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Prospectus offerings in Canada: a comprehensive guide to the improved Canadian marketing rules for issuers and investment dealers

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On August 13, 2013, significant amendments to National Instrument 41-101 - *General prospectus requirements*, National Instrument 44-101 - *Short form prospectus distributions*, National Instrument 44-102 – *Shelf distributions* and National Instrument 44-103 – *Post-receipt pricing* (and their respective companion policies) regarding permissible "pre-marketing" and "marketing" activities came into force (collectively, the "**New Amendments**"). These amendments are, for the most part, identical to the proposed amendments published for comments by the Canadian Securities Administrators (the "CSA") on November 25, 2011 (the "2011 proposed amendments").

The New Amendments (i) provide issuers and investment dealers with a new prospectus exemption allowing them to solicit expressions of interest by institutional investors in connection with an initial public offering ("IPO"), (ii) clarify the extent of what is allowed to be included in a bought deal letter and the potential amendments that can be brought thereto, (iii) implement new rules regarding the distribution of documents to potential investors by investment dealers and regarding the content of such documents, and (iv) regulate "road shows" (meetings held by top executives and investment dealers with current or potential investors to discuss a potential offering). The following provides a general guide to the New Amendments with a view to allowing issuers and investment dealers to gain a better understanding of what changes they will have to implement in their practices.

SOME HIGHLIGHTS OF THE NEW AMENDMENTS:

- Issuers and investment dealers can test the market for an IPO with institutional investors (subject to a 15 day "cooling-off" period).
- In the case of a bought deal, issuers do not have to obtain a receipt for the short form prospectus within the four business day deadline provided that the prospectus is filed within that time period.
- In certain circumstances, dealers and issuers can upsize a bought deal by up to 100% of the original offering size.
- "Market out" clauses in bought deal letters are prohibited.
- Except for standard term sheets that contain only limited information, a template version of all materials distributed or shown to investors must be approved in advance by the issuer, filed on SEDAR and incorporated by reference in the prospectus (and translated into French if the prospectus is filed in Quebec).
- Dealers must keep records of the investors who attend road shows and of the information provided to them.

I. CHANGES TO THE "PRE-MARKETING"[1] RULES

A. THE NEW TESTING THE WATERS EXEMPTION

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With the notable exception of “bought deal” offerings, the previous regulatory regime prohibited any form of marketing of public offerings until a receipt for a preliminary prospectus had been obtained. As a result, issuers and investment dealers were prevented from “testing the waters” by soliciting expressions of interest before proceeding with the offering. This forced issuers and investment dealers to incur significant costs (notably for due diligence) without any real certainty that the prevailing market conditions justified such an expenditure.

In line with the approach recently adopted in the United States with the enactment of the *Jumpstarts Our Business Startups Act* (United States) (the “**JOBS Act**”), the New Amendments now allow an issuer to assess the market’s interest in its potential IPO prior to preparing and filing a preliminary long form prospectus.

The exemption only authorizes issuers and investment dealers to contact accredited investors.[2] Therefore, although they will have to wait until a receipt for the preliminary long form prospectus has been issued before contacting retail investors, investment dealers will be able to contact institutional investors to assess their potential interest in purchasing securities of the issuer.

While this new prospectus exemption, referred to in the New Amendments as the “testing the waters” exemption (the “**Testing the Waters Exemption**”), adds much needed flexibility to today’s securities market, issuers and investment dealers must nevertheless comply with an array of rules and conditions in order to avail themselves of the exemption. More particularly:

(i) the issuer must provide written authorization to the investment dealer to act on its behalf before the investment dealer makes any solicitation of expressions of interest;

(ii) the issuer must maintain a written record identifying all investment dealers that it has authorized to act on its behalf;

(iii) the issuer must approve in writing any materials distributed by investment dealers to accredited investors;

(iv) written materials distributed to accredited investors must be marked as confidential;

(v) investment dealers must maintain records identifying all accredited investors solicited; (vi) investment dealers must keep a copy of any written material distributed to any such accredited investors and of the approval of the issuer in respect of the distribution of such materials;

(vii) investment dealers must obtain confirmation in writing (and keep a copy of any such confirmation) from the accredited investor that it will keep information concerning the proposed IPO confidential and that it will not use the information for any purpose other than assessing its interest in the offering until such time as the information has been generally disclosed in the preliminary long form prospectus or until the issuer confirms in writing that it will not be pursuing the potential IPO;[3] and

(viii) any confidential materials to be distributed to accredited investors must contain a legend indicating that it is not subject to liability for misrepresentation.

