

Update

Corporate Securities Law

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TSX Restrictions on Prospectus Offerings

The Toronto Stock Exchange (the “TSX”) has always had approval rights in respect of prospectus offerings by listed issuers, but until recently this had not represented a meaningful obstacle to financings. To the contrary, because the TSX imposes detailed restrictions on private placements, prospectus offerings were on occasion perceived as a path to completion of a financing that could not practicably meet the requirements for a private placement transaction.

The TSX had recently signaled that it would more actively consider using its approval rights in the context of prospectus offerings, and its recent denial of a proposed prospectus offering by OPTI Canada Inc. (“OPTI”) is a clear indication that the ground has shifted.

The TSX’s Company Manual provides that the TSX has discretion to apply the rules applicable to private placements, including the rules as to the maximum discount to market price that will be permitted without prior shareholder approval, to a prospectus distribution. In exercising that discretion “the TSX will consider factors such as: (i) the method of the distribution; (ii) the participation of insiders; (iii) the number of places; (iv) the offering price; and (v) the economic dilution.”

In late June, OPTI announced that it had reached an agreement with a syndicate of underwriters for a public offering. The public offering price was at a discount that exceeded the maximum permissible under the private placement rules (absent shareholder approval). OPTI announced that the TSX would not accept notice of the financing without shareholder approval, which OPTI stated could not be obtained in a practicable timeframe. There was no indication from the TSX or OPTI as to whether any factors other than the discount in the offering price influenced the TSX’s decision.

The end of the story for OPTI is that it will proceed with its offering. A new agreement was reached, at a price that was accepted by the TSX without any requirement for shareholder approval, in part because the offering price is 5¢ higher than the initial price, but largely because OPTI’s share price had fallen approximately 30% in reaction to the TSX’s initial refusal.

Issuers should keep in mind the TSX’s increased willingness to use its discretion to actively scrutinize prospectus offerings, and to apply elements of its private placement rules to prospectus deals.