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BY E-MAIL (tsxrequestforcomments@tsx.com)

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Attention: Legal Counsel

Dear Legal Counsel:

Request for Comments - Amendments to Parts IV and VI of the Toronto Stock Exchange Company Manual

We are writing to you in response to the Request for Comments published on May 26, 2016 (the "**Request for Comments**") in respect of the proposed amendments to Part IV (the "**Part IV Amendments**") and Part VI (the "**Part VI Amendments**", together with the Part IV Amendments, the "**Amendments**") of the Toronto Stock Exchange (the "**TSX**") Company Manual (the "**Company Manual**").

We are generally supportive of the Amendments, which modernize certain disclosure obligations applicable to listed issuers and provide shareholders with better access to key documents and information. The following sets forth our comments with respect to the Amendments.

Part IV Amendments

We are concerned with the proposed broad language used in Section 473, which could be read as requiring disclosure of both current and historical versions of the enumerated documents. Based on the description provided by the TSX in the Request for Comments, we understand the intention is to limit the disclosure obligation to "current" copies of the documents listed in Section 473; however, this is not apparent in the proposed draft. Continued posting of superseded documents has the potential to confuse shareholders and may negatively impact the utility of the Part IV Amendments. The Part IV Amendments should provide in clear terms that Section 473 requires disclosure of "current and complete" copies of the enumerated documents.

We note that, in certain cases, the new website disclosure obligations set out in the Part IV Amendments are duplicative of existing disclosure requirements under Ontario securities laws. A listed issuer is already required under Ontario securities laws to disclose on SEDAR a number of the documents listed in the Part IV Amendments (i.e., constating documents and shareholder rights plans) and to disclose the full text of certain security based compensation arrangements from time to time in its annual proxy circular. Because most shareholders do not have sophisticated means to search documents on SEDAR, it can be extremely difficult for shareholders to locate documents through SEDAR. Ideally, as listed issuers adapt to the website posting requirements to be adopted through the Part IV Amendments, Ontario securities law would be amended to provide that disclosure made under Section 473 of the Part IV Amendments would satisfy the corresponding disclosure requirements under Ontario securities laws, without requiring a listed issuer to also disclose the same document on SEDAR.

We also note that the TSX has not included a requirement in the Part IV Amendments for listed issuers to give their shareholders notice that documents covered by the Part IV Amendments are available on the listed issuer's website. Without providing notice to shareholders of where they can find disclosure documents, many shareholders will be unaware of the availability of such documents on a listed issuer's website. Notice of the availability of certain documents on SEDAR is required to be given to shareholders under Ontario securities laws in several continuous disclosure documents. The New York Stock Exchange similarly requires listed issuers to give notice of the availability of certain documents required to be posted on a listed issuer's website in the issuer's annual proxy circular. We would suggest that the adoption of a similar annual disclosure requirement by the TSX would be advisable and would not be burdensome for listed issuers.

In addition to the above general comments on the Part IV Amendments, we have responded directly to the following questions posed in the Request for Comments.

1. Are there any additional documents that should be included in Section 473?

The proposed Section 473 includes the requirement to disclose a laundry list of "corporate governance documents", which generally tracks the recommended corporate governance policies set out under Ontario securities law (including those set out in National Policy 58-201 – *Corporate Governance Policies* ("**NP 58-201**")); however, policies regarding representation of women on boards and in senior management or other diversity policies encouraged by National Instrument 58-101 – *Disclosure of Corporate Governance Practices* are noticeably absent from the list of corporate governance documents required to be posted by the proposed Section 473. The Part IV Amendments should be extended to include disclosure regarding any policies relating to the representation of women or other diversity policies, if a listed issuer has adopted such policies, as this is a growing area of interest and engagement among certain shareholder groups in Canada. The fact that certain listed issuers do not have such policies is not sufficient justification for excluding such policies from the proposed disclosure requirements contained in the Part IV Amendments.

2. Are there any documents that should not be included in Section 473?

(a) Security Based Compensation Arrangements

We note with concern that the TSX is proposing in the Part IV Amendments that listed issuers disclose their security based compensation arrangements on their respective websites. The TSX has purposefully limited Section 613 of the Company Manual to security based compensation arrangements involving issuances of securities from treasury and is maintaining and further clarifying this limitation to the application of Section 613 in the proposed Part VI Amendments. Copies of a listed issuer's security based compensation arrangements which involve issuances of securities from treasury are already required by Section 613 to be disclosed by listed issuers in their respective annual proxy circulars from time to time and we do not believe that posting such plans on the listed issuer's website is burdensome. We would, however, suggest that the reference to security based compensation arrangements in the Part IV Amendments be clarified to confirm that such disclosure requires only the disclosure of such security based compensation arrangements as "involve the issuance or potential issuance of securities from treasury", in accordance with the TSX's practice of limiting shareholder approval requirements to such arrangements.