An investment dealer who solicits expressions of interest from accredited investors pursuant to this Testing the Waters Exemption is subject to a “cooling-off” period whereby a preliminary long form prospectus in respect of the IPO cannot be filed until at least 15 days following the date of the most recent solicitation. This “cooling-off” period is imposed to prevent the exemption from simply being used to pre-sell the securities to be distributed as part of the IPO.

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The Testing the Waters Exemption can be relied upon only in connection with IPOs made by issuers that are not "public issuers" as defined in the New Amendments[4] prior to completion of the IPO, or that are not controlled by a "public issuer" (except if the IPO by such subsidiary is not material to the parent). As this exemption is not only available to small-size issuers, as is the case in the United States under the JOBS Act, large issuers can avail themselves of the benefit of the exemption provided they meet all of the abovementioned criteria.

B. THE CHANGES TO THE BOUGHT DEAL EXEMPTION

The New Amendments have maintained the widely used "bought deal" exemption.[5] They have however brought one small but important change to the existing requirements: the requirement that a receipt for the preliminary short form prospectus must be obtained within four business days from the date the bought deal letter has been entered into has now been replaced by the requirement that the preliminary short form prospectus must simply be filed within that same four business day period, thereby allowing the issuer to finalize and file the preliminary short form prospectus later during the day (therefore putting less pressure on all parties involved).

The New Amendments also provide detailed rules with regards to which practices the CSA consider acceptable under this exemption. To this end, the New Amendments contain a definition of what constitutes a "bought deal agreement" and clarify what types of amendments can be made to it (in particular, under what conditions a bought deal may be "upsized") and what types of unilateral rights of termination can be included.

1. Upsizing Bought Deals

In the 2011 Proposed Amendments, the CSA expressed concerns as to the possibility for bought deals to be "upsized" in light of the possibility for an issuer to sign a bought deal letter for a very small amount of securities and then, based on the interest of the market, substantially increase the amount of securities (and potentially the price of such securities) to be distributed. The reason for such concerns is that the rationale of the "bought deal" exemption is that it should only apply in offerings where underwriters have made a firm commitment in favour of the issuer to purchase its securities (constituting the so-called "bought deal"). The CSA's concerns created great uncertainty given the lack of rules clarifying which types of "upsizing" were allowed under the previous rules.

Pursuant to the New Amendments, issuers and underwriters are now allowed to amend their original bought deal agreements and "upsize" their offerings if:

> a news release is immediately issued following the amendment of the bought deal letter;
> the offering is increased by not more than 100% of the size of the original deal (not taking into account the securities available upon exercise of the over-allotment option);
> the type of securities to be purchased and the price per security remain the same as under the original bought deal letter; and
> no previous amendment has been made to the original bought deal letter to increase the number of securities to be purchased.

An "upsizing" cannot, however, take the form of an option in the bought deal letter. The only option that the bought deal letter may provide for is the over-allotment option, which remains capped at 15% of the initial offering size. The 100% "upsizing" described above must therefore be the result of a subsequent amendment to the bought deal letter.

2. Other Types of Amendments to the Bought Deal Letter

The bought deal letter may also be amended to provide for the offering of a different type of securities or for a different sale price provided that certain conditions are met (notably that the aggregate dollar amount of the securities to be purchased by the underwriters remains the same[6]).

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However, a bought deal letter cannot be withdrawn or amended so as to provide for a lower price per securities or a smaller offering until at least the fourth business day following the day on which the bought deal letter was entered into.

Amending a bought deal letter (for example, in the case of an " upsizing") does not extend the four business day time limit in which to file the preliminary short form prospectus. Notwithstanding the amendment, the preliminary short form prospectus must be filed within four business days after entering into the original bought deal letter.

