Canada

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EQUITY CAPITAL MARKETS: GENERAL

1. Please give a brief overview of the equity market(s) in your jurisdiction and initial public offering (IPO) activity generally. What were the large deals over the past year? Have there been many listings of overseas companies on your market(s)?

Despite the global economic downturn, Canada's capital markets experienced an increase in IPO activity in 2009. The first 11 months of 2009 saw 56 IPOs on the Toronto Stock Exchange (TSX), Canada's senior securities exchange, with a total value of about Can$4.5 billion (about US$4.1 billion), compared with 52 IPOs with a total value of about Can$1.9 billion (about US$1.75 billion) during the same period in 2008 (*Toronto Stock Exchange Statistics - November 2009*).

Notable Canadian equity offerings from 2009 include:

- US$4.03 billion (about EUR2.7 billion) common share offering by Barrick Gold Corporation.
- Can$2.5 billion (about US$2.3 billion) common share offering by Manulife Financial Corporation.
- Can$1.6 billion (about US$1.47 billion) common share offering by TransCanada Corporation.
- US$1 billion (about EUR0.67 billion) subordinate voting share offering by Fairfax Financial Holdings Limited.
- Can$945 million (about US$871 million) common share IPO by Genworth MI Canada Inc.
- Significant equity offerings by several of Canada's major banks.

The TSX has made efforts to increase listings of foreign issuers in recent years. In particular, the TSX has seen a marked increase in listings of foreign clean technology and renewable power issuers.

2. Please describe the main equity capital market(s) and summarise the following in relation to each market (distinguishing where appropriate the requirements for overseas companies seeking a primary listing in your jurisdiction):

- **The regulator.**
- **Any minimum size requirement.**
- **Any minimum trading record required.**
- **Any working capital requirements.**
- **Any minimum numbers of shares in public hands.**
- **Number of companies traded.**
- **Annual cost of being listed.**

The TSX provides the main market for senior equities. Accordingly, this chapter only deals with the TSX, unless otherwise specified. Canada's other stock exchanges are:

- The TSX Venture Exchange, an exchange for the securities of early stage businesses.
- The Canadian National Stock Exchange, a new exchange designed for emerging issuers.
- The Montreal Exchange, which facilitates the trade of derivative products.
- ICE Futures Canada (formerly the Winnipeg Commodity Exchange), a subsidiary of the Intercontinental Exchange, which provides a market for agricultural futures and options.

Regulators

The securities industry in Canada is regulated by each of the country's ten provinces and three territories (references in this chapter to provinces or provincial include the territories). As a result, issuers often deal with up to 13 different regulators, although securities laws of the various jurisdictions are similar in many respects. Reforms have been implemented to harmonise securities laws across Canada, for example, through National Instruments and Multilateral Instruments, which apply consistently across all or some provinces. Unless otherwise specified, this chapter is based on Ontario law. Canada's capital markets are also regulated by:

- Various business corporations statutes and regulations of the federal and provincial governments, which govern the corporation and its conduct.
- Self-regulatory organisations, such as the Investment Industry Regulatory Organization of Canada (IIROC), which oversees all investment dealers and trading activity on equity and debt marketplaces in Canada.
- Rules of the Canadian stock exchanges.

Size limits, trading record, working capital requirements and shares in public hands

The TSX places issuers applying for listing in one of three categories, each with different minimum listing requirements: Industrial (General), Mining or Oil and Gas. Generally, an Industrial applicant is expected to have:

- Net tangible assets of at least Can$7.5 million (about US$7 million).
- Pre-extraordinary items and pre-tax earnings from ongoing operations in the last fiscal year of at least Can$300,000 (about US$276,000) and pre-tax cash flow from ongoing operations in the last fiscal year of at least Can$700,000 (about US$645,000).
- An average pre-tax cash flow from ongoing operations for the past two fiscal years of Can$500,000 (about US$461,000).
- Adequate working capital to carry on the business and an appropriate capital structure.

Applicants who do not meet these requirements may still qualify for listing, but will be subject to a higher standard of review. Industrial applicants must have at least one million freely tradable shares with an aggregate market value of Can$4 million (about US$3.7 million). On listing, these shares must be held by at least 300 public shareholders, each holding one "board lot" or more. A "board lot" for securities trading means one of the following:

- 100 securities having a market value of Can$1 (about US$0.9) per security or greater.
- 500 securities having a market value of less than Can$1 and no less than Can$0.1 per security.
- 1,000 securities having a market value of less than Can$0.1 (about US$0.09) per security.

International issuers are issuers that are listed on another recognised exchange which is acceptable to the TSX and are incorporated outside of Canada. There are no management or financial requirements for international issuers. However, these issuers are generally required to have some presence in Canada and must be able to demonstrate, as with all issuers, that they are able to satisfy all of their reporting and public company obligations in Canada. This may be satisfied by having a member of the board of directors or management, an employee or a consultant of the issuer situated in Canada.

Number of companies traded

As of 30 November 2009, the TSX had 1,474 listed issuers.

Annual cost

The TSX charges an initial Can$10,000 (about US$9,000) non-refundable fee when an issuer applies to list its securities. For Canadian issuers, listing fees range from a minimum of Can$10,000 to a maximum of Can$200,000 (about US$184,000). International issuers with a primary market outside Canada have a similar fee schedule, but pay a maximum fee of Can$150,000 (about US$138,000).

