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ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÉRES

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Dear Sirs/Mesdames:

Re: Notice of Proposed Pre-Marketing and Marketing Amendments to the Prospectus Rules (the "Notice")

The Investment Industry Association of Canada ("IIAC" or the "Association") appreciates the opportunity to comment on the Notice published on November 25, 2011. We support the CSA's efforts to create greater flexibility for dealers and issuers to assess possible market demand for certain financings, while providing more equal access of to information and maintaining appropriate investor protection. We do, however, have concerns regarding the practicalities and costs of certain provisions. Our comments in respect of the specific provisions and questions included in the Notice are provided below.

Testing the waters for IPO issuers

The Association supports the creation of the proposed "testing of the waters for IPO issuers" contained in subsection 13.4(1) of NI 41-101. Although it is appropriate to ascertain interest of permitted institutional investors in respect of IPO transactions through confidential communication, it should be made clear that the material provided to such prospective investors is limited to information that would be disclosed in the prospectus document.

We note that the stated policy rationale for the existing rules includes equal access to information. As such, the CSA may wish to consider allowing the "testing of the waters" provision to apply to sophisticated retail investors who may be most likely to participate in certain types of structured product offerings.. From an investor protection perspective, it may be appropriate to restrict retail exposure to only Accredited Investors as defined in section 1.1 of NI 45-106.

We also recommend using the Accredited Investor definition rather than Permitted Institution to describe those investors that could be canvassed under the "testing of the waters" provisions. The current Accredited Investor definition more closely reflects the types of investors that would be interested and appropriately qualified to receive and assess information. The definition of Permitted Institution is quite narrow, and excludes investors that we would expect to be canvassed in the process of "testing the waters" such as foreign hedge funds or US accredited investors. The inclusion of these entities should not raise any public policy concerns..

We understand the need for appropriate record keeping in respect of those canvassed under this provision. However, we are concerned that the prescribed documentation requirements for dealers will add unnecessary costs in respect of need to develop and maintain separate systems to meet the specific requirements of the proposed regulation. Currently, dealers maintain comprehensive record keeping systems suited to their particular operational and compliance processes and system configuration. While we support the regulatory objective, which appears to be to ensure that no information is disclosed that will not be included in the prospectus, this can be achieved by permitting the dealers to develop processes that are consistent with their existing record keeping systems to achieve this objective, rather than prescribing specific procedures.

We would also appreciate further guidance regarding the applicability of the "testing the waters" provision to a situation where a subsidiary of a public company is undertaking an IPO, and this transaction is deemed material to the parent company. Guidance in respect of "wall crossing" would be instructive to the market.

Bought deal exemption

The proposed clarifications relating to the bought deal exemption are helpful. It is important to provide certainty in respect of the circumstances in which an offering can be expanded. We do, however, have concerns with the certain of the provisions.

In respect of the limitation on an expansion of the offering size, we note that the current absence of a specific limit affords issuers and dealers with a flexibility that can allow for issuers to raise additional funds if an offering is received with unexpected demand.. If the CSA is of the view that a limit is necessary in such circumstances, we would support a limit of 100% of the original offering. In addition, the provision that prohibits a bought deal from being upsized if it is "the culmination of a formal or informal plan to offer a larger number of securities under the short form prospectus devised before the execution of the original agreement" provides some practical problems in its interpretation. Discussions between the issuer and underwriter will necessarily involve market demand and the possibility of upsizing in the event that the demand is greater than expected at the given price. It is unclear whether these discussions would constitute a "formal or informal plan". We believe that if an upsizing limit is implemented, there is no need for this provision.

We also are concerned with the provision which states that additional underwriters may not join the syndicate if the addition of a particular underwriter was not the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement. Often, there are circumstances where issuers want the ability and flexibility to permit additional dealers to join the syndicate. For instance, for very large transactions, it is Canadian practice to sign and launch with a smaller syndicate and invite other participants in after the initial launch, as it not be practicable to invite and receive confirmations for a large number of participants in a timely and coordinated manner. We do not believe the expansion of the syndicate in this manner has any negative consequences from an investor protection or market integrity perspective. As such, we believe this restriction should be removed.

Termination provisions

The proposed rules appear to prohibit all terms and conditions of the underwriting from being amended or modified. This is inconsistent with current market practice, which involves issuers and underwriters entering into a relatively short engagement letter or bought deal letter, then subsequent negotiating a mutually satisfactory underwriting agreement. It is not clear whether the proposed rules will disallow such a practice. The regulatory intent of this provision is unclear, as we do not believe that the current practice raises any investor protection issues.

Guidance on "sufficient specificity"

Although we agree that guidance on "sufficient specificity" is useful in developing a more consistent and predictable practice, we believe the drafting in subsection 6(b)(4) presents some practical difficulties. In particular, the provision that states that:

"Those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or with other dealers) will propose to the issuer or the selling securityholder an underwriter of securities".

In order to establish a mutual intent to conduct an offering, a dealer may have to make several proposals before it is reasonable to conclude that an issuer will undertake an underwriting. Until there is a mutual bona-fide intention on the part of both the issuer and dealer to conduct a public distribution, it would be premature to declare that the distribution has commenced. We agree that the trigger point may occur earlier than the date of the engagement letter or bought deal agreement, however, the guidance should reflect the reality that there are two parties involved in making the determination to conduct a public offering. As such, the trigger for a distribution should hinge on whether it is reasonable that a dealer will undertake a distribution based on discussions with the issuer.

