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Academy

Zooming In: Canadian Capital Markets in 2021

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Agenda

1. Capital-Raising in 2020 and What to Expect in the Rest of 2021
2. Key Considerations in PIPE Transactions
3. CSA Regulatory Burden Reduction Initiatives
4. Recent Case Law
5. Recommendations from the Capital Markets Modernization Taskforce

Capital-Raising in 2020 and What to Expect in the Rest of 2021

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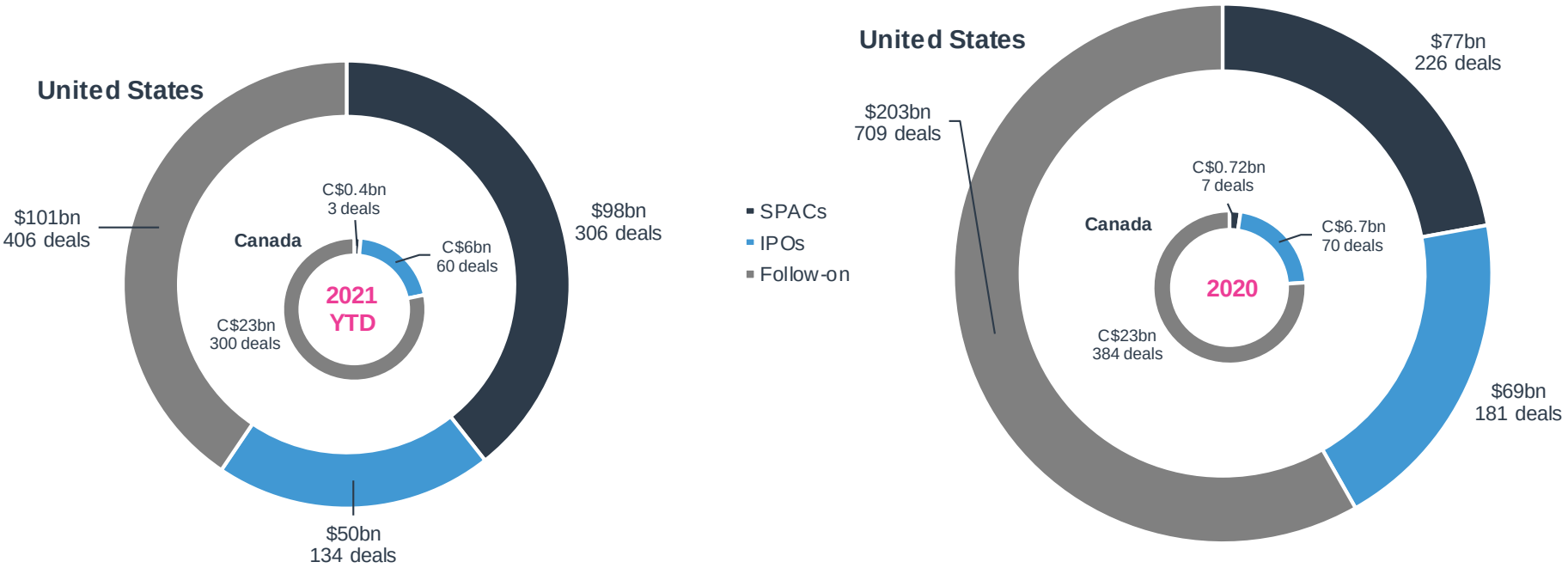
Capital-Raising in 2020 and What to Expect in the Rest of 2021 – Robust Equity Markets



Capital-Raising in 2020 – Confidential Prospectus Filings

Advantages

- Clear regulatory hurdles (in private)
- Abridgement of public review
- Ready for market window

Drawbacks

- Overwhelmed regulators
- Priority to public filings
- No definitive timelines
- No established policies and guidance for common issues

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What to Expect in the Rest of 2021 – Our Predictions for H2 2021 and H1 2022

- Regulatory developments
  - > Canadian WKSI
- Emergence of the U.S. re-IPO
  - > Initial public offering in the U.S. under south-bound MJDS

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Key Considerations in PIPE Transactions

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The Basics – What Is a "PIPE"?

Broadly speaking, a private placement:

- to one investor or a small group of investors
- of public equity and/or securities with an option to acquire public equity

Often includes additional rights:

- for investor (participation, registration, board representation, veto/protective covenants)
- for issuer (investor lockup & other transfer limitations; standstill)

Why a "PIPE"? ….