3. Unilateral Right to Terminate the Bought Deal Letter (the "Out" Clauses)

The New Amendments provide for more detailed rules regarding what terms can be included in a bought deal letter and also impose additional restrictions.

The new definition of "bought deal agreement" contained in the applicable regulation now expressly prohibits "market out" clauses whereby one or several underwriters may draw on a contractual provision to terminate a commitment to purchase securities when the securities cannot be marketed profitably due to prevailing market conditions.

With the exception of this specific prohibition, a bought deal letter may nevertheless provide that it may be unilaterally terminated upon the failure by a third party to perform certain specific actions or when a certain specific event occurs or fails to occur. The CSA warn however that such unilateral rights of termination must be in line with the policy rationale of the "bought deal" exemption. As mentioned earlier, the rationale of the "bought deal" exemption is to provide certainty of financing only in the circumstances where the underwriters have agreed to purchase the securities on a firm commitment basis.

As a result, the CSA warn issuers and underwriters against the use of "regulatory out" provisions in bought deal letters which allow underwriters to terminate the bought deal letter if the receipt for the final prospectus has not been obtained within a specific time frame (normally a short one). The CSA state that issues may arise upon the receipt of the regulators' comments on the prospectus and that the issuer and the underwriters should not expect that all comments will necessarily be resolved within a given timeframe.

The CSA also express concerns regarding the use of "due diligence out" clauses,[7] clarifying that they should not be used in a way so as to defeat the policy rationale of the "bought deal" exemption. The CSA suggest that underwriters who are not willing or able to conduct sufficient due diligence prior to entering into a bought deal letter should consider proposing a fully marketed offering to the issuer. To allow underwriters to conduct their due diligence, the CSA have clarified that entering into an engagement letter with an issuer solely for the purpose of conducting due diligence before a potential prospectus offering does not by itself indicate that the distribution discussions are of "sufficient specificity" (which would prevent investment dealers from soliciting expressions of interest from their clients), provided such engagement letter does not contain any other information which would indicate that it is reasonable to expect that the investment dealers will propose an underwriting of securities to the issuer.[8] However, extreme care must be used before making any solicitation without the benefit of an exemption once such an engagement letter has been entered into, given that the wording of such an engagement letter or the content of the discussions between the issuer and the investment dealers may cause securities regulatory authorities to consider that "sufficient specificity" in the discussion between the issuer and the investment dealers has been reached.[9]

While the CSA do not explicitly state in the New Amendments that the following unilateral rights of termination can be inserted in bought deal letters, the New Amendments seem to suggest that

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“disaster out” or “material adverse change out” clauses[10] will remain acceptable in bought deal letters, except if drafted so broadly as to allow underwriters to terminate the bought deal letter too easily.

Finally, the bought deal letter cannot provide that the bought deal is conditional on the syndication of the deal, except in so far as it provides that the bought deal is subject to confirmation the next business day by the lead underwriter that one or more additional underwriters have agreed to purchase certain of the securities offered. Where this is the case, the news release announcing the conclusion of the bought deal letter should not be issued, and the bought deal prospectus exemption allowing solicitation of an expression of interest will not apply, until such confirmation has been made.[11]

It must be noted that the above requirements and conditions apply to the more extended form of underwriting agreements typically entered into upon filing of the preliminary short form prospectus and that replace the bought deal letter.

II. CHANGES TO THE “MARKETING RULES” DURING THE WAITING PERIOD[12]

Under the previous regulatory regime, issuers and investment dealers were allowed to use notices, circulars, advertisement, letters or other communications that identified the securities proposed to be issued, stated the price of such securities and stated the name and address of the person from whom purchases of securities could be made.[13]

The New Amendments have now created two new categories of promotional documents which may be distributed to potential investors in the context of a prospectus offering, namely “ standard term sheets” and “marketing materials”. Specific rules apply to the use of each of these promotional documents.