We are also concerned about the consequences of the statement in subsection 6(b)(4) of the guidance, which discusses situations where an issuer rejects a proposed engagement letter or proposal for an underwriting from a dealer. The guidance states that:

*Similarly we do not agree with the interpretations that if an issuer rejects a proposed engagement letter or proposal for an underwriting from a dealer, the "distribution" has ended and the dealer could immediately resume communications with potential investors concerning their interest in purchasing securities **of** the issuer. In these situations, we expect the dealer not to resume communications with potential investors until after a cooling off period"*

The use of the word "of" as highlighted in the provision is problematic in that it may be interpreted to apply to securities traded in the secondary market, rather than those to be distributed pursuant to a prospectus distribution. This would result is significant negative consequences for the issuer as it could curtail secondary market trading by a dealer or group of dealers. We recommend the word "of" in this provision be changed to "from" to provide clarity of the intention.

Term sheet provision for bought deals

We are concerned that the definition of "term sheet" in section 1.1 of NI 41-101 is overly broad, in that it only excludes a prospectus, notice, circular advertisement, letter or other communication expressly permitted by securities legislation. This may have unintended consequences in respect of certain email or other communication with investors that references the distribution, but is not of the same character or does not contain the type of information that would be conveyed in communication with the intention of soliciting interest. We suggest the definition be refined so that it applies to a written communication regarding a distribution of securities under a prospectus that contains material information about the distribution and legal terms of the offering that is available under the prospectus.

We question the provision that requires that any potential investor that received a term sheet, must also receive the subsequent preliminary prospectus. This requirement imposes a significant compliance burden, without any clear investor protection benefit. In many cases, the mere receipt of a term sheet does not indicate an expression of interest to purchase the securities. In any case, prospectus and secondary liability for distributions ensures that purchasers are protected.

As a practical matter, the provision in subsection 7.5(1)(d) of NI 44-101 that requires that all information in the term sheet concerning the securities to be disclosed in the news release should be restricted to material information.

In response to the specific question posed in the Notice, we believe that the term sheet should be available to retail investors, as, given that all information concerning securities in the terms sheet are required to be included in the news release or in the continuous disclosure record of the issuer. The protections in respect of prospectus and secondary liability, ensure that there are no investor protection issues in this regard.

Press release disclosure

The requirement that all of the information in the term sheet concerning the securities be included in the press release is unnecessary and inconsistent with current practice. Information such as the termination provisions for the underwriting commitment, eligibility for investment in registered plans and the underwriting fee are generally not included in the press release, as investors will receive it in the term sheet or the prospectus.

Term sheet timing

The proposed rules require that the term sheet be approved in writing by the issuer and underwriters and filed on SEDAR before solicitation activities commence. The addition of the requirement of written approval could lead to difficulties in timing, which often is crucial for such transactions. We believe that the provision could be modified to allow for a 24-48 hour filing requirement without creating public policy concerns.

Road shows

In respect of road shows, we advocate adopting a model similar to the US, which provides equal access to institutional and retail investors. Under this regime, either (a) road shows are open to everyone or (b) the road show presentation must be filed on EDGAR as a free writing prospectus. If the materials are not filed on EDGAR, (which appears to be the common practice), the road show materials must be "made generally available without restriction" through electronic means. In practice, we understand that access is limited to viewing only, with no capability to print or download the content or access it after the viewing period expires.

This has led to the need for regulatory relief in Canada on cross border marketed offerings (eg IPOs) because the Canadian rules currently do not permit an electronic road show to be open to all investors, and there is a preliminary prospectus delivery obligation prior to the road show.

If road show material is required to be filed on SEDAR in Canada, the result is that the materials would also have to be filed on EDGAR as well for cross border shows. This represents a significant change from current US practice, and could create a disincentive for firms to offer cross border IPOs.

We believe that a regime consistent with the US model would adequately protect the investor, and avoid the need for regulatory relief on cross border offerings.

Comparable companies

We acknowledge the CSA concern regarding the possibility of "cherry picking" comparable companies for discussion in the road shows, however, we believe this is best addressed by the use of cautionary language in the disclosure concerning comparables, or by restricting the use of comparables altogether.

Confidential marketing under a shelf prospectus

The proposed rules contain a provision that states that if an issuer does not issue a news release about a potential drawdown under a shelf prospectus, dealers should consider measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees".

Although this appears to recognize the existing practice of confidentially marketed shelf takedowns, further guidance in respect to what measures are envisioned to ensure compliance with this provision would be helpful.

Conclusion

The IIAC supports the CSA efforts to increase the range of permissible pre-marketing and marketing activities, and clarify regulatory expectations in connection with prospectus offerings. We hope our comments will assist in refining the proposed amendments to ensure that the improvements can be implemented in a practical and efficient manner.

Thank you for considering our submission. We would be pleased to meet with you in person to discuss the issues and respond to any questions that you may have in respect to our position.

Yours sincerely,

Susan Copland