Goodmans LLP Update

Canadian Securities Regulators Amend Financial Statement Disclosure Requirements for IPOs

On April 14, 2022, the Canadian Securities Administrators (CSA) published amendments to the Companion Policy to National Instrument 41-101 General Prospectus Requirements that harmonize the interpretation of financial statement disclosure requirements for acquisitions completed before or in connection with an IPO.

Background

IPO prospectuses are required to include three years[1] of audited financial statements and MD&A of the issuer and for any business acquired if a reasonable investor reading the prospectus would regard the "primary business" of the issuer to be the acquired business. Historically, these requirements have been inconsistently interpreted by the different provincial securities commissions, with certain regulators taking a stricter view than others as to when an acquisition constitutes the "primary business" of an issuer. Through the amendments, the CSA reached a consensus on a harmonized approach to the interpretation of the "primary business" requirements.

The amendments were originally published for comment in August 2021. Goodmans and six other organizations submitted comment letters (see our August 23, 2021 Update, *Canadian Securities Regulators Propose Guidance on Financial Statement Disclosure for IPOs*).

While we welcome clarification of the IPO requirements for companies that have operated for over three years, we continue to believe that modifications are appropriate to afford similar treatment to entities like REITs, roll-up issuers and other entities formed less than three years before their IPOs, and to treat all IPO issuers consistently. We hope that such treatment will be afforded through exemptive relief by securities regulators.

The Amendments

The amendments provide that an acquisition will be the "primary business" of an issuer (and thus require three years of audited annual financial statements and MD&A) if any of: (a) the issuer's proportionate share of the consolidated assets of the acquired business exceeds 100% of the issuer's consolidated assets; (b) the issuer's proportionate share of the consolidated investments in and advances to the acquired business exceeds 100% of the issuer's consolidated assets; or (c) the issuer's proportionate share of the consolidated specified profit or loss of the acquired business exceeds 100% of the issuer's consolidated specified profit or loss, in each case calculated as of the most recently completed year end prior to the acquisition[2].

[1] Two years for venture issuers.

[2] Subject to certain requirements and circumstances (including the availability of separate financial statements for the acquisition), an issuer may apply an optional test, which provides that an acquisition will only be the "primary business" of an issuer if any of the asset, investment or specified profit or loss tests are triggered as of *the most recently completed interim period or financial year that is included in the prospectus*. This optional test allows issuers to recognize growth between the date of acquisition and its most recently completed financial year or interim period, and the corresponding decline in significance of the acquisition relative to the issuer.

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Acquisitions that fall below the 100% thresholds noted above will be subject to the "business acquisition" requirements, which use 30% thresholds for non-venture issuers and only require financial statement disclosure if two or more of the asset, investment or specified profit or loss tests are triggered.

The amended guidance does not include changes to the "predecessor entity" requirements, meaning that REITs and other roll-up issuers formed less than three years[1] before their IPOs will continue to require historical financial disclosure for each predecessor entity *regardless of significance*. Where historical financial statements are not available for a "predecessor entity" or one or more of the acquired businesses is immaterial, an issuer may seek relief through a pre-filing process.

The amended guidance does not apply to reverse take-overs, qualifying transactions for SPACs and CPCs or to acquisitions that fundamentally change the business of an issuer.

If you would like to discuss these amendments, please contact any member of our Corporate Securities Group.