A. STANDARD TERM SHEETS

1. Authorized Content of the Standard Term Sheets

The New Amendments define standard term sheets as three-line written communication documents which may be supplied to both retail and institutional investors once a preliminary prospectus is filed, or alternatively, once a bought deal is announced. Standard term sheets may include the following information:

(i) the name of the issuer;
(ii) the jurisdiction in which the issuer’s head office is located;
(iii) the statute under which the issuer is incorporated or organized;
(iv) a brief description of the business of the issuer;
(v) a brief description of the securities offered;
(vi) the total number of the securities offered;
(vii) the price at which the securities are being sold;
(viii) the investment dealers’ names;
(ix) the amount of the underwriting commission or agency fee;
(x) the exchange on which the securities are proposed to be listed;
(xi) the proposed closing date;
(xii) the proposed use of proceeds;
(xiii) the maturity date of debt securities;
(xiv) a brief description of interest payable;
(xv) in the case of securities for which a credit supporter has provided a guarantee or alternative credit support, a brief description of the credit supporter and the guarantee or alternative credit support provided;
(xvi) whether the securities are redeemable or retractable;
(xvii) in the case of convertible or exchangeable securities, a brief description of the underlying securities;
(xviii) the terms of the over-allotment option; (xix) whether the offering is a bought deal or an agency deal;
(xx) in the case of preferred shares, a brief description of dividends payable;

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(xxi) in the case of restricted securities, a brief description of the restrictions;
(xxii) whether the securities are eligible for investment in registered retirement savings plans or other such plans; and
(xxiii) contact information for the investment dealers.

These newly regulated standard term sheets will not differ greatly from those term sheets that investment dealers are currently using with respect to shelf distributions. However, this may not be the case with respect to those term sheets that are generally being used for certain types of debenture or rate reset preferred share offerings and which typically include various additional terms relating to the debentures or preferred shares being offered and the credit ratings of such securities, or those term sheets used for offerings made by certain types of issuers which sometimes include other financial information such as expected "yield" or certain comparables with other issuers. Investment dealers will, however, still be allowed to use these more detailed term sheets, to the extent that they comply with the provisions applicable to "marketing materials" explained below.

2. Conditions Applicable to Standard Term Sheets

An investment dealer that provides a standard term sheet to a potential investor during the waiting period will have to ensure that the standard term sheet satisfies the following conditions:

the standard term sheet must reproduce the legend prescribed by regulation (which refers investors to the fact that the preliminary prospectus is still subject to completion and to the fact that the standard term sheet does not provide full disclosure of all material facts relating to the securities being offered);
the standard term sheet must only contain the limited information prescribed by regulation (as detailed above) and all such information must be disclosed in, or derived from, the preliminary prospectus or any amendment thereto; and
a receipt for the preliminary prospectus must have been issued in the local jurisdiction prior to the use of the standard term sheet.

In the case of a bought deal, underwriters may provide a standard term sheet to investors once the entering into of the bought deal letter is publicly announced by news release and prior to the preliminary short form prospectus being filed, provided that the following conditions are met:

the standard term sheet must contain the cautionary language prescribed by regulation (which refers investors to the fact that the preliminary short form prospectus has not yet been filed and to the fact that the standard term sheet does not provide full disclosure of all material facts relating to the securities being offered);
any information in the standard term sheet must be disclosed in or derived from the bought deal news release, the issuer's continuous disclosure record appearing on SEDAR or the subsequent preliminary short form prospectus (but in the latter case, subject to selective disclosure concerns[14]); and
the preliminary short form prospectus must be filed in the local jurisdiction.

Standard term sheets need not be filed on SEDAR nor included or incorporated by reference in the applicable prospectus. They will therefore not be subject to statutory civil liability. However, they are nevertheless subject to the existing statutory prohibitions on misleading statements.[15] The securities regulatory authority reviewing the prospectus may request copies of the standard term sheets distributed to investors. Any discrepancies between the standard term sheets and the prospectus may result in delays or an outright refusal by the regulatory authority to grant a receipt for the prospectus.