Annual fees for listed issuers range from a minimum of Can$12,500 (about US$11,500) to a maximum of Can$95,000 (about US$87,000).

IPOs ON THE MAIN EQUITY CAPITAL MARKET(S)

3. What are the main ways of structuring an IPO?

The most basic form of IPO is one in which securities are issued from treasury to public investors.

A shareholder, or "selling security holder", can also effect an IPO by selling its securities in a private issuer by way of a prospectus, either alone or in conjunction with a treasury offering.

An "indirect offering" offers an alternative IPO structure. Under this type of offering, interests in the operating entity are not offered directly to the public but are instead acquired by a separate entity (for example, a real estate investment trust or its subsidiary). The securities of this separate entity are offered to the public under a prospectus.

The TSX Venture Exchange's Capital Pool Company (CPC) programme allows sponsors to form a CPC with no commercial operations and to raise between Can$200,000 (about US$184,000) and Can$1.9 million (about US$1.75 billion), with a two year timeline in which to acquire a business that meets listing criteria, known as a "qualifying transaction", which allows the CPC to obtain regular listing status on the TSX Venture Exchange. Since the CPC programme's inception in 1988, over 2,000 CPCs have been created and over 1,600 of those have completed a qualifying transaction.

The TSX's Special Purpose Acquisition Corporation (SPAC) programme, which was established in December 2008, involves a similar two-step listing process, except that the SPAC programme requires the initial IPO to raise a minimum of Can$30 million (about US$28 million), the SPAC's securities are listed on the TSX as opposed to the TSX Venture Exchange, and the subsequent acquisition transaction must take place within 36 months. As of the time of writing, there has not yet been a SPAC listed on the TSX.

Follow-on equity offerings are typically structured differently from IPOs (*see Question 29*).

4. Outline the procedure for a company applying for a primary listing of its shares in your jurisdiction. Is the procedure different for an overseas company? Is an overseas company likely to seek a listing for shares or depositary receipts?

To initiate the listing process on the TSX, an issuer must submit a listing application together with supporting documents which demonstrate that the issuer is able to meet the minimum listing requirements. Generally, the application must include information about the issuer's business, investments and properties, the securities which are to be listed and any material legal proceedings affecting the applicant.

Within five days of receiving a listing application, the TSX will notify the applicant whether all required documentation has been submitted in a form acceptable to the TSX. Applicants then have 75 days to submit any outstanding documentation.

Once all required documentation has been received, the TSX's policy is to use its best efforts to examine the application and render a decision within 60 days. However, applications are normally processed more quickly to meet the timelines of an IPO (*see Question 18*).

The procedures for listing the securities of a foreign issuer are the same as those for a Canadian issuer. An overseas issuer would likely seek a listing for shares, as depositary receipts are rarely issued in Canada.

5. Briefly outline the role of advisers commonly used for an IPO.

Underwriters

The underwriters act as the issuer's initial link to the public capital markets. They assist in assessing market demand for the issuer's securities, negotiating with the issuer the terms, structure and pricing of the offering and marketing the offering. They also perform due diligence on the issuer's business to ensure the interests of public investors are protected.

Issuer's legal counsel

The issuer's lawyers:

- Assist with the structuring of the IPO.
- Advise on any changes or restructuring required before the IPO.
- Prepare the prospectus and other key documents.
- Assist with the regulatory review process and listing applications.
- Prepare the issuer for its continuing obligations following the IPO.

Underwriters' legal counsel

The underwriters' lawyers:

- Conduct due diligence on the issuer.
- Work with the issuer's lawyers in the preparation of the prospectus and other key documents.
- Prepare the underwriting agreement.
- Advise the underwriters in relation to their obligations.

Auditors

The issuer's auditors:

- Provide accounting advice.
- Assist with due diligence.
- Prepare financial statements and financial disclosure that forms part of the prospectus.
- Prepare comfort letters relating to such financial information.

6. What are the principal documents produced in an IPO?

The principal documents produced in an IPO typically include:

- Preliminary and final prospectus.
- Underwriting or agency agreement.
- Escrow/lock-up agreements.
- Option plan.
- Shareholder rights plan.
- Non-competition, management and employment agreements.
- Listing application.
- Acquisition agreement (if an indirect offering, *see Question 3*).

7. Please summarise the requirements for a prospectus (or other main offering document).

No person or company can "trade" in a security where such trade would be a "distribution" of the security unless, in the absence of an applicable exemption, a prospectus is filed with the securities regulatory authority in each of the provinces in which the security will be offered.

"Trade" is broadly defined and includes a sale of securities (including treasury issuances) or any act in furtherance of a sale of securities (such as an offer to sell). A trade constitutes a "distribution" if it involves one of the following:

- The issuer issuing securities that have not previously been issued.
- A trade in previously issued securities of an issuer from the holdings of any control person (a rebuttable presumption of control exists where a holding, alone or in concert with others, constitutes more than 20% of the issued and outstanding voting securities).
- A trade in securities previously issued under an exemption from the prospectus requirements.

8. Is it possible to extend an offer to certain types of persons within your jurisdiction without preparing a full prospectus (for example, to sophisticated investors, employees or a small group)? If so, please set out suggested wording that would be used to restrict the offering.

