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Public Offerings in Canada – Regulatory Update: New Confidential Prospectus Pre-File Review Process

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On March 5, 2020, the Canadian Securities Administrators (the CSA) introduced a harmonized process for the full review of prospectuses of non-investment fund issuers on a confidential pre-filing basis under *CSA Staff Notice 43-310 – Confidential Pre-File Review of Prospectuses* (CSA Notice 43-310).

Consistent with the existing practice for cross-border IPOs, issuers will now be able to confidentially pre-clear a prospectus and securities regulator comments before publicly launching a Canada-only IPO or a follow-on offering or before publicly filing a base shelf prospectus. While the introduction of the pre-filing process is the result of the Ontario Securities Commission and the CSA's broader ongoing initiative of reducing the regulatory burden for issuers and other market participants and is not directly a response to the COVID-19 pandemic, the process may particularly be helpful in mitigating execution risk for public offerings during the current period (and future periods) of market volatility.

Background

Provincial securities regulators in Canada have historically had varying approaches to confidential pre-file reviews of prospectuses. For those securities regulators allowing confidential pre-filings, the process has typically been limited to review of prospectuses pertaining to cross-border IPOs, specific novel or complex items within a prospectus for which the issuer has sought guidance and the technical disclosure of mining issuers in Ontario or British Columbia. Apart from such limited circumstances, the prospectus regulatory review process typically begins only once an issuer has publicly filed its preliminary prospectus. Any material issues raised during the regulator review process can create uncertainty for and delay the completion of a live public offering and the process therefore poses execution risk, particularly (i) during periods of market volatility, (ii) where the issuer is looking to take advantage of a limited market window, or (iii) for issuers that operate in "high-beta" sectors.

To address this concern and provide issuers with greater flexibility and certainty in planning their capital raising initiatives, the CSA expanded the availability of a confidential pre-file review of a prospectus under CSA Notice 43-310.

Pre-Filing Conditions

Any non-investment fund issuer filing a prospectus in a Canadian jurisdiction can use the pre-filing process (investment fund issuers have a separate existing pre-filing process available to them).

The pre-filing process is available for long form prospectuses (e.g., those filed for an IPO), short form prospectuses (e.g., those filed for a follow-on marketed, over-night marketed or bought deal offering) and base shelf prospectuses (those filed to allow an issuer to take advantage of the shelf procedures to complete a follow-on offering). Given that one of the primary purposes of the pre-filing process is to mitigate execution risk in connection with completing a public offering, the process is not available for (i) non-offering prospectuses (e.g., those filed by a special purpose acquisition corporation (a SPAC) in connection with completing a qualification transaction), provided that it is available for non-offering prospectuses filed in connection with cross-border financings, and (ii) prospectuses filed solely to qualify the issuance of securities on conversion of convertible securities (e.g., common shares underlying special warrants).

At the time of a prospectus pre-filing, the securities regulators expect the following:

- the terms and conditions of the offering and any related transactions to be clearly determined,
- where the price of the offering has not been determined, an estimate of the offering price (and information derived from the offering price), where practical, to be included in the pre-filed prospectus,
- the underwriters to have substantially completed their review of the pre-filed prospectus,
- the pre-filed prospectus to be of the same form and quality as if it was a publicly filed preliminary prospectus and to contain all disclosure (including financial statements) required under securities laws for the applicable form of prospectus,
- the concurrent filing of any other documents required to be filed with a publicly filed prospectus, including copies of any required material contracts, technical reports (where the issuer has a mineral project) and annual information forms (e.g., in the case of a venture issuer that is submitting the pre-filed prospectus in connection with a follow-on offering, where a current annual information form has not yet been filed by the venture issuer), and
- an indication of when the issuer expects to publicly file the prospectus.

Regulator Pre-Filing Review

Generally, the principal regulator will use its best efforts to provide initial comments on the pre-filed prospectus within 10 working days of receiving the pre-filing. This is consistent with the timing for the initial review of a publicly filed preliminary long form prospectus (but longer than that of three working days for a publicly filed preliminary short form prospectus).

However, the actual initial review period may vary from this suggested timing where (i) the pre-filing is complex or involves a novel and substantive issue, or raises a novel policy concern, or (ii) the issuer's disclosure is incomplete.