B. GREEN SHEETS

Investment dealers will remain able to provide their registered representatives with summaries of the principal terms of an offering (the so-called "green sheets"). However, any green sheet that is distributed to the public will have to comply with the rules applicable to standard term sheets or marketing materials depending on the level of disclosure it contains (typically, green sheets will contain information beyond what a standard term sheet is allowed to contain and will therefore be treated as marketing materials). The securities regulatory authority reviewing the prospectus may request a copy of any green sheet provided to the investment dealers' registered representatives

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and any discrepancies between the green sheet and the prospectus may result in delays or an outright refusal by the regulatory authority to grant a receipt for the prospectus.

C. MARKETING MATERIALS

The New Amendments define “marketing materials” as a written communication regarding a distribution of securities under a prospectus which contains material facts relating to the issuer or the securities offered. This definition basically encompasses any document typically distributed to investors that contains more detailed information than standard term sheets.[16] The New Amendments do not introduce any limits as to the type of information that may be included in these “marketing materials”, provided that such information is derived from the prospectus (except for comparables as more fully discussed below).

An investment dealer will be entitled to provide a potential investor with any such marketing materials during the waiting period (or in the case of a bought deal, after public announcement of the entering into of a bought deal letter), provided that the following conditions are met:

- with the exception of comparables, all information about the issuer, the securities or the offering mentioned in the marketing materials must be disclosed in, or derived from, the preliminary prospectus (in the case of a bought deal, if the marketing materials are delivered prior to the issuance of a receipt for the preliminary short form prospectus, the information must be derived from the bought deal news release, the issuer’s continuous disclosure record appearing on SEDAR or the subsequent preliminary short form prospectus, but in the latter case, subject to selective disclosure concerns);
- a template version of the marketing materials must be approved in writing by the issuer and lead underwriter or agent prior to use;[17]
- a template version of the marketing materials must be filed on SEDAR on the day that they are first provided to investors and will have to be incorporated by reference in the final prospectus (any disclosure related to comparables may be redacted from the version filed on SEDAR or incorporated by reference into the prospectus as more fully described below);
- marketing materials distributed must also contain the prescribed legend (similar to the legend for a standard term sheet);
- a receipt for the preliminary prospectus must have been issued in the local jurisdiction prior to the use of the marketing materials (or in the case of a bought deal, if the marketing materials are delivered prior to the issuance of a receipt for the preliminary short form prospectus, the preliminary short form prospectus must be filed in the local jurisdiction); and
- a copy of the preliminary prospectus must be delivered to potential investors with the marketing materials (in the case of a bought deal, if the marketing materials are delivered prior to the issuance of a receipt for the preliminary short form prospectus, a copy of the preliminary short form prospectus must be delivered to each investor who received the marketing materials and expressed an interest in acquiring the securities upon the receipt being issued).

The fact that the information concerning the securities presented in the marketing materials must be disclosed in, or derived from, the preliminary prospectus, the bought deal news release or the issuer’s continuous disclosure record does not mean that such information has to be presented in the same format. The information may be summarized and graphs or charts based on any numerical data contained in such documents may be included in the marketing materials.

TEMPLATE VERSIONS

The New Amendments allow for the approval and use of a “ template” form of the marketing materials (with blank spaces providing for information to be added). Such a template version may contain spaces for the date of the marketing material and the name and contact information of the underwriters or agents to be added. The template versions (not the actual versions distributed to investors) must be approved by the issuer and be filed on SEDAR and incorporated by reference in the final prospectus (but not in the preliminary prospectus, even if the marketing materials are distributed, in the case of a bought deal, prior to the receipt for the preliminary prospectus being obtained). As a result, only the template version will be subject to statutory civil liability. Prior to distributing the marketing materials to investors, investment dealers are allowed to complete the

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blank spaces of the template by adding the date of the marketing materials and the name and contact information of the underwriters or agents. They are also allowed to add a cover page to the template referring to the investment dealer or a particular group of investors and change the font, colour or size of the text (such version distributed to investors is referred to in the New Amendments as a “limited-use version” of the marketing materials). Some sections of the template version may also be omitted from the limited-use version provided to investors provided that the template is divided into separate sections for each distinct subject.