Securities can be sold in reliance on an exemption from the prospectus requirements (*see Question 9*). Though typically not required, the issuer may choose to provide potential investors with an offering memorandum, containing information necessary to evaluate the issuer and the securities being offered. A Canadian offering memorandum might contain the following cautionary language on its cover page:

> "This Offering Memorandum constitutes an offering of these securities only in those jurisdictions and to those persons where and to whom they may be lawfully sold. No securities commission or similar regulatory authority in Canada has reviewed this Offering Memorandum or has in any way passed upon the merits of the securities offered hereunder and any representation to the contrary is an offence. No prospectus has been filed with any such authority in connection with the securities offered hereunder. This Offering Memorandum is confidential and is provided to specific prospective investors for the purpose of assisting them and their professional advisers in evaluating the securities offered hereby and is not to be construed as a prospectus or advertisement or a public offering of these securities."

In most cases, an offering memorandum must also contain a description of a purchaser's statutory rights of action for damages or rescission under provincial securities law.

9. Are there any exemptions from the requirements for a prospectus (or other main offering document)?

A number of exemptions from the prospectus requirements are available, including distributions:

- To "accredited investors" such as institutional investors and high net worth individuals.
- By a "private issuer" (an issuer with less than 50 security holders that has not distributed its securities to the public and is not a mutual fund or investment fund), to certain non-public purchasers.
- To a person purchasing as principal and to whom the acquisition cost is not less than Can$150,000 (about US$138,000) paid in cash at the time of the trade.
- In certain cases, to employees, executive officers, directors and consultants of the issuer.

In addition to the enumerated statutory exemptions, an issuer may be granted an exemption from the prospectus requirements where the regulators are satisfied that it is not prejudicial to the public interest. This power is usually exercised when a statutory exemption is unavailable and the protections afforded by the prospectus requirements are unnecessary.

10. Please outline the contents of the prospectus (or other main offering document).

A prospectus must provide full, true and plain disclosure of all "material facts" relating to the securities issued or to be distributed thereunder. Under provincial securities laws, the term "material fact" means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of the securities being offered.

Generally, a prospectus is required to include, among other things:

- A description of the issuer and its business.
- The planned use of proceeds received from the issuance of the securities.
- Financial information and management's discussion and analysis (MD&A) of the financial condition and results of operations.
- A description of the securities being distributed.
- Information regarding the directors and officers of the issuer.
- Information regarding the audit committee and corporate governance practices.
- The plan of distribution.
- Any risk factors facing the issuer or relating to the securities being issued.
- Any other material facts.

At the same time as the filing of the prospectus, the issuer must also file supporting documents, including:

- Any documents that affect the rights of security holders (for example, constating documents, any security holders' rights plans or similar plans).
- Material contracts, reports and valuations, if applicable.
- Personal information forms for each director and executive officer of the issuer.
- An auditor's comfort letter regarding the audited financial statements.

11. How is the prospectus (or other main offering document) prepared and verified?

The prospectus is generally prepared by the issuer and its legal counsel, with the significant involvement of the lead underwriters and their legal counsel as well as the issuer's auditors.

The underwriters and their counsel, to the extent possible, verify the facts and statements made in the prospectus based on their due diligence review of the issuer.

The provincial securities commissions comment on the preliminary prospectus, normally within ten business days of the filing of the preliminary prospectus. The issuer is then required to address any deficiencies or inaccuracies before the final prospectus is approved for filing.

In addition, the auditors provide a comfort letter with respect to certain financial information contained in the prospectus.

12. Who is responsible for the content of the prospectus (or other main offering document) and any liability arising from its contents?

A purchaser who acquired a security under a prospectus that contained a misrepresentation has a statutory right of action for damages against:

- The issuer (or any selling security holder on whose behalf the distribution was made).
- Every person who was a director of the issuer at the date the prospectus was filed.
- Each underwriter of the offered securities.
- Every person or company whose consent to disclosure of information in the prospectus was required to be filed with the prospectus, such as lawyers and accountants (but only with respect to reports, opinions or statements that were made by them).
- Every other person who signed the prospectus, such as promoters.

If a prospectus contains a misrepresentation, there are no statutory defences to the issuer or the selling security holders, except if the purchaser purchased the securities with knowledge of the misrepresentation. Other classes of defendants may have certain additional defences in an action by a purchaser, including a "due diligence" defence.

In addition, penalties for breaches of provincial securities laws, certain offences set out in the Criminal Code (Canada) and non-statutory civil liability may apply to misrepresentations contained in a prospectus.

13. Briefly explain the ways used to market an IPO.

The marketing process commences after the preliminary prospectus is filed and receipted. In contrast to the process in certain other jurisdictions, in Canada, clearance from the securities regulators is not required before marketing can commence, although issuers often wait for initial comments from the principal regulator, which are required to be provided within ten business days of filing the preliminary prospectus. Although the pricing information is left out of the preliminary prospectus, the underwriters will establish a price range for marketing purposes.

The marketing period for a traditional IPO typically lasts two to four weeks, and involves a road show where management and the lead underwriters visit various cities and meet with retail brokers and institutional investors. Marketing activities are very restricted in Canada, and must be conducted with reference to the preliminary prospectus. The lead underwriters typically prepare a summary document containing key marketing points for the offering, often referred to as a "greensheet" or a "bluesheet". This document is not permitted to be distributed to the general public.

