

# Canadian Initial Public Offerings



In recent years, many U.S. companies have chosen the Toronto Stock Exchange as the preferred listing platform for an IPO. Goodmans LLP has advised on the vast majority of these offerings, and is widely recognized as one of Canada's leading law firms for cross-border IPOs. A Canadian IPO offers private equity sponsors, owner-managers, and companies an attractive way to monetize all or part of a U.S.-based business or portfolio of assets. This note describes the benefits of taking a business public in Canada, provides an overview of the Canadian IPO process and highlights recent regulatory developments in the area.

## Why a Canadian IPO?

There are several reasons a U.S. business may wish to undertake a Canadian IPO:

**Attractive Valuations.** Appropriate businesses and assets are able to achieve favorable valuations in Canadian IPOs. This may be particularly true for businesses that can provide Canadian investors with a strong dividend yield or an investment opportunity that is not otherwise currently available in the Canadian capital markets.

**Deal Flexibility.** Canadian institutional and retail investors are generally receptive to vast ranges in public issuer size. In Canada, smaller and mid-size issuers can attract ongoing market interest and research coverage, which may not be the case in the United States. Also, Canadian investors have historically been accepting of a variety of commercial arrangements to facilitate public offerings by financial sponsors and controlling shareholders. Examples of such arrangements may include external management contracts, board appointment or nomination rights, veto/approval rights, pre-emptive rights and registration rights.

**Speed of Execution.** An initial public offering can often be completed far more quickly in Canada than a similar offering in the United States. As discussed in further detail below, this is primarily a result of the expedited regulatory review process as well as the customary practice of marketing an IPO concurrently with the regulatory review.

**Proportional Ongoing Compliance Requirements.** Canada is generally viewed as having a proportional governance regime that is sensitive to the costs facing smaller and mid-sized issuers.

**Less Litigious Investment Culture.** While the prospectus and secondary market liability regimes in Canada are similar to those in the United States, Canada is historically a much less litigious jurisdiction than the United States.

**Ease of Ongoing Access to Capital.** Canadian "bought deal" offerings permit issuers to return to the capital markets efficiently and quickly to fund future growth and acquisitions or to monetize a sponsor's retained interest.

## The Canadian IPO Process

### Preparing to go Public and Drafting the Prospectus

**Assembling the IPO Team.** A company looking to go public will have to assemble a team of advisors (including legal counsel and auditors), engage underwriters for the offering and ensure that it has a management team and board of directors with the qualities and experience necessary to successfully guide a public company.

**Structuring the IPO.** Prior to undertaking an IPO, determinations will have to be made as to the form of entity to go public, the assets to be included and the most suitable capital structure. A company and its shareholders may also wish to consider pre-IPO restructuring alternatives in order to maximize tax efficiencies.

**Evaluating the Business.** Before going public, a company will have to ensure that its business is prepared for an IPO. This may involve, among other things, developing or revising a formal business plan (which will not be made public but may serve as a useful tool for underwriters to evaluate the potential for an offering and can ultimately be used to prepare portions of the prospectus), confirming or formalizing key arrangements with customers and suppliers, and ensuring that formal governance, management reporting systems and internal controls are in place that are appropriate for a public company and will allow the CEO and CFO to complete the requisite quarterly certifications post-closing.

**Due Diligence.** As part of the IPO process, the underwriters will want to conduct due diligence on the company with the assistance of their counsel. The proposed board of directors and senior management should also conduct due diligence. The due diligence process will generally be comprised of legal, financial and operational due diligence.

**Drafting the Prospectus.** The key disclosure document in a Canadian IPO is the prospectus. The prospectus must contain full, true and plain disclosure of all material facts relating to the securities being offered. A Canadian prospectus is generally required to include audited financial statements for the business going public for the three most recently completed financial years ended more than 90 days before

the date of the prospectus. Unaudited interim or “stub period” comparative financial statements for the most recently completed interim period of the business that ended more than 45 days before the date of the prospectus will also be required. Financial statements must generally be prepared in accordance with IFRS, though other options may be available for qualifying foreign issuers. In certain circumstances, Canadian securities regulators have illustrated flexibility when it comes to the financial statement requirements for immaterial aspects of a business looking to go public.

### Clearing the Prospectus with Regulators and Marketing the Offering

**Regulatory Review.** Once prepared, the preliminary prospectus (together with supporting documentation) is filed with and reviewed by Canadian securities regulators. Canadian regulators generally review and process IPOs much more quickly than U.S. regulators, with first comments issued in Canada two weeks after filing the preliminary prospectus and the prospectus review process typically being completed within four to five weeks of filing a preliminary prospectus.

**Marketing the Offering.** The company’s management and underwriters will typically conduct a “road show” involving meetings with brokers and institutional investors. The goal of these marketing efforts is to create sufficient interest in the company and demand for the securities to permit both a successful offering and a strong aftermarket, and to effect the optimal distribution of the securities both geographically and in terms of retail and institutional investors. In Canada, the marketing of the IPO is typically completed concurrently with the regulatory review. This allows a typical Canadian IPO to price and close within five to seven weeks of filing the preliminary prospectus.

### Life as a Public Company

**Financial Statements and Related Materials.** Once a company has gone public in Canada, it will be subject to continuous disclosure obligations that are similar to the on-going filings required for U.S. public companies, including the filing of quarterly and annual financial statements, management’s discussion and analysis, CEO and CFO certifications, an annual information form and business acquisition reports in connection with “significant” acquisitions.