If a final prospectus (or amendment thereto) subsequent to the delivery of the original marketing materials (or any amendment thereto) modifies a statement of a material fact made in the marketing materials, the issuer must file on SEDAR and make public, at the time that such prospectus (or amendment) is filed, a revised copy of the template version of such materials that is blacklined to outline the changes and must disclose in the prospectus (or the amendment) how the statement in the previous marketing materials has been modified. The marketing materials will not however, as a matter of law, be considered to amend a preliminary prospectus, a final prospectus or any amendment thereto regardless of when it is filed. Investment dealers that are part of a syndicate in which they do not act as lead or co-lead underwriters or agents should be aware that they will be liable for any misrepresentation contained in the template version of the marketing materials even if such materials were prepared, distributed and/or filed on SEDAR by the lead underwriter or agent prior to their joining the syndicate. Therefore, every investment dealer should request that the lead underwriter or agent and the issuer modify in the prospectus any statement made in earlier marketing materials that they have concerns with.

The fact that the template version of the marketing materials is required to be incorporated by reference into the final prospectus also means that if the prospectus is filed in the Province of Quebec, such template version of the marketing materials will have to be translated into French and the French translation will have to be filed on SEDAR.

COMPARABLES

As mentioned above, issuers will be allowed to redact “ comparables” – information comparing the issuer to other issuers – from the template version of the marketing materials filed on SEDAR and incorporated by reference in the final prospectus. The redacted template version must include a note stating that the comparables were removed from the redacted version of such materials.

Given that they will not be incorporated by reference in the prospectus, comparables will not be subject to statutory civil liability, but will nevertheless be subject to statutory prohibitions on misleading or untrue statements. Furthermore, in order to mitigate potential investor protection concerns, the CSA require that issuers confidentially file on SEDAR a template version of the marketing materials that contains the comparables. Contrarily to the redacted version, the version containing the comparables will not be made public. The CSA also require that any version of the marketing materials containing the comparables that will be provided or distributed to investors include, at a place proximate to the comparables, risk disclosure and cautionary language explaining what the comparables are and why certain issuers were chosen as a comparison. In addition, such cautionary language must explain that any information regarding other issuers provided in the marketing materials was not independently verified and must state that if there is a misrepresentation, investors will not have a remedy under securities legislation.

D. ROAD SHOWS

The New Amendments expressly allow investment dealers to conduct road shows with institutional and retail investors during the waiting period, or in the context of a bought deal, once the deal is publicly announced. The following conditions apply to such road shows:

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all materials distributed or shown to investors at any such road show (including, for example, a PowerPoint presentation) must comply with the limitations and restrictions applicable to standard term sheets or marketing materials outlined above even if the investors are not entitled to retain a hard copy of the materials;[18]

if retail investors are attending the road show (even if by phone, on the Internet or through other means),[19] an investment dealer must begin the road show with an oral reading of a prescribed statement stating that the presentation does not provide full disclosure of all material facts and risks involved, which disclosure is provided in the applicable prospectus;

the investment dealers conducting the road show must ask any investor attending the road show (even if by phone, on the Internet or through other means) to provide their name and contact information and the investment dealers must keep a record of any information provided by the investor;[20] and

the investment dealers conducting the road show must provide the investors attending the road show with a copy of the preliminary prospectus and any amendment (if the road show is conducted prior to the issuance of the receipt for the preliminary prospectus in reliance on the bought deal exemption, the investment dealers must provide the investors with a copy of the preliminary prospectus upon issuance of the receipt thereof).

Investment dealers will not be required to verify the contact information obtained from investors or to ensure that they have received the prospectus. The investment dealers will be found to have met their obligation to ask for such information and to provide a copy of the prospectus so long as they establish and follow reasonable procedures to ask any investor attending any such road show to provide their name and contact information, and send a copy of the prospectus to each investor (without the necessity of obtaining confirmation of receipt).[21]

Apart from the requirement to read a statement to retail investors, verbal communications provided in the road shows remain largely unregulated. Such oral information will not have to be included in the prospectus. The CSA warn however that verbal information should normally be derived from the relevant prospectus that has been filed on SEDAR and that issuers and investment dealers should avoid selective disclosure when responding to questions from investors, particularly if the road show occurs in the context of a bought deal and prior to the issuance of a receipt for the preliminary short form prospectus.

