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Trevor Scott is recognized in *The Canadian Legal Expert® Directory* as a leading M&A and corporate commercial lawyer and by *Best Lawyers* for corporate law (finance and mergers and acquisitions).

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Dealer Bulletin

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Canadian Securities Regulators Propose Significant Changes for Marketing Prospectus Offerings

The Canadian securities regulators have proposed changes to increase the range of permitted marketing activities in connection with prospectus offerings. The proposed changes provide guidance to dealers on current industry practices relating to the use of term sheets, road shows and green sheets, as well as upsizing or adding dealers to a bought deal.

Proposed changes include:

- allowing dealers to determine interest in an IPO without a prospectus
- expressly allowing term sheets provided they are publicly filed and included in a prospectus
- expressly allowing road shows provided new rules are followed
- permitting upsizing or adding dealers to a bought deal

TESTING THE WATERS FOR AN IPO

Existing laws generally prohibit soliciting any expressions of interest from investors until a preliminary prospectus is filed and receipted. Under the proposed changes, dealers would be allowed to determine interest in a potential IPO through limited confidential communication with permitted institutional investors. Companies would be required to keep written records of any dealer it authorized to "test the waters" for an IPO. A dealer would be required to keep records of all permitted institutional investors it solicited and a copy of the investors' written confirmation to keep information confidential. Companies that are already public in a foreign jurisdiction are not eligible.

TERM SHEETS

Current laws limit the use of documents describing a prospectus offering other than a prospectus. For bought deals, the proposed changes will expressly allow dealers to provide term sheets describing the offering to permitted institutional investors after the bought deal is announced and prior to the preliminary prospectus being filed (the regulators are seeking comments on whether dealers should also be able to provide term sheets to retail investors). Also, for all public offerings, dealers may provide term sheets to investors both during the waiting period (between the filing of the preliminary prospectus and final prospectus) and after the filing of the final prospectus. Using a term sheet will be subject to the following conditions:

- disclosure in the term sheet must be fair, true and plain
- the term sheet must be approved by the public company and the dealers and filed publicly on SEDAR before it is used (term sheets for bought deals will not be publicly available until the preliminary prospectus is filed and receipted)

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- the term sheet must be included in the final prospectus (and the preliminary prospectus for bought deals), which will result in statutory liability for any misrepresentations in the term sheet
- the term sheet can only contain information contained in the prospectus (or only information that is contained in the bought deal news release or the company's public disclosure for bought deals)
- the term sheet must contain a prescribed warning legend
- the term sheet must be distributed with a copy of the prospectus (for a bought deal any permitted institutional investor that recorded a term sheet must receive the subsequent preliminary prospectus)

GREEN SHEETS

Dealers will continue to be able to provide green sheets to their registered representatives. However, green sheets distributed to the public will be considered a "term sheet" and must comply with the requirements described above.

ROAD SHOWS

The proposed changes would expressly permit road shows (including in person, by conference calls, over the internet or by other electronic means) to be conducted during the waiting period or after the final prospectus. Road shows will be subject to the following conditions:

- all information in the road show must be contained in the prospectus and be fair, true and plain (if the road show is restricted to institutional investors, then information on comparables can be provided without including it in the prospectus)
- any written materials (including slide decks) distributed to investors must comply with the term sheet requirements discussed above, including that they are filed on SEDAR and become publicly available (except for comparables if the road show is limited to permitted institutional investors)
- procedures must be followed to track attendance, ensure investors receive the prospectus, and restrict copying
- the dealer must be authorized in writing by the public company to conduct the road show

The Canadian securities regulators have asked for comments on whether there should be additional rules on the use of comparables, such as a template mandating the metrics used in compiling comparables, how a representative sample is chosen, and requiring cautionary language on how comparables can be "cherry picked" or misunderstood.

UPSIZING AND ADDING DEALERS TO A BOUGHT DEAL

The proposed changes would permit dealers to increase the size of a bought deal and add other dealers to an underwriting syndicate, provided that the change was not planned, formally or informally, prior to signing the original bought deal letter. Upsizing would only be permitted if a news release is issued immediately, the offering price is unchanged, and the increase in the offering size is limited to a specified percentage (the regulators are requesting comments on whether this percentage should be 15%, 25%, 50% or some other percentage). The preliminary prospectus is still required to be filed and receipted within four days of the original bought deal letter.

ADDITIONAL INFORMATION

The proposed changes are open for comments until February 23, 2012. If you wish to discuss any aspect of this commentary, please contact Trevor Scott by phone at 604-661-1732 or by email at tscott@farris.com or any other member of Farris' public company practice group.

This summary is necessarily of a general nature and should not be constructed as the giving of legal advice. You are urged to seek legal advice on areas of specific interest or concern.