Throughout the marketing period, the underwriters take orders for the securities. If a sufficient order book has developed to sell the offering, the underwriters and the issuer will negotiate a price for the offering, to be reflected in the final prospectus.

Under Canadian securities laws, an underwriter is required to send a copy of the preliminary prospectus to any person who indicates an interest in the offering and requests a copy of the preliminary prospectus.

The underwriter is required to send to each purchaser a copy of the final prospectus. A purchaser can withdraw from its agreement to purchase the securities within two business days of receipt of the final prospectus.

14. Describe any potential liability from publishing research reports by connected brokers and ways used to avoid such liability.

Securities legislation and IIROC's Universal Market Integrity Rules generally prohibit fraudulent, manipulative and deceptive activities. In addition, IIROC's Dealer Member Rules contain the minimum requirements that analysts and dealer members must have in place to minimise potential conflicts of interest when publishing research reports or making recommendations.

In addition to civil, regulatory and criminal liability for breaches of securities laws (*see Question 22*), IIROC hearing panels have the power to impose a number of sanctions on dealer members and their partners, directors, officers and employees who are approved by IIROC or another self-regulatory organisation (Approved Persons) for a violation of the Universal Market Integrity Rules and the Dealer Member Rules, including:

- Reprimands.
- Fines of up to Can$1 million (about US$0.9 million) for Approved Persons and Can$5 million (about US$4.6 million) for dealer members.
- Suspension and expulsion of membership in IIROC.

15. Is the bookbuilding procedure used and if so, in what circumstances?

Most Canadian securities offerings involve building a book of institutional orders.

16. Where bookbuilding is used, how is any related retail offer dealt with?

Where bookbuilding is used, a certain percentage of the offering, frequently 20% to 25% for a typical offering of common shares, will be allocated to retail investors, although the percentage will vary based on the nature of the securities being offered and the level of demand from institutional and retail investors.

17. How is the underwriting for an IPO typically structured? What are the typical terms of the underwriting agreement?

Underwritings for Canadian public offerings are typically structured in one of three ways:

- **Best efforts underwriting.** The underwriters, acting as a sales agents, agree to use their best efforts to sell as much of the offering as possible. The underwriters only receive a commission on those securities actually sold and are not responsible for any unsold securities.
- **Firm commitment underwriting.** The underwriters agree, subject to certain conditions and termination rights, to purchase the entire offering of securities, regardless of whether they are able to sell the securities to the public.
- **Standby underwriting.** The underwriters agree to take up all or some portion of an offering that cannot be sold to investors.

On an IPO, the underwriting is initially done on a "best efforts" basis. Firm commitment underwriting then takes effect once the offering has been marketed and priced and the underwriting agreement is signed.

In addition to setting out the underwriters' fees and any obligations to purchase the securities issued, the underwriting agreement (or agency agreement in the case of a best efforts underwriting) typically contains the following key terms:

- Representations, warranties and covenants of the issuer.
- Conditions precedent to the underwriters' obligation to close the offering, including delivery of certain documents.
- Termination rights available to the underwriters before closing, including:
  - if a significant event that could affect the market price of the securities occurs (known as "disaster out");

- if the state of the financial markets is such that the securities cannot be profitably marketed (known as "market out"); or
- if a material change occurs which could result in purchasers exercising their right to withdraw from purchasing the securities.

- Indemnity provisions in favour of the underwriters.
- A provision restricting the issuer from selling additional securities for a specified period of time following closing of the offering.

18. Please provide a summary of the timetable for a typical IPO.

The IPO process comprises two broad phases:

- From commencement of work until filing of the preliminary prospectus.
- From filing of the preliminary prospectus until closing of the offering.

The duration of the first phase depends on several factors, including the availability of information about the issuer, the complexity of the structure and the state of the financial statements and other due diligence materials.

There are two parts to the second phase, which typically lasts about four to seven weeks:

- Between filing of the preliminary prospectus and filing of the final prospectus.
- Between filing of the final prospectus and closing of the offering.

Canada has an efficient prospectus clearing process, which typically takes three to five weeks on an IPO, although it can be longer or shorter. Once the final prospectus is filed, the offering typically closes within one week to ten days, allowing time for the final prospectus to be mailed to all purchasers and for the mechanics of closing to be implemented.

19. Are there rules on price stabilisation in the period after trading starts?

Under Canadian securities laws, underwriters are permitted to engage in price stabilisation activities in the period after trading starts, provided that the securities subsequently sold do not exceed a specified maximum price and so long as details of the proposed price stabilisation are included in the prospectus.

IIROC's Universal Market Integrity Rules also permit stabilisation activities, subject to price limitations, for the purpose of maintaining a fair and orderly market in the offered security. However, IIROC considers it to be inappropriate for a dealer to engage in market stabilisation activities in circumstances where it knows or should reasonably know that the market price is not fairly and properly determined by supply and demand.

20. What is the approximate cost of an IPO?

The costs of an IPO include:

- Underwriters' commissions.
- Fees of lawyers, accountants, and other experts and advisers.
- Marketing costs, including costs associated with the underwriters' road show.
- The costs of translating the prospectus into French, if the offering is to be made in Québec.
- The costs of printing and distributing the prospectus.
- Filing and regulatory fees.
- Listing fees payable to the stock exchange.
- Transfer agent fees.