Several restrictions also exist in regards to the presence of media at road shows. While the media may attend road shows, they should not be specifically invited by the issuer or investment dealers. Road shows should not be disguised press conferences with media and issuers or investment dealers should not market a prospectus offering in the media.

III. CHANGES TO THE “MARKETING RULES” DURING THE POST FINAL RECEIPT PERIOD

A. GENERALLY

Except for contextual changes, the rules governing the use of standard term sheets, marketing materials and road shows during the waiting period will largely apply in the post final receipt period. As such, issuers and investment dealers must behave in the same manner during the post final receipt period as they would during the waiting period, including in the context of a shelf distribution (subject to the particularities more fully described below).

B. SHELF DISTRIBUTIONS

Certain particularities apply to shelf distributions. For example, the requirement that information contained in the standard term sheet or in the marketing materials be derived from the prospectus is problematic in the context of a shelf distribution (given that most of the information specifically related to the offering will have been omitted from the base shelf prospectus and that the relevant prospectus supplement would generally not yet be available at the time of distribution of such standard term sheet or marketing materials). Accordingly, standard term sheets and marketing materials may contain information that is not derived from the base shelf prospectus to the extent that such information will later be disclosed in, or derived from, the prospectus supplement that will be subsequently filed. The same requirements apply to base PREP prospectuses.

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Issuers and investment dealers should be aware of selective disclosure concerns regarding information 22 contained in standard term sheets or marketing materials that is derived from a prospectus supplement that has not yet been filed on SEDAR. The CSA clarify that any such information that could affect the market price of the issuer's securities should be broadly disseminated in a news release before being circulated.

The New Amendments still allow issuers to address selective disclosure concerns pertaining to the description of the securities to be offered by filing a preliminary form of prospectus supplement on SEDAR describing the securities to be offered (from which the pricing information and the composition of the syndicate will typically have been omitted) and by asking the principal regulator to make such preliminary prospectus supplement public. However, the right to use such preliminary prospectus supplement is subject in the case of equity securities offered under an unallocated base shelf prospectus to the requirement of a news release being issued once the issuer has formed a reasonable expectation that the distribution will proceed. While the CSA do not expressly discuss this issue, the use of a preliminary prospectus supplement may not be necessary to address selective disclosure concerns to the extent that the issuer and the investment dealers file a template version of the marketing materials describing the securities to be offered on SEDAR prior to their distribution to investors (even if the New Amendments only require that they be filed the same day that they are used). The filing on SEDAR of the template version of the marketing materials prior to their use may be sufficient to address any concerns regarding the complete disclosure of the terms of the securities to be offered.

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[1] ***Reminder****:* "Pre-marketing" refers to the marketing activities occurring prior to the filing of a preliminary prospectus.

[2] ***Reminder****:* The "accredited investor" prospectus exemption does not apply to marketing activities with accredited investors done in furtherance of a distribution pursuant to an anticipated prospectus. Any such marketing activities conducted prior to the issuance of a receipt for the preliminary prospectus is therefore prohibited unless the issuer or the investment dealers can rely on the "bought deal" exemption or the Testing the Waters Exemption.

[3] Such confirmation can be obtained through a simple return email from the accredited investor.

[4] "Public issuer" is defined in the New Amendments as being: (i) any Canadian reporting issuer, (ii) any issuer that has a class of securities registered with the United States Securities and Exchange Commission pursuant to the United States *Securities Act of 1933* (other than an entity registered or required to be registered as an investment company under the United States *Investment Company Act of 1940*), (iii) any issuer that has a class of securities that have traded on an over-the-counter market, and (iv) any issuer that has any of its securities listed, quoted or traded on a marketplace outside of Canada.

