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TMX Group Consultation Paper on Emerging Market Issuers

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On December 17, 2012, the Toronto Stock Exchange (“TSX”) and TSX Venture Exchange (“TSXV”), which together with the TSX forms the “Exchanges,” published a consultation paper on their respective listing requirements applicable to issuers with a significant connection to an emerging market jurisdiction (the “Paper”). The Paper follows the recent guide published by the Ontario Securities Commission: *Staff Notice 51-720 – Issuer Guide for Companies Operating in Emerging Markets* in which similar issues were identified and discussed. The principal purposes of the Paper are to: (a) present the potential risks associated with listing emerging market issuers (“EMIs”) that have been identified by the Exchanges; (b) provide preliminary guidance to issuers and their advisors with respect to listing considerations applicable to EMIs; and (c) solicit comments from market participants on matters related to listing EMIs, including possible new guidance or requirements that the Exchanges may implement.

The Paper identifies an emerging market jurisdiction as any jurisdiction outside of Canada, the United States, Western Europe, Australia and New Zealand. Generally, the TSX will consider the following factors in determining whether an issuer may be an EMI:

- residency of “mind and management”
- jurisdiction of the principal business operations and assets
- jurisdiction of incorporation
- nature of the business
- corporate structure

Risks Relevant to EMIs

The Exchanges identify in the Paper the following four principal areas relevant to listing in which there may be greater risks associated with EMIs: Management and Corporate Governance, Financial Reporting, Non-Traditional Corporate/Capital Structures, and Legal Matters Relating to Title and Ability to Conduct Operations.

Management and Corporate Governance

There is a greater risk with EMIs that management are unfamiliar with Canadian securities laws and the requirements of the Exchanges, thus increasing the possibility of non-compliance or misunderstanding of what is required. Communication issues may exist if the board of directors or management are not fluent in a common language or in the language in which the issuer conducts business, and knowledge gaps may occur where management lacks experience and familiarity with the laws of the jurisdictions where the issuer is carrying on its activities. In such circumstances, there is the potential for issues to arise, such as inadequate oversight of management by the board, the inability of advisors such as legal counsel and auditors to adequately communicate with management, the inability of board committees to appropriately carry out their duties, and the inability of management to adequately communicate with a Canadian securities regulatory authority or an Exchange.

Financial Reporting

The risk of errors or oversights in the audit process, and correspondingly in an issuer's financial statements, may increase when Canadian auditors lack expertise and experience in local jurisdictions. Alternatively, differences in qualification standards for financial professionals in EMI jurisdictions and lack of sufficient experience with audit practices may also increase EMIs' risk profile.

Non-Traditional Corporate/Capital Structure

Foreign ownership and tax rules in emerging market jurisdictions often necessitate the need for complex corporate or capital structure. Where such structures are utilized, there may be potential risks related to title and control over assets, inability of shareholders to have recourse against the assets of an EMI, or inadequate public disclosure regarding the nature, material characteristics and risks associated with the structure.

Legal Matters Relating to Title and Ability to Conduct Operations

EMIs often encounter issues with respect to demonstrating legitimacy and certainty of title with respect to their assets, or ability to carry out operations in an EMI jurisdiction if seen to be a foreign entity under local laws. Issues regarding title, permits and licensing can impede the listing process.

Preliminary Guidance

In light of the potential risks associated with the listing of EMIs, the Exchanges strongly recommend in the Paper that any issuer with significant connections to an emerging market jurisdiction that is contemplating listing on an Exchange arrange a pre-filing conference with the applicable Exchange at any of their offices in Canada. At such meeting, the issuer's ability to meet listing requirements and to mitigate any potential risks associated with being an EMI would be openly discussed. The Paper sets out that senior management, key directors and the sponsor of the applicant must be in attendance at any such meeting.

Request for Comment – Key Concepts

After setting out the primary risks and the recommendation as to pre-filing conferences, the Paper raises several key questions in regard to EMIs for public response. The TSX poses questions in regard to the definition of an EMI itself, corporate governance, including the suitability of Chief Financial Officers and appropriateness of

auditors, financial reporting, related party transactions, non-traditional corporate structures and sponsorship for EMIs.

The TSXV publishes for comment with the Paper a new proposed Appendix 2B to its Corporate Finance Manual, which sets forth the specific additional and supplemental requirements applicable to the listing of EMIs that it proposes to implement. Of particular interest are the following concepts:

1. The definition of “Excluded Resource Issuer” creates a class of mining or oil and gas issuer that would be excluded from the definition of EMI provided that none of a majority of the company’s senior officers or directors, or any senior officer or director of an issuer that is also a control person or an associate of a control person, has been residing in an emerging market jurisdiction for a majority of the ten years preceding the company’s application for listing.
2. Section 4.2(d)(ii) of Appendix 2B sets forth certain additional qualification requirements that the TSXV will impose upon a CFO of an EMI, including the ability to apply Canadian GAAP [NTD: necessary to define?] to material foreign transaction streams and balances, the capability of designing and applying effective internal controls over financial reporting to all transaction streams in accordance with the cultural norms applicable in the emerging market jurisdiction, a strong understanding of Canadian securities laws, as well as a strong understanding of the business environment in the jurisdiction in which most of the Issuer’s transactions are conducted.
3. Section 4.5 sets forth substantive new additional requirements to be applicable to the financial reporting and internal controls of EMIs. These requirements include the review of interim period financial statements by auditors for two years following listing, review and evaluation by the auditors of internal controls prior to listing, confirmation in

writing to the TSXV by the issuer’s CEO and CFO that internal controls over financial reporting provide reasonable assurance regarding the reliability of financial reporting prior to listing, and compliance with the full CEO/CFO certification requirements under *National Instrument 52-109 – Certification of Disclosure in Issuers’ Annual and Interim Filings* from the time of listing on an ongoing basis, including in respect of disclosure controls and internal controls over financial reporting.

4. Section 4.6 sets out additional requirements for those EMIs using non-traditional corporate or capital structures, including satisfying the TSXV that such structures are necessary and providing a legal opinion regarding same if required.
5. Section 4.8 sets out certain modifications to the sponsorship requirements for EMIs. Specifically, the availability of certain sponsorship exemptions – such as the involvement of a Member of the Exchanges or of a bank or other major financial institution, will *not* be available to EMIs except at the discretion of the TSXV.

The Exchanges have invited comment from market participants on any of these proposed policies in respect of EMIs by **February 28, 2013**.

Contact Us

This article contains a summary only of some of the main points in the Paper. For further information contact:

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