For a typical IPO, the underwriters' commissions range between 5% and 6% of the total issue price, but could be above or below this range in certain circumstances. Other costs could total between Can$2 million (about US$1.84 million) to Can$3 million (about US$2.76 million), but could also be more or less depending on a variety of factors, including timeline and complexity.

21. What are the main tax issues that arise on an IPO?

A number of tax issues may arise on an IPO that require specialist tax advice. These issues include:

Financing expenses

A corporation that undertakes an IPO will invariably incur a number of expenses, including:

- Fees of underwriters, lawyers and accountants.
- Costs of printing the prospectus and share certificates.
- Costs related to marketing the offering to potential investors.

In general, a corporation can deduct such expenses, on a straight-line basis over a five year period, pro-rated to the number of days in a tax year. Other expenses may be fully deductible in the year incurred, including transfer agent fees, stock exchange listing fees, financial reporting related fees and business representation fees.

Acquisition of control of the corporation by a person or group of persons

Generally, an IPO will not give rise to an acquisition of control of the corporation. However, once a corporation has gone public, it is possible that control can be acquired by a person or a group of persons acting in concert through the acquisition of the majority of the issued shares. Tax considerations that arise on an acquisition of control include restrictions on the use of pre-acquisition of control loss carry forwards, resource pools and other tax attributes of the public corporation and any corporations controlled by it.

Loss of status as a Canadian Controlled Private Corporation (CCPC)

CCPCs are entitled to various tax benefits under the Income Tax Act (Canada), including favourable tax treatment of stock options

and a reduced tax rate for small businesses. When a company becomes public, due to either the listing of shares on a designated stock exchange, or by merging with or being acquired by an existing public company, it loses its status as a CCPC, resulting in a loss of the above tax benefits. Pre-IPO planning should consider taking advantage of such benefits before the loss of CCPC status.

Further, any subsidiaries of the newly public corporation will also lose their CCPC status and the tax benefits that flow from it.

Loss of certain tax-free dividends

Only private corporations are entitled to distribute tax-free capital dividends. Once a corporation has completed an IPO, it will be unable to distribute such dividends, and should consider clearing out its capital dividend account before going public.

Capital gains exemption

Holders of "qualified small business corporation shares" may be eligible for a one-time enhanced capital gains exemption on the disposition of such shares. This exemption permits up to Can$750,000 (about US$690,000) of the gain from the disposition to be realised tax-free. In general, "qualified small business corporation" status will be lost when a corporation ceases to be a CCPC. Accordingly, shareholders may wish to consider planning to crystallise accrued gains in the shares of the corporation before the IPO, so as to use this exemption.

CONTINUING OBLIGATIONS

22. Please outline any continuing obligations to which listed companies are subject, in particular:

- **The key areas covered by the obligations.**
- **Whether the same rules apply to domestic and foreign companies and to issuers of shares and depositary receipts.**
- **How these obligations are regulated and any penalties for breach.**

Key areas

Key areas of continuing obligations to which listed issuers are subject include:

Press releases and material change reports. If a material change occurs in the affairs of the issuer, the issuer must immediately issue a press release and file a material change report with securities regulators within ten days. Additionally, the issuer must notify and, in certain circumstances, obtain the prior consent of its stock exchange for any proposed material change in its business or affairs. The TSX requires listed issuers to disclose "material information", which is considered to be broader than a "material change".

Annual financial statements including MD&A. The annual financial statements are typically contained in an issuer's annual report, which will also include a report to the issuer's shareholders together with MD&A of the current financial situation and operating results of the issuer. All such documents, together with the issuer's annual information form on the business and operations of the issuer, must be filed with securities regulators, as prescribed by applicable securities legislation and stock exchange rules and regulations, within 90 days after the end of each financial year.

Unaudited interim financial statements. Unaudited interim financial statements must be prepared for each of the first three quarterly periods of each fiscal year. The interim financial statements, along with the accompanying MD&A, are required to be sent to each shareholder who requests a copy, and to be filed with securities regulators and stock exchanges within 45 days of the relevant quarter end. The chief executive officer and chief financial officer of most listed issuers are required to certify that the issuer's annual and interim filings contain no misrepresentations, as well as certain matters with respect to the issuer's disclosure controls and procedures and internal controls over financial reporting.

Annual meeting. The TSX requires each of its listed issuers to hold an annual meeting of shareholders within six months of its fiscal year end, at which, in addition to any special business, shareholders review the issuer's financial statements for the most recent fiscal year, elect the directors of the issuer and appoint the auditors of the issuer for the ensuing period. Before holding its annual meeting of shareholders, the issuer must prepare and send to each of its shareholders a notice of the meeting, a copy of its annual financial statements and proxy solicitation materials.

Insider reporting. Insiders of an issuer, including its directors, officers and significant shareholders, must prepare, file and regularly update "insider reports" with securities regulators, disclosing their relationships with and shareholdings of the issuer.

Domestic and foreign companies

There are two categories of non-Canadian reporting issuers which are eligible for relief from various continuous disclosure obligations under Canadian securities law:

SEC foreign issuers. These include both US domestic issuers and foreign private issuers subject to the rules of the US Securities and Exchange Commission (SEC).