**Annual Meetings.** Public companies are required to hold annual meetings of their shareholders for electing directors, appointing the auditor and transacting other business. Securities laws require that certain disclosure be provided in connection with these meetings, including disclosure relating to the compensation of senior executives and directors.

**Disclosure of Material Changes.** In Canada, a public company must issue a news release immediately after the occurrence of a “material change” describing the nature and substance of the change, and a material change report must be filed with Canadian securities regulators within 10 days of the change.

**Insiders.** Persons in a “special relationship” with a public company are prohibited from purchasing or selling securities of the company with knowledge of material undisclosed information, as well as “tipping” or informing others of such information. In addition, certain specified “insiders” of a public company must prepare and file reports disclosing their ownership of securities of a public company (including any changes in ownership on an ongoing basis).

## Recent Liberalization of Canadian Pre-Marketing Rules

Recently, Canadian securities regulators have adopted new rules that are intended to facilitate IPOs and other securities offerings by significantly broadening the scope of permissible marketing activities for prospectus offerings in Canada. The new rules also reflect, and provide guidance on, well-developed practices in securities offerings, and clarify regulatory perspectives on questions and issues concerning offering processes that have been previously clouded with some uncertainty.

As a result of the recent regulatory changes, businesses contemplating an IPO are permitted to “test the waters” by having one or more investment dealers measure the appetite of “accredited investors” (being investors who meet the criteria to make private placement investments) for investment in an IPO, subject to obtaining the potential investors’ commitments to maintain confidentiality and not to misuse the information about the proposed offering and other limited

procedural requirements. This rule change is intended to help issuers avoid spending time and resources on IPOs when there is insufficient demand.

The new rules also permit delivery to prospective investors of “term sheets” and “marketing materials” to assist in the marketing of securities offerings (subject to satisfying certain content and filing requirements) and have liberalized the use of road show materials in marketing a Canadian offering.

## Bought Deals

One of the greatest advantages of the Canadian capital markets is the ability for issuers to effectively and efficiently raise subsequent capital following an IPO through what is known as a “bought deal”. There is no minimum waiting period to qualify to conduct a bought deal and most TSX-listed issuers meet the qualifications for this form of financing.

In a bought deal, the underwriters agree to purchase the entire follow-on offering, regardless of investor commitments. A bought deal commences with the execution of a brief “bid letter”, which contains very limited “outs” for the underwriter. Within four business days of the execution of the bid letter, the issuer and the underwriters will file a preliminary prospectus and enter into a more formal underwriting agreement. A bought deal, commencing from the date a “bid letter” is received from the underwriters until closing, typically takes approximately 20 days to complete (which time frame can be further condensed by using a “shelf” prospectus) and generally involves very little regulatory intervention.

Bought deals are ideal financing alternatives for those issuers that regularly need to access capital to fund growth, or those issuers with significant sponsors (e.g. private equity firms) that are looking to exit their positions over time.

## What Industry Leaders Say About Goodmans

As a private-equity backed U.S. company going public on the Toronto Stock Exchange, our lawyers at Goodmans were key advisors. In addition to developing a highly effective cross-border structure, they demonstrated leadership, skill and passion in supporting the execution of our successful, fully subscribed IPO, while on an expedited timeline. We continue to rely on Goodmans' experience and expertise now that we are a public company, and appreciate having them as part of our team.

– **Robert P. Landin**, CEO, Milestone Apartments REIT

Goodmans' experience and support was invaluable in resolving issues to execute the offering in record time.

– **Michael Salter**, CFO, Medical Facilities Corporation

Goodmans did an outstanding job at every step of the transaction, from the early days of analyzing structural alternatives through to a rather complex closing with many moving parts. We were extremely fortunate to have them representing us.

– **Barry Welch**, President & CEO, Atlantic Power Corporation

We were looking for a firm who had experience in cross-border income trust deals. I knew that our structure had to be unique for this deal to be completed. The team at Goodmans set out a process that was innovative and responsive and led to our recent successful IPO transaction.

– **Denis Gallagher**, Chairman & CEO, Student Transportation Inc.

When preparing for our recent cross-border IPO transaction, it was important to us that we retain the very best advisors. Goodmans lived up to its reputation in this regard, and displayed the highest-level of expertise, creativity, professionalism and focus in guiding and supporting us in achieving a successful closing of a complex transaction. Their dedication and willingness to work hard to meet difficult deadlines has also been instrumental in our success. They are a trusted advisor and continue to add value as we aggressively grow our portfolio.

– **Scott T. Frederiksen**, CEO, WPT Industrial REIT

## Our IPO Practice

Goodmans is internationally recognized as one of Canada's top capital markets law firms.

Goodmans has played a central role in developing Canada's domestic and cross-border IPO market across a wide range of industries, from natural resources, energy and infrastructure to real estate, financials and technology. We have been a key advisor on many of Canada's IPO "firsts", including the first domestic REIT, the first domestic business trust, the first cross-border REIT, the first cross-border business trust, the first cross-border income securities offering, the first cross-border high dividend common share offering, and the first US REIT IPO in the world by a non-US entity.

We are consistently ranked among Canada's leading lawyers by the major legal guides, including *Lexpert*, *American Lawyer*, *Chambers*, *Euromoney*, *Law Business Research*, *Practical Law Company* and *Best Lawyers*.

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