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Important Developments in TSX Policy in 2018

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The TSX continued to adopt significant policy and practice refinements in its staff notices in 2018. Included among these were important modifications with implications for both the issuance of securities in connection with acquisitions and the pricing of offerings. Although TSX staff notices are intended to provide guidance to listed companies, this guidance is applied mandatorily by TSX staff, adding an additional layer of substantive requirements that listed issuers need to appreciate.

New Requirements for Significant Share Issuances

In August 2018, the TSX published Staff Notice 2018-0005 (Notice), which replaced previous guidance regarding securityholder approval requirements in connection with the acquisition of a public company in a formal takeover bid, arrangement, amalgamation or similar transaction. Since 2009, the TSX has required issuers to obtain securityholder approval if the number of securities issuable as payment of the purchase price in an acquisition exceeds 25% of the issuer's outstanding securities on a non-diluted basis (Significant Issuance). Under previous guidance, listed issuers were not permitted to subsequently increase the number of securities issuable under the transaction without obtaining further securityholder approval. As a result of the Notice, issuers can now issue an additional 25% of the maximum number of shares previously approved for issuance without obtaining further securityholder approval, but only in connection with an increase in the consideration payable under the transaction.

The disclosure required for a Significant Issuance is largely unchanged by the Notice, as is the requirement to obtain TSX approval for such disclosure. The TSX requirement that issuers disclose in their information circular the maximum number of securities that may be issued for a Significant Issuance also remains unchanged. The only substantive change in the Notice is a new requirement that all listed issuers must now include the following statement in the information circular for their Significant Issuance:

> TSX will generally not require further security holder approval for the issuance of up to an additional [x] [securities], such number being 25% of the number of securities approved by security holders for the transaction.

This requirement applies to all issuers seeking securityholder approval for a Significant Issuance, whether or not the issuer has any intention of increasing the consideration payable in connection with the acquisition. As a result, acquirers using share consideration that would result in a Significant Issuance can no longer rely on the fixed maximum number of securities for which securityholder approval is sought and obtained to discourage further negotiation by target boards or shareholders.

In essence, the TSX has mandated that each issuer using share consideration in such an acquisition must disclose that it has room to negotiate a significant increase in the consideration payable for the acquisition, even after securityholder approval of the acquisition has been obtained, whether or not the issuer desires this ability or its shareholders would have approved the transaction at a higher price. This new requirement may ultimately have unintended consequences and seriously disadvantage certain acquirers and their shareholders by undermining their bargaining position. Other issuers may benefit from being able to increase the consideration payable in their Significant Issuance after shareholder approval has been obtained by increasing the number of shares to be paid in a deal that has been topped by a competitive offer.

While acquisitions involving a Significant Issuance requiring securityholder approval as a result of section 611(c) of the *TSX Manual* were rare in the years after the securityholder approval requirement was originally adopted in 2009, such transactions have become more common and well-accepted in the Canadian marketplace in recent years. Issuers contemplating acquisitions that would involve a

Significant Issuance will need to weigh the implications of the Notice and the manner in which it may ultimately affect how the transaction will play out. Any determination to increase the consideration payable in a transaction following shareholder approval for a less expensive deal, as permitted by the TSX in the Notice, may undermine shareholder confidence and goodwill – with unintended consequences.

New Guidance on Pricing Offerings

In March 2018, the TSX published new guidance in Staff Notice 2018-0003 (Pricing Guidance) on pricing prospectus offerings and private placements when an issuer has recently disclosed material information. The Pricing Guidance sets out the TSX's expectations that offerings by listed issuers should be priced five clear trading days after any dissemination of material information to ensure that the market price appropriately prices the impact of the material information that has been disclosed.

If it is impractical for the issuer to wait five days after the disclosure of material information to launch an offering, the Pricing Guidance provides some latitude for issuers to contact the TSX to seek an exemption. In certain circumstances, the TSX may agree to allow an issuer to rely on a market price calculated using less than five days' trading history, though it has not elaborated on situations in which it may consent to a divergence from its customary market price determination.

Issuers unfamiliar with the implications of the Pricing Guidance run the risk of pricing offerings when such pricing would be prohibited by the TSX or relying on a market price calculation that may not be accepted by the TSX. Either scenario would heighten the risk that the TSX could intervene to require shareholder approval of the offering, a result that would be unfavourable in most circumstances and potentially fatal to the issuer's ability to complete the offering on a timely basis or at all. In addition, issuers should be mindful that the intention to effect an offering itself, depending on its size and surrounding circumstances, may constitute material undisclosed information for the purposes of the TSX regime, which the TSX could in theory require to be disclosed before the offering is priced.

Our Take

In 2018, the TSX continued to issue significant policy and practice refinements in staff notices that are adopted without the market consultation or input that would arise in connection with a proposed change to the *TSX Manual*. As a result, staff notices do not receive the same level of scrutiny and often fail to garner the publicity warranted by the serious nature and implications of the matters they address.

In the Notice, the TSX is attempting to resolve a problem for issuers that wish to increase the share consideration payable for acquisitions for which they have received securityholder approval. By mandating that all issuers disclose to securityholders that they are entitled to issue up to an additional 25% of the securities approved in an acquisition if the consideration increases, the TSX has solved an administrative problem for such issuers. Although this change will undoubtedly benefit these issuers, it is a blunt instrument and may tactically undermine other issuers that prefer to be constrained from increasing the consideration that they are offering. Even issuers that may be willing to increase the consideration payable in a transaction are likely to be unhappy with the TSX's new mandatory disclosure requirements.

In recent years, the TSX has been increasingly attentive to issues relating to the pricing of offerings by companies that possess material non-public information. All issuers considering raising capital, whether by public offering or private placement, need to be aware of (i) the cumulative impact of recent TSX pronouncements relating to the disclosure of material non-public information prior to offerings and (ii) the implications of these pronouncements on the timing of pricing and announcement of such offerings. Heightened scrutiny of these matters may result in unexpected delays or, more seriously, unexpected securityholder approval requirements imposed on issuers by the TSX.

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