Designated foreign issuers. These are foreign reporting issuers:

- That are not subject to the SEC rules but to the securities laws of Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, The Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland or the UK.
- For which the total number of equity securities owned, directly or indirectly, by residents of Canada does not exceed 10%, on a fully-diluted basis, of the total number of equity securities of the issuer, calculated, in most cases, as of the first day of the issuer's current financial year.

The exemptions are contingent on the non-Canadian reporting issuer's compliance with the securities regulatory requirements in its home jurisdiction, and the rules of the stock exchange(s) on which its securities are listed. Documents that the non-Canadian reporting issuer files with the SEC or the designated foreign issuer's regulators must also be filed in Canada, and any documents that the home country requires to be sent to security holders must also be sent to Canadian security holders.

Regulation and penalties

In addition to the liability attached to prospectus disclosure (*see Question 12*), Canadian securities laws impose a statutory regime of civil liability for an issuer's continuous disclosure. The regime provides secondary market investors with a limited right of action for damages resulting from an issuer's misrepresentation

in public disclosure, or a failure to make timely disclosure of a material change. The list of potential defendants includes:

- The issuer and its directors.
- Responsible senior officers.
- Auditors.
- Responsible experts.
- "Influential persons" (including control persons (that is, generally any person holding more than 20% of the issued and outstanding voting securities of the issuer), promoters, investment fund managers where the issuer is an investment fund, and insiders).
- Each director or officer who knowingly influenced the misrepresentation.

In Ontario, a person or company that submits to the Ontario Securities Commission (OSC), or files under the Securities Act (Ontario) (OSA), information or material that contains a statement that is in a material respect misleading or untrue, or does not contain a fact that is required to be included or that is necessary to make the statement not misleading, or that otherwise contravenes Ontario securities law, may be liable to a fine of up to Can$5 million (about US$4.6 million), or imprisoned for a term of up to five years less a day, or both. A director or officer of a company that authorises or permits such a statement or contravention to be made by a company is subject to the same penalties.

Further, if the OSC is of the opinion that it is in the public interest to do so, the OSC can order a person or company that has not complied with Ontario securities law to pay an administrative penalty of up to Can$1 million (about US$900,000) for each failure to comply.

Provincial securities laws also prohibit insiders of an issuer (for example, directors, officers, employees and advisers, among others) from trading in securities of the issuer while in possession of material non-public information and from informing others of such undisclosed information. These prohibitions are enforced using a wide range of sanctions including:

- Penal sanctions.
- Significant fines.
- Administrative sanctions.
- Civil actions by investors.

Under the OSA, a person or company that contravenes these rules is liable for a fine of up to Can$5 million (about US$4.6 million), or the amount equal to triple the profit made or loss avoided by the person or company due to the contravention, whichever is greater.

In addition to liabilities for breaches of provincial securities laws, certain offences set out in the Criminal Code may apply to the trading of securities. Among other things, these provisions prohibit:

- Intentional fraud, such as defrauding any person of property, money or valuable security.
- Fraudulently affecting the public market price of shares.
- Use of the mail to defraud.

Commission of the most serious criminal offences, fraud over Can$5,000 (about US$4,600) and fraud affecting public markets, may potentially result in a conviction and up to 14 years imprisonment. Insider trading, issuing a false prospectus, and fraudulent manipulation of stock exchange transactions may potentially result in imprisonment for up to ten years.

DE-LISTING

23. What action is required to de-list a company? Have there been many de-listings on your market(s) in the past year?

An issuer can be de-listed from the TSX either by the TSX or voluntarily.

De-listing by the TSX

If the TSX determines that any of the prescribed de-listing criteria (for example, insolvency, insufficient trading activity or market value or failure to comply with TSX policies) has become applicable to a listed issuer or its securities, the TSX will notify the listed issuer and the market that the issuer is under a de-listing review.

Depending on the severity of the problem, the TSX will then conduct a remedial review process or an expedited review process. In both cases, the issuer has the opportunity to present submissions to the TSX before being de-listed. Under a remedial review, the issuer has a period of 120 days to correct the deficiencies that triggered the de-listing review. Under an expedited review, the TSX immediately moves to suspend trading and de-list the issuer, if not satisfied that such action is unwarranted based on the issuer's submissions.

Voluntary de-listing

A listed issuer wishing to have all its listed securities, or any class of its securities, de-listed from the TSX must submit a formal application to the TSX.

Between 1 September and 30 November 2009, 47 issuers were de-listed from the TSX.

An issuer whose securities are de-listed can submit an application to cease to be a reporting issuer to the securities commissions which, once approved, relieves the issuer of continuous obligations applicable to listed issuers.

REFORM

24. Please summarise any proposals for reform.

The Canadian securities regulators and the TSX are constantly revising various of their rules and policies. The most notable proposal for reform is the proposed establishment of a single national securities regulator to replace the current 13 provincial and territorial regulators. The Canadian federal government established the Canadian Securities Transition Office in June 2009 to lead all aspects of the transition, including the development of a federal Securities Act. In October 2009, an advisory committee with representatives from ten of the 13 provinces and territories was established to assist the Transition Office.