[5] ***Reminder****:* The "bought deal" exemption, as it existed prior to the New Amendments, required (i) that an agreement to purchase securities (announced publicly by press prelease) setting out the terms of the distribution (typically called a bought deal letter) be concluded between the underwriters and the issuer, (ii) that a receipt for a preliminary short form prospectus be obtained within four business days from the date of such agreement, (iii) that such preliminary short form prospectus be sent to each person that has expressed an interest in acquiring the securities, and (iv) that no

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agreement of purchase and sale (other than with the underwriters) be entered into until a receipt for the final short form prospectus had been issued.

[6] The bought deal letter cannot be amended to “upsize” the bought deal and change the type of securities and/or price per security as part of the same amendment. Both types of amendments can however be made during the four business day period, provided they each comply with all applicable conditions.

[7] This refers to clauses which render the obligations of the underwriters in any way subject to completion of, and satisfaction with the results of, the underwriters’ due diligence investigation of the issuer.

[8] ***Reminder****:* A distribution of securities commences at the time when an investment dealer has had discussions with an issuer (or selling securityholder) about the distribution and those discussions are of “sufficient specificity” that it is reasonable to expect that the investment dealer (alone or together with other dealers) will propose an underwriting of the securities to the issuer (or selling securityholder). Solicitation of expressions of interest by investment dealers once a distribution of securities has commenced is prohibited until the issuance of a receipt for the preliminary prospectus (except if done pursuant to a valid prospectus exemption such as the “bought deal” exemption).

[9] Particularly given the new clarifications by the CSA to the effect that it is not required that an engagement letter or indicative terms for a proposed offering be provided to an issuer for such threshold to be reached.

[10] “Disaster out” and “material adverse change out” clauses refer to provisions which permit an underwriter to terminate its commitment to purchase securities upon occurrence of an event or condition (or sometimes the enactment of a law or regulation) that “materially” or “seriously” affects the financial market in general, and/or the industry of the issuer and/or the business or operations of the issuer.

[11] The lead underwriter will have the possibility to add or remove an underwriter in the syndicate or adjust the percentages of their respective positions in the syndicate even after the one business day confirmation has been given.

[12] ***Reminder****:* “Marketing” activities refer to oral or written communications which occur *after* the filing of a preliminary prospectus but before a receipt for a final prospectus is granted to the issuer. This period is called the “waiting period”.

[13] The New Amendments define such documents as being a “preliminary prospectus notice” and maintain the right to distribute such documents during the waiting period. Any document containing more information than the above stated information would be considered to be a standard term sheet or a marketing material.

[14] ***Reminder****:* Securities legislation prohibits a reporting issuer and any person or company in a special relationship with a reporting issuer from informing, other than in the necessary course of business, anyone of a “material fact” or a “material change” (or any information that could affect the

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decision of a reasonable investor) before that material information has been generally disclosed to the public.

[15] ***Reminder****:* Even if no civil remedy is made available in connection with misrepresentations contained in such documents, such a misrepresentation would breach securities legislation and would entitle the applicable securities regulatory authorities to issue a cease trade order, deny issuance of a receipt for a prospectus, or if the nature of the misrepresentation justifies it, make a recommendation for a prosecution under applicable securities legislation.

[16] The CSA clarify in the relevant companion policy that the definition is not intended to include a cover letter or email from an investment dealer to an investor that encloses a copy of a prospectus, a standard term sheet or marketing materials.

[17] Such approval may be given by email.

[18] Certain exceptions apply to road shows conducted in connection with certain U.S. cross-border offerings which are exempted from the requirement to file and incorporate by reference in the prospectus a template version of the marketing materials.

[19] ***Reminder****:* When conducting a road show over the phone, the Internet or by other electronic means, investment dealers must be mindful of the applicability of registration requirements in light of the province or territory where the investor might be located. If one or more investment dealers allow potential investors in different provinces or territories of Canada to participate in a road show through such means, at least one of the investment dealers conducting the road show must be registered as an investment dealer in each province or territory where the participating investors are located.

[20] Certain exceptions apply to road shows conducted in connection with certain U.S. cross-border IPOs where the investors attending the road show can provide their name and contact information on a voluntary basis.

[21] Specific rules apply in the case of electronic delivery. See *Policy Statement 11-201 respecting Electronic Delivery of Documents*.

[22] See note 14.

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