Many listed issuers have a number of security based compensation arrangements that are not currently required to be provided to shareholders, including some which are historical (but still relevant due to outstanding grants) and some which are inter-related in complex ways; such arrangements are often difficult to understand, highly specific and may be unique to the listed issuer. As a result of the foregoing, these arrangements may be difficult for shareholders to contextualize, decipher and compare as between listed issuers. Shareholders already receive properly contextualized descriptions of the non-share compensation arrangements in the annual proxy circulars of listed issuers, which is far more relevant and useful than the actual text of such arrangement. We do not believe that the TSX should require such arrangements to be disclosed on listed issuer's websites.

In addition, we would further suggest that listed issuer website disclosure not be required in respect of documents representing security based compensation arrangements other than plans covered by Section 613. In particular, we would suggest that without further clarification, the documents required to be disclosed on a listed issuer's website by proposed Section 473(d) could be interpreted to include, in addition to security based compensation plans, copies of grant agreements and other documents that may contain employee information protected by privacy laws. We would suggest that the TSX should clarify that the provisions of proposed Section 473(d) are not intended to require the disclosure of individual grant agreements (including those which constitute security based compensation arrangements covered by Section 613(b)(ii)) or employment agreements. To address the foregoing concerns we would suggest that proposed Section 473(d) be revised to read as follows:

> "plans representing security based compensation arrangements required to be disclosed to security holders pursuant to Section 613;"

(b) Position Descriptions

We note with concern the proposed requirement in the Part IV Amendments for listed issuers to disclose position descriptions, which is over-broad. We note that under NP 58-201, issuers are recommended to adopt position descriptions for the chair of the board, the chair of each committee and the chief executive officer. It is unclear if the proposed disclosure requirements under Section 473 are intended to be limited to the positions referenced in NP 58-201, or are meant to extend to other positions within a listed issuer's organization. If the latter, it is unclear if the disclosure requirement is intended to be limited to executive position descriptions or extend beyond.

If the TSX is suggesting that listed issuers disclose position descriptions for executive or other officers, it should be noted that such position descriptions are fluid, and can evolve with personnel changes and business developments. The result may be that position descriptions for such individuals are being modified on a regular basis or have never been formalized. Ongoing disclosure of this nature would be burdensome and of very little value to the listed issuer's shareholders. It would be virtually impossible for shareholders to confirm whether and to what extent position descriptions are adhered to in the listed issuer's business in any event. As a result of the foregoing, we would suggest that the TSX delete the reference to position descriptions in proposed Section 473 or revise such reference to clarify that the position descriptions required to be disclosed are limited to those required by NP 58-201.

3. *How long should issuers have after Section 473 comes into effect to establish or update their website with the required documents? Is 60 days from the date the rule comes into effect sufficient time to comply with the requirements?*

We are concerned that a 60 day transition period would provide insufficient time for listed issuers to prepare their websites for the additional disclosure requirements included in the Part IV Amendments. For some listed issuers, adding the required documents may require a significant reformulation of their website, including the creation of new stand-alone pages. For many listed issuers, these additions may prompt some level of website redesign. Many listed issuers will retain the services of a third party website design firm to make the required additions and changes to their website. A listed issuer's ability to comply with the Part IV amendments by the end of the transition period may be tied to the availability of such service providers. We would recommend, depending on the timing of adopting of the Part IV Amendments, that the transition period be extended to the next following January 1 (or at least 180 days from the date the relevant provisions are published by the TSX in final form) in order to give listed issuers at least two quarters to prepare appropriately.

Part VI Amendments

While we are generally supportive of the Part VI Amendments, we note with concern certain duplicative and imprecise drafting that may contribute to difficulties interpreting these provisions. The definition of security based compensation arrangements set out in the pre-amble

to Section 613(b) expressly limits the application of Section 613 to any security based compensation arrangements that "involve the issuance or potential issuance of securities from treasury"; however, in identifying specific types of security based compensation arrangements, the draft subsections contained in Section 613 reiterate this limitation, in some cases in an inconsistent manner. In particular, we would propose deleting as unnecessary the language identified with a strikethrough below from subsections 613(b)(iv) and (v):

> (iv) stock appreciation rights ~~involving issuances of securities from treasury~~;
>
> (v) full value equity-based plans ~~involving the issuance or potential issuances of securities of the listed issuer~~;

In particular, the reference to the issuance or potential issuances of securities of the *listed issuer* (emphasis ours) in subsection 613(b)(v) may give rise to unintended consequences.

Set out below, please find our consolidated response to the following questions posed in the Request for Comments.

