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Keep It Between Us: Canadian Securities Regulators Adopt Confidential Prospectus Review Process

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Canadian public issuers and those issuers contemplating a Canadian IPO may now file a prospectus for review by securities regulators' staff on a confidential basis. Under this new process, an issuer may submit a near-final draft preliminary prospectus to its principal securities regulator without signalling the prospective offering to the market through a public filing. Under the cover of the confidential filing, the issuer will be able to work with staff to resolve regulatory issues related to the offering.

As noted in our recent bulletin, this confidential review process is one of many burden-reducing initiatives being pursued by Canada's securities regulators. It was strongly advocated by Davies (most recently in its comment letter on burden-reduction initiatives of the Ontario Securities Commission) on the basis that it would significantly reduce the potential for delay and uncertainty, and therefore execution risk, resulting from the prospectus review process. Having already addressed significant regulatory concerns on a confidential basis, issuers will have more flexibility to time their access to the public markets when opportunities present themselves.

This is more good news for Canadian public markets, especially in the shadow of the ever-growing influence of private capital on the Canadian corporate landscape. We expect this process will become a useful tool to mitigate execution risk, particularly for offerings in which all or a significant part of the issuer's disclosure record has not been subject to regulatory review. To date, this confidential pre-filing review process had been available only for cross-border IPOs, certain more complex filings and for limited reviews of the technical disclosure of mining issuers in Ontario or British Columbia. We applaud staff of the Canadian securities regulators for broadening the scope for these reviews even beyond the confidential filing regime currently available in the United States.

Pre-filing Is Not a Free Pass

Issuers and their prospective underwriters should anticipate making a significant investment before using this pre-filing process. To use the process, staff will generally expect that

- the terms and conditions of the proposed offering and related transactions will be clearly determined;
- the draft prospectus will
  - be of the same form and quality as a publicly filed preliminary prospectus, and
  - include disclosure required under applicable securities legislation (including financial statements); and
- the prospective underwriters will have substantially completed their review of the draft prospectus.

A pre-filing review process may be suspended if staff determines that the draft prospectus is materially non-compliant or incomplete, and it will not recommence until the issuer files a revised draft of the prospectus with the necessary information. Staff expects that material contracts and technical reports that would be required in a public filing will accompany the pre-filing of the draft prospectus. Staff also asks that the draft prospectus include an estimate of the price of the offering and other information derived from the price, where practical – though we do not expect that issuers and underwriters will be constrained by those estimates in any public offering.

Pre-filing Process Specifics

Issuers may use the process for any type of Canadian prospectus – long form (including for IPOs), short form and shelf prospectuses all qualify. The process is available to both private issuers looking to complete an IPO and public issuers looking to raise additional capital. The process is not available for certain types of offerings (e.g., prospectuses qualifying structured notes or securities issued under convertible securities, such as special warrants) or for non-offering prospectuses that are to be filed only in Canada. Nor will the process be available to investment funds.

An issuer will pre-file its draft prospectus only with its principal securities regulator. However, if the draft prospectus contains a novel and substantive issue, or raises a novel policy concern, the principal regulator may involve staff from other Canadian securities regulators in the process.

Staff will conduct the same level of review under the pre-filing review process as it would under the typical public filing process and will use its best efforts to provide initial comments within 10 business days of submission (staff's workload permitting, with priority given to public filings). While this pre-file process contemplates a full review of the draft prospectus, the issuer may elect to limit the scope of the review to only certain aspects of the prospectus. Once the pre-filing review process is complete, the issuer will still be required to publicly file its prospectus and begin the public review process (whereby traditional review periods will still be applicable) if it wishes to proceed with the offering. During the public review process, regulators will retain the discretion to provide further comments and raise additional concerns.

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