty as to when the TSX would apply its private placement rules to a public offering. Over time, market participants came to understand that the TSX would not approve a discount to market price of greater than 15% on a public offering, and that the TSX would closely scrutinize any public offering with a discount of greater than 10% to market price.

Given changing market practice, including the common use of bought deals and overnight marketed offerings that are executed and priced within a shorter timeframe which allows for less price discovery, and the TSX’s experience that the absence of clear pricing guidelines was causing increased engagement by issuers with the TSX regarding the pricing of public

offerings, the TSX concluded that it was advisable to set new standards relating to the pricing of public offerings. The TSX published a request for comments with respect to proposed amendments to Section 606 of the Manual on December 1, 2022 and, following the public comment period, adopted the Amendments effective April 20, 2023.

Amendments to provisions of TSX Manual regarding prospectus offerings

The Amendments remove the five factors that were previously listed and provide that, for a public offering to be considered “bona fide”, the TSX will now consider: (a) whether the offering has been “broadly marketed”, meaning the agents or underwriters either (i) distribute the offered securities to at least 50 purchasers; or (ii) make the offer known to the selling group and/or equity capital markets desks at substantially all Canadian investment dealers; (b) the offering price, with reference to the closing price of the most recently completed trading session for the securities (the Closing Price) (instead of the five day volume-weighted average trading price (Five Day VWAP)), under the previous rules); and (c) insider participation.

For a “broadly marketed” prospectus offering where there is no insider participation, the TSX will generally accept the offering price of the securities regardless of the discount amount. In cases where there is insider participation in a “broadly marketed” prospectus offering:

- if the offering price is equal to or less than a 15% discount to the Closing Price, the TSX will generally accept notice of the prospectus offering where insiders participate up to their respective pro rata interest and the TSX will apply its private placement rules to any portion of insider purchases exceeding their respective pro rata interest in the issuer; and
- where the offering price exceeds a 15% discount to the Closing Price, the TSX will apply its private placement rules to all insider purchases.

Where a prospectus offering has not been broadly marketed, the TSX will apply the private placement provisions of the Manual to the offering.

TSX Staff Notice regarding pricing in the context of recent disclosure of material information

The TSX reviews the price at which securities are issued for financings with reference to the “market price” as defined in the Manual (the Market Price). The TSX has also previously provided guidance that the Market Price of a financing should reflect all material events, changes or announcements (collectively, Material Information). As defined in the Manual, the Market Price is typically equal to the Five Day VWAP immediately preceding the relevant date. The newly-issued Staff Notice acknowledges that the Five-Day VWAP may not be appropriate in circumstances where the five-day period would include trading days both before and after the dissemination of Material Information.

As outlined in the Staff Notice, where a listed issuer seeks to price a financing shortly following the dissemination of Material Information, the TSX will typically expect Market Price to be assessed based on (i) for a prospectus offering, the Closing Price; and (ii) for a private placement, the one-day volume-weighted average trading price, in both cases reflecting one clear trading session post-dissemination of the Material Information. By way of example, for a prospectus offering, if material information is released pre-market on Monday, the Monday Closing Price may be used, but if material information is released Monday at 11 a.m. (EST),

the Tuesday Closing Price may be used. Notwithstanding the above, the TSX reserves the discretion to use an alternate formula in cases where the Closing Price or single day volume-weighted average price does not appear appropriate in the circumstances. This new guidance does not impact the availability of announcement of a bought deal financing concurrently with the announcement of Material Information such as an acquisition transaction, provided that the TSX requirements for such pricing required by Staff Notice 2016-0006 are met.

The TSX confirmed that, absent recent dissemination of Material Information, where a listed issuer seeks to price a financing in the normal course, the TSX will typically expect Market Price to be assessed based on (i) for a prospectus offering, the Closing Price; and (ii) for a private placement, the Five-Day VWAP.

Conclusion

The new framework and guidance offered by the Amendments and Staff Notice are helpful developments for issuers, agents and other stakeholders in Canadian capital markets seeking clarity on the application of the TSX's prospectus offering rules and pricing for financing transactions.

Based on the new rules, issuers and dealers should consider the level of insider participation in proposed prospectus offerings when determining the offering price and related price discount being offered to purchasers. Issuers should also consider the new guidance on assessing Market Price when a prospectus offering or private placement financing is expected to occur shortly after the dissemination of Material Information.