The Transition Office has stated that it expects to issue a transition plan by the summer of 2010 and to have a national se-

curities regulator in place by 2012. However, the provinces of Alberta, Manitoba and Québec have declined to participate in the transition process. Québec has been the most vocal in its opposition, having initiated a constitutional challenge in an effort to block the plan.

DEBT CAPITAL MARKETS: GENERAL

25. Please give a brief overview of the debt securities market in your jurisdiction. Has it been active? What were the major deals over the past year?

The Canadian debt capital markets have been very active in recent years. In the first three quarters of 2009, Canadian debt capital market volumes reached Can$110.8 billion from 244 issues, representing a 20.5% increase over the same period in 2008 (*Thomson Reuters Third Quarter 2009 Canada Debt Capital Markets Review*).

Notable Canadian debt offerings from 2009 include:

- Can$1.75 billion (about US$1.6 billion) offering of notes by Husky Energy Inc.
- Can$1.22 billion (about US$1.1 billion) and Can$1.07 billion (about US$0.9 billion) offerings of notes by Potash Corporation of Saskatchewan Inc.
- US$1.25 billion (about EUR0.85 billion) offering of notes by Barrick Gold Corporation.
- Can$1.08 billion offering of notes by Nexen Inc.
- Significant debt offerings by several of Canada's major banks and other financial institutions.

26. What are the different methods of raising finance through the issue of debt securities in your jurisdiction (for example, bonds or EMTN programmes)?

Debt securities are normally issued by way of prospectus using a similar process as used for equity securities.

In Canada, a popular medium-term note (MTN) programme is available, which allows for the continuous distribution of debt securities in which the specific variable terms of individual debt securities, such as prices, interest rates and maturity, and the method of distribution of the securities, are only determined at the time of distribution. To establish an MTN programme an issuer files a "base shelf prospectus". When the terms of the debt securities have been determined, the issuer files a "pricing supplement", that contains these terms and a list of other material documents of the issuer to be incorporated by reference in the base shelf prospectus, as of the date of the pricing supplement.

27. For new issues to be cleared and settled through Euroclear or Clearstream, what percentage use the New Global Note (NGN) structure? What percentage retain the classic or traditional global note structure?

Not applicable.

28. Please describe the main market(s) (including any exchange-regulated market or multi-lateral trading facility (MTF)) for debt securities and summarise the following in relation to each market:

- **The regulator.**
- **Any minimum size requirement.**
- **Any minimum trading record required.**
- **Any working capital requirements.**
- **Number of issues traded.**
- **Annual cost of being listed.**

The regulators, minimum listing requirements and annual listing fees set out in *Question 2* are generally applicable to debt securities. However, the TSX typically gives consideration to listing debt securities that do not meet the minimum listing requirements or to which certain of the requirements are not applicable.

LISTING ON THE MAIN DEBT CAPITAL MARKET(S)

29. What are the main ways of issuing debt securities on the debt capital market(s)?

Debt securities can be issued to the public by way of a prospectus offering, or on a private placement basis in reliance on an exemption from the prospectus requirements (*see Questions 9 and 33*).

An issuer that has already completed an IPO can issue debt or equity securities in a "follow-on offering" using alternative forms of prospectus. The base shelf prospectus system (*see Question 26*) allows an issuer to rapidly offer its securities to the public through the filing of a "pricing supplement", which does not require regulatory review or approval. Certain public issuers can also offer debt or equity securities using a "short form prospectus", which incorporates by reference certain of the issuer's public disclosure, and involves a shorter regulatory review and approval process than a long-form prospectus used in an IPO.

30. Briefly outline the role of advisers commonly used when issuing and listing debt securities.

The role of advisers in an offering of debt securities is generally similar to that of advisers in an IPO (*see Question 5*).

31. What are the principal documents produced when issuing and listing debt securities?

In addition to the documents set out in *Question 6*, such as the preliminary and final prospectus and the underwriting or agency agreement, the issuer typically enters into a trust indenture with an indenture trustee. The trust indenture outlines the issuer's obligations to the debt holders, including remedies available to debt holders in the event that the issuer fails to make scheduled

payments or to satisfy certain tests of financial health. The indenture trustee is responsible for administering the trust indenture on behalf of the debt holders.

For offerings of secured debt, there may be a package of security documents outlining the secured parties' rights against the collateral granted by the issuer, and against other secured parties.

In addition, credit rating agencies may issue letters that assign ratings of creditworthiness to the debt securities being issued.

32. Please summarise the requirements for a prospectus (or other main offering document).

The prospectus requirements are similar to those for an issue of equity securities (*see Question 7*).

33. Are there any exemptions from the requirements for a prospectus (or other main offering document)?

Similar exemptions from the prospectus requirements apply to equity and debt issuances (*see Question 9*). In addition, offerings of non-convertible debt securities with an approved credit rating and a term to maturity of less than one year are exempt from the prospectus requirements.

34. Please outline the content of the prospectus (or other main offering document).

The content of a prospectus for an offering of debt securities is generally similar to that of an offering of equity securities (*see Question 10*). If the debt securities being issued have a term to maturity in excess of one year, the prospectus must contain historical earnings coverage ratios of the issuer, adjusted to reflect the issuance of the debt securities. Details of any ratings obtained or sought from credit rating agencies must also be disclosed in the prospectus.