1. *Is the burn rate and the formula for calculating it useful and appropriate disclosure? In particular, is the use of the maximum payout of the multiplier appropriate? If not, please provide other measure would be preferable. Would it be more appropriate to permit the use of a historic midpoint payout of the multiplier, rather than the maximum?*

2. *Is it sufficient to have the burn rate only for the most recently completed year, rather than the last three years for both Approval Meetings and Other Annual Meetings?*

We are concerned with the proposed inclusion of the burn rate in Form 15 of the Part VI Amendments and recommend that such requirement be abandoned by the TSX. It is unclear what value, if any, will be derived by shareholders from the disclosure of a burn rate for any given year, especially if disclosure is only provided for the most recently completed year. If the burn rate requirement is to be included in the Part VI Amendments, Form 15 should require disclosure for the three most recently completed financial years of a listed issuer, which periods should not be varied in any circumstances (as currently proposed in the Part VI Amendments). This consistency in the periods used to calculate the annual burn rate will foster annual comparability of a listed issuer's burn rate. In addition, the consistency in the periods used to calculate the annual burn rate, together with the use of multi-year disclosure, should ameliorate any concern that listed issuers may boost grants early in a fiscal year to avoid including them in their upcoming annual proxy circular in respect of the prior fiscal year, as listed issuers who undertake such unscrupulous practices will be exposed through the multi-year disclosure provided in the listed issuer's subsequent annual proxy circular. Requiring multi-year burn rate disclosure may provide shareholders with a sense of the trajectory of the stock-based compensation practices of a listed issuer, which may have some utility for shareholders. Multi-year burn rate disclosure may, however, be misleading where a listed issuer's compensation practices are shifting in terms of the relative use of security based compensation plans covered

by Section 613 of the Company Manual (and required to be included in a burn rate calculation), as compared to those plans not caught by the Section 613 disclosure requirements. For reasons described in more detail below, the proposed Part VI Amendments may exacerbate this shift, which has been ongoing for a number of years.

The burn rate disclosure requirements included in the Part VI Amendments do not in any way take into account significant events or transactions experienced by a listed issuer that result in a significant increase in the number of outstanding securities of the listed issuer (the denominator in the formula). The Part VI Amendments do not require that listed issuers note that such events occurred and may have contributed to an artificially low burn rate in a particular year. There can be a number of factors impacting the number of grants in a given year under the plans covered by Section 613 (consider, for instance, the acquisition of a significant new subsidiary adding many new employees who are provided grants under relevant plans), which may cause sudden notable increases in a listed issuer's burn rate. Again, the Part VI Amendments do not require that listed issuers note or explain such events, however, in cases where a burn rate is increasing materially it would be expected that a listed issuer will feel obliged to provide a detailed explanation relating to such increase.

As discussed above, we are not convinced that a listed issuer's burn rate for the most recently completed year will provide meaningful insight into a listed issuer's compensation practices. If the intention of the TSX is to provide a new method of comparing compensation practices of listed issuers by requiring disclosure of the burn rate, it should be noted that the burn rate is currently contemplated to be prepared on a per-plan basis. Listed issuers with multiple plans will have multiple comparatively smaller burn rates, while listed issuers with a single plan will have a misleadingly larger burn rate. There is no requirement that a listed issuer with multiple plans aggregate their per-plan burn rate, though this aggregated number would surely be more instructive and provide a better method of comparison across listed issuers than the per-plan calculations. In recent years, many listed issuers have moved the balance of their stock-based compensation grants from plans which would be covered by the Part VI Amendments to plans which are not covered by the disclosure requirements in Section 613 of the Company Manual and would not be caught by the mandated burn rate disclosure. The burn rate calculation as contemplated by the Part VI Amendments will result in listed issuers who rely primarily on security based compensation covered by Section 613 of the Company Manual to compare unfavourably to listed issuers who rely primarily on security based compensation plans that are not caught by the TSX disclosure requirements. Surely, potentially fostering an unfavourable perception among shareholders of listed issuers who rely primarily on security based compensation plans covered by Section 613 of the Company Manual is not the intention of the TSX. Listed issuers with larger numbers of 'participating securities' will generally have higher burn rates than listed issuers with smaller numbers of 'participating securities', and comparisons of burn rates as between these disparate types of listed issuers may disadvantage or penalize certain listed issuers, and will not be useful absent other more meaningful disclosure which most listed issuers will feel obliged to provide. The additional disclosure that may be required to properly contextualize the differences in burn rate between listed issuers may be lengthy, which

will generally contribute to such disclosure being burdensome on listed issuers and remaining unread by shareholders. Given these potential disadvantages and the perceived limited utility of mandating burn rate disclosure, we would recommend that such requirement be abandoned by the TSX.

With respect to the treatment of the multiplier, we do not think the use of historic midpoint payout would be particularly helpful, as it would create an inconsistency with the disclosure required by the Part VI Amendments for outstanding awards (based on the maximum payout of the multiplier). We would recommend maintaining a consistency of approach in both contexts if the burn rate disclosure requirements are adopted.

Please do not hesitate to contact either Robin Upshall 416.367.6981 or Daniel Pearlman 416.367.7459 should you have any questions in respect of our comments.

Yours very truly,

(signed) Davies Ward Phillips & Vineberg LLP

cc *Susan Greenglass, Director, Market Regulation, Ontario Securities Commission*
(*via email: marketregulation@osc.gov.on.ca*)