

## Canadian Securities Regulators Propose More Flexible Rules for Marketing Public Offerings

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Securities regulators in Canada are proposing changes to the prospectus offering regime that would give issuers and investment dealers greater flexibility in marketing public offerings of securities both before and after a preliminary prospectus is filed. The proposed changes are designed to ease existing regulatory burdens that market participants face when planning and executing a public offering, while at the same time providing enhanced investor protections. The proposed rule changes would

- permit investment dealers to “test the waters” for an initial public offering (IPO) before a preliminary prospectus is filed;
- permit issuers and dealers to upsize bought deals and add dealers to a syndicate on certain conditions;
- allow investment dealers to provide term sheets to investors at the same time as the preliminary prospectus or, in the case of bought deals, to institutional investors after the bought deal is announced; and
- formalize and clarify the rules relating to live, electronic and other investor road shows in connection with prospectus offerings.

While providing greater flexibility for marketing, the regulators are proposing to impose a “fair, true and plain” disclosure requirement on term sheets and road show materials, which would also be subject to prospectus-level liability. Mutual fund offerings are not affected by the proposed changes. Comments on the proposals are due by February 23, 2012.

### Testing the Waters for an IPO

Under current rules, issuers and investment dealers are generally prohibited from communicating about an offering of securities before a preliminary prospectus is filed and receipted. The regulators are proposing to permit dealers to “test the waters” for a potential IPO on behalf of non-reporting issuers by contacting certain institutional investors on a confidential basis to solicit expressions of interest. The institutional investors that could be contacted would include financial institutions, banks, pension funds, governments, Crown corporations, municipalities and investment funds. The issuer and dealers would have to keep records of which investors were contacted and obtain a confidentiality acknowledgement from those investors. Testing the waters would not be permitted for existing reporting issuers or issuers that are already public companies in a foreign jurisdiction.

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## Upsizing and Adding Investment Dealers to a Bought Deal

Canadian securities rules currently allow investment dealers to solicit expressions of interest before a short form prospectus-eligible issuer files a preliminary prospectus for a bought deal. For these bought deals, the issuer and dealers must have entered into an agreement for the purchase and sale of the offered securities. They must also announce the offering publicly, and file and obtain a receipt for the preliminary prospectus within four business days of entering into the agreement.

It could be argued that increasing the size of a bought deal or adding investment dealers to a syndicate violates the existing pre-marketing restrictions by changing the terms of the original bought deal agreement. The new rules would permit issuers and dealers to upsize bought deals and add dealers to a syndicate, provided that such changes were not planned, formally or informally, before the execution of the original bought deal agreement. In the case of upsizing a deal, the price would have to remain unchanged, a news release would have to be issued immediately, and the increased deal size would be restricted to a specified percentage. The regulators are soliciting comment on whether 15%, 25%, 50% or some other percentage is the appropriate upsizing limit. The new rules would also expressly prohibit market out clauses in bought deal agreements, although such clauses are not typically included in bought deal agreements as a matter of market practice.

## Term Sheets

Current rules limit the use of offering documents other than a prospectus. Under the proposed rules for bought deals, investment dealers would be able to provide term sheets to permitted institutional investors during the four business days before the preliminary prospectus is filed. The regulators are seeking comment on whether retail investors should also be able to receive term sheets for a bought deal during this period. In other offerings, dealers would be able to provide term sheets to institutional and retail investors at the same time as providing them with the preliminary prospectus.

The ability to provide investors with term sheets in both bought and non-bought deals would be subject to certain conditions, including the following:

- The disclosure in a term sheet must be “fair, true and plain” and approved in writing by the issuer and investment dealers.
- A term sheet would be subject to prospectus-level liability for misrepresentations. It would have to be included in or incorporated by reference into the final prospectus, as well as the preliminary prospectus in the case of bought deals, and it would also have to contain certain prescribed legends with cautionary language noting, among other things, that it does not contain full disclosure of all material facts.
- In the case of bought deals, all information about the securities in the term sheet would have to be included in the news release or in the issuer’s continuous disclosure documents. In other offerings, all information about the securities in the term sheet would have to be included in the preliminary prospectus. This would include any information that compares the issuer to other issuers (“comparables”).
- Term sheets would have to be filed on SEDAR and would become publicly available once a prospectus has been filed.
- Greensheets or other sales communications that are only distributed internally to registered sales representatives and other staff by investment dealers would continue to be permitted under the new rules.

## Road Shows and Investor Presentations

Canadian securities laws do not currently include rules explicitly governing road shows and other investor presentations. This has resulted in varying practices in the marketplace and uncertainty as to what activities are permitted. The proposals would formalize the rules for all types of road shows in connection with prospectus offerings, whether live, electronic or conducted in another manner. The proposed new rules include the following:

- All information in a road show would have to be fair, true and plain and would have to be included in the preliminary prospectus.
- The “fair, true and plain” requirement, but not the prospectus inclusion requirement, would apply to any comparables presented at a road show for permitted institutional investors. The use of comparables would not be permitted in road shows for retail investors in the absence of prospectus liability, although the regulators are seeking comment on this point.
- Any written materials provided to investors at road shows (other than comparables) would have to comply with the term sheet provisions described above.
- Access to road show materials would have to be restricted and tracked and recipients would have to receive a copy of the preliminary prospectus.
- Road show materials would also have to be filed on SEDAR, with the result that issuers conducting Canada-U.S. offerings would no longer have to apply for exemptive relief to reconcile conflicting rules in the two jurisdictions regarding the public availability of road show materials.

## Interpretation of When a Distribution of Securities Commences

The regulators have previously provided guidance that a distribution begins when an investment dealer has discussions with an issuer or selling security holder that are of “sufficient specificity” that it is reasonable to expect that the dealer will propose an underwriting. From that point, any marketing activities prior to the filing of a preliminary prospectus are impermissible pre-marketing. The regulators believe that some market participants take an aggressive view that a distribution does not commence until an investment dealer provides a proposed engagement letter or proposal with indicative terms to an issuer. The regulators disagree with that view. As an example, the regulators believe that “sufficient specificity” would exist if an investment dealer advised an issuer that the market looks favourable for a possible offering and that the dealer would likely provide indicative terms later that day. **1**