35. How is the prospectus (or other main offering document) prepared and verified?

The prospectus preparation and verification process is generally similar for equity and debt offerings (*see Question 11*).

36. Who is responsible for the content of the prospectus (or other main offering document) and any liability arising from its content?

The same parties are liable for prospectus misrepresentations under equity and debt offerings (*see Question 12*). In addition, a credit supporter who guarantees the obligations of the issuer of debt securities is required to make certain disclosure in the prospectus and to sign the prospectus, and is liable for misrepresentations contained in the prospectus.

37. Briefly explain the ways used to market debt securities.

The marketing process for debt securities is generally similar to the marketing process for equity securities (*see Question 13*). For debt offerings by mature issuers with frequent access to the debt markets, a road show may not be necessary to market the securities.

38. Please provide a summary of the timetable for issuing and listing debt securities.

An offering of debt securities typically follows a shorter timeline than an IPO, particularly if the issuer takes advantage of the "base shelf prospectus" system or is able to file a "short form prospectus" (*see Question 29*). An offering under the base shelf prospectus system can often be completed in one to two weeks, and a bought deal offering using a short form prospectus can often be completed in under three weeks, although the actual timeline ultimately depends on a variety of factors.

39. What is the approximate cost of issuing and listing debt securities?

The costs of issuing and listing debt securities are typically less than those for an IPO of equity securities. Underwriters' commission for a debt offering typically range between 0.25% and 1% of the total issue price, although offerings of high-yield debt securities typically have higher commissions. Other costs could total between Can$200,000 (about US$184,000) and Can$1.5 million (about US$1.38 million).

40. What are the main tax issues that arise when issuing and listing debt securities?

The principal Canadian tax issues that may arise in connection with an issue and listing of debt securities include:

- **Withholding tax.** Interest paid on a "plain-vanilla" debt security held by an arm's length non-resident is not subject to Canadian withholding tax. However, interest with unusual factors (such as interest that is contingent or dependent on the use of or production from property in Canada) may be subject to Canadian withholding tax. In general, no other Canadian taxes are payable by non-resident holders who do not carry on business in Canada in relation to the acquisition, holding or disposition (including sale or redemption) of "plain-vanilla" Canadian debt securities, or the receipt of interest, principal or premium on them.
- **Interest deductibility.** Generally, interest paid or payable on debt securities is only deductible if the borrowed money is used for the purpose of earning income from a business or property (with specific exceptions). Accordingly, the borrower must ensure the appropriate use of the borrowed funds. Further, because the Canadian corporate tax system does not operate on a consolidated basis, additional planning will be required to ensure interest deductions are available to particular income earning entities in the corporate group, to maximise the benefit of such deductions.

THE REGULATORY AUTHORITIES

The contact information for Canada's 13 provincial and territorial securities regulators is as follows:

Alberta
T +1 403 297 6454
E *inquiries@seccom.ab.ca*
W *www.albertasecurities.com*

British Columbia
T +1 604 899 6854
E *inquiries@bcsc.bc.ca*
W *www.bcsc.bc.ca*

Manitoba
T +1 204 945 2548
E *securities@gov.mb.ca*
W *www.msc.gov.mb.ca*

New Brunswick
T +1 506 658 3060
E *information@nbsc-cvmnb.ca*
W *www.nbsc-cvmnb.ca/nbsc/*

Newfoundland and Labrador
T +1 709 729 4189
W *www.gs.gov.nl.ca/cca/fsr*

Northwest Territories
T +1 867 873 7490
W *www.justice.gov.nt.ca/SecuritiesRegistry/index.shtml*

Nova Scotia
T +1 902 424 5354
W *www.gov.ns.ca/nssc*

Nunavut
T +1 867 975 6590
W *www.justice.gov.nu.ca/i18n/English/legreg/sr_index.shtm*

Ontario
T +1 416 597 0681
E *inquiries@osc.gov.on.ca*
W *www.osc.gov.on.ca*

Prince Edward Island
T +1 902 368 4550
W *www.gov.pe.ca/securities*

Québec
T +1 514 395 0337
W *www.lautorite.qc.ca*

Saskatchewan
T +1 306 787 5842
W *www.sfsc.gov.sk.ca*

Yukon Territory
T +1 867 667 5005
W *www.community.gov.yk.ca/corp/secureinvest.html*

- **Financing expenses.** Similar to the expenses of an IPO, most expenses incurred in the issuance of debt securities are deductible over a five year period, with certain exceptions whereby they are deductible in the year incurred. This amortisation is accelerated if the debt securities are repaid within this five year period, provided such repayment is not part of a series of borrowings and repayments.

CONTINUING OBLIGATIONS

41. Please outline any continuing obligations to which companies with listed debt securities are subject, in particular:

- **The key areas covered by the obligations.**
- **Whether the same rules apply to domestic and foreign issuers.**
- **How these obligations are regulated and any penalties for breach.**

The same continuing obligations described in *Question 22* apply to issuers with listed debt securities.

REFORM

42. Please summarise any proposals for reform.

There are no current proposals for reform specific to the debt markets (*see Question 24*).

The authors thank Janice Dubiansky, Sheldon Freeman, Bill Gorman and Jon Northup, all of Goodmans LLP, for their contributions to this chapter.

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