While the principal regulator will conduct the same level of review on a pre-filing as they would for a publicly filed preliminary prospectus, the issuer will still be required to publicly file its preliminary prospectus and undergo a public review process, for which the existing initial public review periods will continue to apply. During this public review process, the securities regulators may raise additional comments, including to address new issues or changes in the prospectus disclosure (including changes to any documents incorporated by reference, where applicable). Although there is no maximum time period prescribed between clearing a pre-filed prospectus and publicly filing the preliminary prospectus, a longer gap between the pre-filing and public filing will likely require changes to the prospectus disclosure (including updates to the financial statements). As a result, issuers that minimize the time between clearing the pre-filed prospectus and the public filing will likely be more successful in minimizing additional regulatory comments on the public filing. Waiting a significant amount of time or making significant changes will likely reduce the timing benefits of making a pre-filing.

Overall, as a part of the transaction planning process, adequate time should be allotted by issuers and underwriters for the pre-filing and public review processes.

Additionally, it is noteworthy that certain securities regulators have indicated to us in corresponding with them that they expect the preliminary prospectus to be publicly filed shortly after comments have been cleared on the pre-filed prospectus notwithstanding that this expectation is not set out in CSA Notice 43-310. Given that the pre-filing procedures are still at an early stage of being utilized, expectations of the regulators in this regard will continue to be monitored as their expectations may vary or evolve and this may impact circumstances where the procedures may be useful.

Observations

The introduction of the pre-filing process is a welcome development for Canadian capital markets participants. The process is intended to reduce execution risk by reducing the time from the public launch of an offering to the closing of that offering. In the context of an IPO and potentially in other transaction scenarios (such as a significant acquisition financing), it may also provide an issuer with the flexibility to materially prepare for the offering without publicly disclosing sensitive business, capital or financial information, or even the fact that it was or is contemplating the IPO or other offering, which is particularly beneficial if the review leads to the offering or the prospectus being significantly revised, or the offering being terminated. As a result, use of the pre-filing process is likely to become a more typical market practice in the context of Canada-only IPOs (in addition to the existing market practice to pre-file for cross-border IPOs).

The process will also provide greater uniformity for cross-border follow-on offerings upon completion of an IPO. US issuers often confidentially submit a registration statement for a follow-on offering in the one-year period following their IPO. After this one-year period, US issuers generally become eligible to use shelf

registration procedures. In Canada, issuers are generally able to access shelf prospectus procedures immediately upon going public, subject to meeting certain requirements. This has historically resulted in a difference between Canadian and US offering practice during the initial one-year period, as to be market ready, dual-listed issuers have often filed Canada-only shelf prospectuses in the initial one-year period. The new pre-filing process will enable confidential pre-filing in both jurisdictions during this period.

The pre-filing process is also expected to be a useful tool for issuers contemplating a follow-on offering in circumstances where there is otherwise heightened execution risk, such as where (i) the issuer completed its go public transaction in a manner that did not involve securities regulator review of its disclosure (e.g., in the case of a reverse take-over or a change of business of an existing reporting issuer that is followed by a stock exchange listing), (ii) the issuer may otherwise be at a risk of significant regulatory review of its disclosure (e.g., an issuer without significant revenue or available working capital), or (iii) the issuer is a part of an emerging industry for which regulatory considerations and perspectives are evolving (as has been seen with cannabis and blockchain issuers in the recent past).

Some of the conditions to the use of the pre-filing process, including that (i) the pre-filed prospectus must be of the same form and quality as if it was a publicly filed preliminary prospectus, and (ii) the underwriters must have substantially completed their review of the pre-filed prospectus, have important implications, including:

- it remains to be seen if the process will be useful for seasoned issuers that are, for example, contemplating a bought deal offering or renewing their base shelf prospectus,
- before completing the pre-filing, issuers and underwriters should ensure that the pre-filed prospectus reflects the contemplated content of any marketing materials that may be used for the offering once it is publicly launched. This will provide comfort in using those marketing materials once the preliminary prospectus is publicly filed, without further regulatory scrutiny, and
- the existing pre-filing interpretation and waiver application processes will continue to be useful at the initial stages of preparing for IPOs and other financing transactions (such as a significant acquisition financing) to address threshold issues, such as the sufficiency of the financial statements proposed by the issuer to be included within the prospectus.

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