Goodmans LLP Update

Corporate Securities Law

January 26, 2012

Significant Changes Proposed to the Rules Governing Prospectus Offerings in Canada

The rules concerning the scope of permissible marketing activities for prospectus offerings in Canada may be significantly changed under proposals made by the Canadian Securities Administrators (the "**CSA**"). The proposed rule changes, if implemented, would meaningfully increase the range of marketing activities that could be undertaken by issuers in connection with prospectus offerings.

The current regulatory regime essentially prohibits marketing of an offering until a preliminary prospectus has been filed and receipted (subject to an exception for "bought deals"), and narrowly circumscribes the marketing activities that may be undertaken during the "waiting period" between the issuances of receipts for the preliminary and final prospectuses for an offering.

The proposals published also outline proposed guidance concerning the conduct of specific marketing activities such as road shows and use of term sheets.

Highlights of the Proposed Amendments

Testing of the waters exemption for IPO issuers

Under the current regulatory regime an offering cannot be marketed until a preliminary prospectus has been receipted. As a consequence, issuers proposing to undertake an initial public offering (an "**IPO**") cannot take steps to measure interest in an IPO before going to the expense of preparing and filing a preliminary prospectus. Under the proposed amendments, non-publicly traded issuers would be permitted, subject to certain procedural requirements, to "test the waters" by having an investment dealer measure the interest of members of prescribed classes of institutional investors ("**permitted institutional investors**"). If implemented this proposal could help avoid investments of time and resources in proposed IPOs for which there is not sufficient interest.

The bought deal exemption

The bought deal exemption, a made-in-Canada innovation and a limited exception to the pre-marketing restrictions, would continue under the proposed new rules, with some elaboration on its use and limits. The bought deal exemption, in general terms, allows an investment dealer to solicit expressions of interest in an offering *before* the filing of a preliminary short form prospectus if, among other things, there is an enforceable agreement for the purchase of the offered securities between the issuer and at least one underwriter, there is public disclosure of that agreement and the preliminary prospectus is filed within four business days.

The bought deal exemption was designed to provide issuers with certainty of financing where underwriters were committed to the offering at an agreed price. Throughout the life of the bought deal exemption questions have arisen as to the limits of the exemption; in particular, if there are changes to the proposed offering after the enforceable agreement, relating in particular to the size of the offering or to the composition of the underwriting syndicate, does varying the terms of the offering undermine the balance that the exemption had sought to achieve? Put differently, if upsizing a bought deal and/or adding underwriters could be perceived to undermine the discipline of the bought deal agreement, under what circumstances could these changes be accommodated? The CSA proposals indicate that answers to these questions would be provided.

Where the size of the offering is concerned, the proposed amendments would allow for the upsizing of a bought deal offering provided that, among other things, the enlargement of the offering is not the culmination of a formal or informal plan to offer a larger amount devised before the execution of the original bought deal agreement and provided further that the increase is not greater than a specified percentage. The CSA is seeking comment as to whether the specified percentage should be 15%, 25% or 50%.

The proposed amendments would also allow for additional underwriters to join the bought deal syndicate but only if the addition of such underwriters was not

the culmination of a formal or informal plan to add that underwriter devised before the execution of the original bought deal agreement.

Use of term sheets

Current rules essentially limit the marketing that can be undertaken during the "waiting period" to the distribution of the preliminary prospectus and the solicitation of expressions of interest from persons to whom the preliminary prospectus has been distributed.

The proposed amendments would allow for the use of "term sheets" to be distributed to potential investors along with the preliminary prospectus. Term sheets would be required to include disclosure that is fair, true and plain (as distinct from the prospectus requirement for disclosure that is full, true and plain) together with prescribed cautionary language. All information concerning the securities in the term sheet, including any comparables, would be required to be contained in the preliminary prospectus, and the term sheet itself would have to be included in, or incorporated by reference into, the final prospectus; as such, issuers would be responsible for information in the term sheet in the same manner as they are for other prospectus disclosure. Any "green sheet" (an explanatory summary of the offering originally designed for use by registered representatives) that is distributed to the public would be treated as a term sheet.

In the context of a bought deal offering, investment dealers would be allowed to provide a term sheet to permitted institutional investors" during the period following the announcement of the bought deal and prior to the filing of the preliminary prospectus if (among other things):

- all information concerning the securities in the term sheet is in the bought deal news release or the issuer's continuous disclosure record;
- the term sheet is included in, or incorporated by reference into, the preliminary prospectus and final prospectus; and
- any permitted institutional investor who receives a term sheet also receives the preliminary prospectus.

Road shows

Another common means of marketing prospectus offerings is the "road show" form of presentation to investors. The proposed amendments outline the requirements applicable to road shows during the waiting period, which would include the following:

- an investment dealer may conduct a road show for investors provided that all road show information (excluding comparables if attendance is restricted to permitted institutional investors) is contained in the preliminary prospectus, all road show information is fair, true and plain and any written materials distributed to investors comply with the provisions applicable to term sheets; and
- an investment dealer must maintain reasonable "restricted access" procedures to verify the identity and keep a written record of any investor attending the road show, to ensure that the investor has received a copy of the preliminary prospectus, and to restrict the copying of any materials.

Other amendments and guidance

The proposed amendments also include provisions prescribing when investment dealers may provide term sheets and conduct road shows after the receipt of a final prospectus (or final shelf base prospectus), and requirements, policies and procedures for research reports issued by investment dealers acting as underwriters in an offering.

Status

The CSA has asked for comments on the proposed amendments by February 23, 2012. The entire text of the Notice of Proposed Pre-Marketing and Marking Amendments to Prospectus Rules and Request for Comment is available at:

http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20111125_41-101_rfc-pro-amd-pre-marketing.htm

Please contact any member of the Goodmans Corporate Finance Group to discuss the implications of the proposed amendments.