How to price an offering on the TSX

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Amendments to the TSX Company Manual - now in effect - bring welcome clarity and greater predictability to the factors considered by the Toronto Stock Exchange (the TSX) when determining whether a prospectus offering is truly a bona fide public offering.

In addition, the TSX has published updated guidance on pricing a public offering or private placement following recent disclosure of material information.

Takeaways

- Deference is generally afforded to an issuer's board of directors with respect to pricing, however the TSX will take into consideration whether an offering is "broadly marketed" and the level of insider participation when determining the rules that will apply to a prospectus offering. If there is no insider participation in the prospectus offering, the TSX will generally accept the offering price of the securities offered regardless of the size of the discount.
- In order to constitute a bona fide public offering, TSX now requires the offering to be "broadly marketed", meaning 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 substantially all Canadian investment dealers.
- The TSX will now use the most recent closing price of the issuer's listed securities as the reference price when analyzing discounts on prospectus offerings (as opposed to the five-day VWAP).
- Where a listed issuer seeks to price a financing following the dissemination of material information, the TSX will not include pre-dissemination trading in the calculation of "market price".

New Pricing Rules Provide Clarity

Effective April 20, 2023, the TSX has announced final amendments (Amendments) to the TSX Company Manual that should provide welcome clarity and greater predictability for listed issuers and dealers with respect to how the TSX will assess the pricing of prospectus offerings. Going forward, while the TSX is of the view that deference should be given to an issuer's board of directors when pricing a public offering, the TSX will

take the following three factors into consideration when determining whether to treat a prospectus offering as a public offering or a private placement:

1. **Is the offering "broadly marketed"?** The TSX defines "broadly marketed" to mean that 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 substantially all Canadian investment dealers. Where an offering is not broadly marketed, the TSX will treat the offering like a private placement and apply the rules in section 607 of the TSX Company Manual (the Private Placement Rules), regardless of the discount applied to the securities or whether insiders are participating in the offering. In such a scenario, any discount in excess of the maximum permitted discount under the Private Placement Rules would generally require shareholder approval for the offering to close.
2. **What is the discount to the "closing price" of the securities?** The TSX defines "closing price" to mean the price at which the last trade in the class of securities was effected on the TSX on that day as shown on the record of sales published by the TSX. Alternative methodology is applied if there were no trades of the securities on the TSX or any recognized exchange. Historically, the TSX has looked to an issuer's five-day volume weighted average price (VWAP) when calculating the applicable discounts for prospectus offerings.
3. **Are insiders participating in the offering?** For the purpose of the TSX Company Manual, "insiders" includes directors and officers of the issuer and any insiders of the issuer, and persons who have beneficial ownership of, or control or direction over, 10% or more of the voting rights attached to the issuer's outstanding voting securities, along with their respective associates and affiliates.

The combination of the above three factors will determine whether the TSX will review all or a portion of the prospectus offering under the Private Placement Rules. The following matrix outlines the TSX's process.

Broadly Marketed	**Discount to Closing Price**	**Insider Participation**	**TSX Review**
No	Any discount	Yes or No	TSX will review offering under Private Placement Rules
Yes	Any discount	None	None
Yes	≤ 15%	Yes - Pro rata	None
Yes	≤ 15%	Yes - Greater than pro rata	TSX will review insider participation above pro rata under Private Placement Rules

Yes	>15%	Yes - Any participation	TSX will review all insider participation under the Private Placement Rules

What is Market Price in the Context of Recently Disclosed Material Information?

Concurrent with the Amendments, the TSX has updated its guidance with respect to how "market price" is defined in the context of a treasury offering. TSX Staff Notice 2023-0002 (Staff Notice) provides that where an issuer seeks to price a financing following the dissemination of material information, the TSX will not include pre-dissemination trading in the calculation of "market price". This is an important development as the TSX Company Manual defines "market price" to generally mean the price equal to the five-day VWAP of the securities on the TSX immediately preceding the relevant date – which could include trading days both before and after the dissemination of material information. The definition acknowledges that there may be exceptional circumstances where the five-day VWAP does not accurately reflect a security's current market price but does not go so far as to describe such exemptions. As a result of the TSX's newly updated position, the TSX will typically expect "market price" to be assessed based on (i) the closing price of the most recently completed trading session, in the case of a prospectus offering, and (ii) the one-day VWAP, in respect of a private placement. This will generally reflect a clear trading session post-dissemination of material information. For example, if material information is released pre-market on Monday, the Monday closing price may be used. If material information is released while markets are open on Monday, the Tuesday closing price should be used. 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 under Staff Notice 2016-0006 are met.

In cases where an issuer seeks to price a financing in the normal course, absent recent dissemination of material information, the TSX will typically expect market price to be assessed based on, (i) in respect of a prospectus offering, the closing price of the most recently completed trading session, and (ii) in respect of a private placement, the five-day VWAP.

Background

Section 606 of the TSX Company Manual sets out the manner in which the TSX will assess a prospectus offering to determine whether it constitutes a bona fide public offering. If an offering is not considered to be a bona fide public offering, the TSX will review the transaction through the lens of the Private Placement Rules.

Historically, Section 606 did not provide a bright line test for assessing a prospectus offering and rather set out five factors that the TSX would consider. As a result, issuers

faced uncertainty when pricing prospectus offerings and unwritten rules generally allowing a 10% discount to market price with a maximum discount of 15% ever being accepted. As the market developed, bought deals became commonplace and issuers struggled with the TSX rules and unwritten policies given the reduced ability to engage in price discovery.

To address these concerns, the TSX engaged in public consultation on proposed amendments to the TSX Company Manual published on December 1, 2022. Written comments were accepted until January 31, 2023 and BLG's comment letter is available here.

Further Information

The Amendments and Staff Notice help provide a greater level of certainty to TSX-listed issuers and dealers on the application of the TSX's policies with respect to the pricing of prospectus offerings, including when a prospectus offering or private placement is expected to occur shortly after the dissemination of material information. Based on the new rules, issuers and dealers should carefully consider the level of insider participation in proposed prospectus offerings when determining the offering price and any related pricing discount being offered to prospective investors.

For additional information, please see TSX Notice of Approval Amendments to the Toronto Stock Exchange Company Manual (April 20, 2023) and TSX Staff Notice 2023-0002.

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