



Proposed Pre-Marketing and Marketing Amendments to Prospectus Rules

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On November 25, 2011, the Canadian Securities Administrators published for comment proposed amendments to the prospectus pre-marketing and marketing regime in Canada for issuers other than mutual funds. The CSA has indicated that the proposals have been designed to increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings and to clarify certain matter in order to provide clear rules and a “level playing field” for market participants involved in a prospectus offering.

Summary of the Proposals

Pre-Marketing

Testing of waters exemption for IPO Issuers

The proposed amendments include a limited exemption from the restriction against pre-marketing of prospectus offerings to allow issuers to determine demand for a proposed initial public offering. The exemption, entitling non-reporting issuers, through an investment dealer, to determine interest in an IPO through communication with permitted institutional investors, will be subject to certain conditions to ensure confidentiality and reduce the risk of conditioning the market, including:

- Before providing a permitted institutional investor with information about the proposed offering, the investment dealer must ask the permitted institutional investor to confirm in writing that it will keep the information confidential.
- The issuer relying on the exemption must keep a written record of any investment dealer that it authorized to act on its behalf in making solicitations in reliance on the exemption and a copy of any written authorization.
- An investment dealer that relies on the exemption must keep a written record of any permitted institutional investor that it solicited and a copy of the above-noted correspondence with the investor.

Due to insider trading concerns, the CSA has indicated that the exemption will not be available to public companies in a foreign jurisdiction that are contemplating an IPO in Canada.

Bought Deal exemption and amendment

The existing pre-marketing exemption for bought deals under Part 7 of National Instrument 44-101 *Short form Prospectus Distributions* (NI 44-101) will no longer be applicable where a bought deal engagement letter contains a “market out” termination provision. Pursuant to the proposed amendments, all references to the term “enforceable agreement” in the existing pre-marketing exemption for bought deals are to be replaced with “bought deal agreement”, and such term is to be amended to explicitly provide that a bought deal agreement cannot have a market-out clause.

In addition, the CSA proposes to amend current prospectus rules to clarify certain matters and to specify when a bought deal agreement can be amended or terminated. Pursuant to the proposed amendments, if an issuer relies on the bought deal pre-marketing exemption and signs a bought deal agreement with an investment dealer, it would be permitted to amend the agreement to provide for a larger offering provided that:

- A news release is issued immediately after the agreement is amended.
- The offering size is increased by not more than a specified percentage of the original size of the offering.
- The preliminary prospectus relating to the bought deal is filed and receipted

within four business days of the original agreement.

- The enlargement of the offering cannot be the culmination of a formal or informal plan to offer a larger amount devised before the execution of the original agreement.
- The enlarged offering is for the same price as the original offering.

The CSA has specifically requested comments on the specified percentage up to which a bought deal could be enlarged, indicating that it assumes such percentage will be limited to either 15%, 25% or 50% of the original offering.

The proposed amendments will also allow for additional underwriters to join a bought deal syndicate if the addition of a particular underwriter was not the culmination of a formal or informal plan to add that underwriter devised before the execution of the original bought deal agreement.

Term sheet provision for bought deals

Proposed Section 7.5 of NI 44-101 contains a term sheet provision for bought deals so that investment dealers may provide a term sheet to a permitted institutional investor after a bought deal is announced, but before a preliminary prospectus is filed. This provision will be subject to certain key conditions, including:

- The disclosure in the term sheet must be fair, true and plain. The CSA has indicated that it would consider a term sheet to be “fair, true and plain” if it is honest, impartial and not misleading, it does not give undue prominence to a particular fact or statement in the prospectus (or a document incorporated by reference therein) and does not contain promotional language.
- All information concerning securities in the term sheet must be in the bought deal news release or the issuer’s continuous disclosure record.

- The term sheet must be approved in writing by the issuer and the underwriters and filed before use (the term sheet will not be made public on SEDAR until the preliminary prospectus is filed and receipted).
- The term sheet must be included in the preliminary prospectus and final prospectus or incorporated by reference into the preliminary prospectus and final prospectus such that the term sheet will be subject to statutory liability for misrepresentations.
- The term sheet must contain a prescribed legend with cautionary language referring investors to the subsequent preliminary prospectus and final prospectus and noting that the term sheet does not contain full disclosure of all material facts.
- Any permitted institutional investor who received a term sheet must receive the subsequent preliminary prospectus.

The CSA has specifically requested comment on whether the rules should also permit an investment dealer to provide a bought deal term sheet to retail investors before the filing of a preliminary prospectus.

Marketing during the waiting period

Term sheet provision

Proposed subsection 13.5(1) of National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) contains a provision to permit investment dealers to provide a term sheet in conjunction with a preliminary prospectus in order to allow for a greater range of marketing communications during the waiting period (the period from issuance of a receipt for a preliminary prospectus to when a receipt for a final prospectus has been obtained). The CSA has indicated that the provision of such term sheets will be subject to certain key conditions, including:

- The disclosure in the term sheet must be fair, true and plain.

- All information concerning the securities in the term sheet, including any comparables (i.e., information that compares the issuer to other issuers), must be contained in the preliminary prospectus.
- The term sheet must be approved in writing by the issuer and the underwriters and filed before use.
- The term sheet must be included in the final prospectus or incorporated by reference into the final prospectus such that the term sheet will be subject to statutory liability for misrepresentations.
- The term sheet must be distributed with a copy of the preliminary prospectus.
- The term sheet must contain a prescribed legend with cautionary language referring investors to the preliminary prospectus and noting that the term sheet does not contain full disclosure of all material facts.

The CSA has further indicated that an investment dealer will continue to be able to provide traditional green sheets to their registered representatives, but that any green sheet that is distributed to the public will be considered a “term sheet” and would contravene the prospectus requirement unless it complied with proposed subsection 13.5(1) of NI 41-101.

Road shows

Under the proposed amendments to section 1.1 of NI 41-101, a “road show” is defined as a presentation to potential investors regarding a distribution of securities under a prospectus conducted by an investment dealer on behalf of an issuer in which one or more executive officers of the issuer participate. Proposed sections 13.8 and 13.9 of NI 41-101 contain provisions for road shows during the waiting period that are to apply to all types of road shows (including in-person, telephone conference calls, over the internet or by other electronic means).

Proposed section 13.8 of NI 41-101 will allow an investment dealer to conduct a road show for permitted institutional investors during the waiting period, subject to certain conditions, including:

- Other than comparables, all information in the road show is contained in the preliminary prospectus.
- All information (including any comparables) in the road show must be fair, true and plain.
- Other than comparables, any written materials distributed to investors must comply with the term sheet provision.

Unlike the provision for road shows for permitted institutional investors, proposed section 13.9 of NI 41-101 will not allow road shows for retail investors to contain comparables in the absence of prospectus liability. The CSA has indicated that it believes such comparative information should only be given to permitted institutional investors and has specifically requested comment on the circumstances in which comparables should be permitted to be given to retail investors.

Last, the proposed amendments require “restricted access” for road shows, requiring investment dealers to establish and follow reasonable procedures to verify the identity and keep a written record of any investor attending a road show in person, by telephone conference call, over the internet or by other electronic means, and to ensure that an investor has received a copy of the preliminary prospectus.

Request for Comments

The CSA has invited market participants to provide input on the proposed amendments. Comments are to be submitted by February 23, 2012.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.

If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.

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