Terms & Execution	– More flexibility, speed and certainty than traditional financing – Additional financing for significant acquisitions
Economics	– Equity-linked securities attractively priced without current dilution – Current yield and potential downside protection for investor – Added to improve economics of concurrent debt financing
Additional Objectives	– Cornerstone to larger financing – Build a strategic partnership – Establish market confidence with investment by "smart" money

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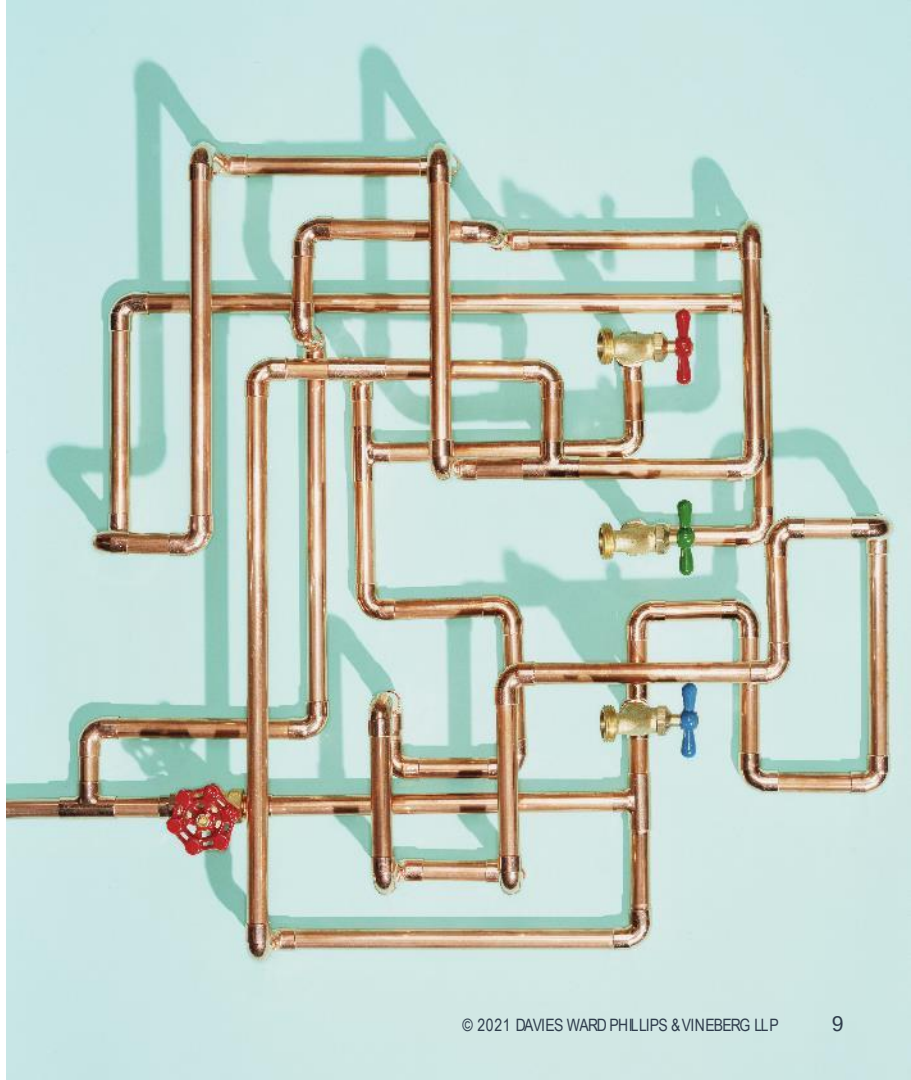
Deal Terms & Structure

No one-size-fits-all

- Balance of issuer and investor objectives …
- That can be shaped or limited by:
  - > securities laws (including stock exchange)
  - > tax, accounting, corporate and regulatory requirements
  - > limitations or rights under third party contracts (including debt covenants)

Structures can vary widely …

- from basic (*e.g.*, common shares of public issuer with or without warrants) …
- to complex (*e.g.*, subsidiary preferred shares exchangeable for public equity)



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Key Considerations for TSX Listed Canadian Issuers

TSX rules & policy contain meaningful limits on PIPE terms

- TSX approval is required due to issuance (current/potential) of new listed shares
  - > ... and the TSX can also require public shareholder approval of the PIPE

Pricing: Maximum discount of 15%–25% off "market price" for any private placement

- Typically, this "market price" is 5-day VWAP of listed shares prior to date of:
  - > binding agreement for the PIPE, or
  - > earlier "price protection" request
- Max discount applies to share price and conversion price of convertible security
- But different requirements apply to
  - > warrants (exercise price cannot be less than applicable "market price"), or
  - > "PIK" shares (treat as new private placement at time; so apply new market price)

Key TSX Considerations (Cont'd)

Shareholder approval generally required if shares issuable:

- will **materially affect control** of listed issuer (presumed at 20% of vote);
- **exceed 25%** of issuer's outstanding (non-diluted) shares if at discount to market price; or
- **to insiders** (in total over last 6 months) **equal 10% or more** of issuer's outstanding (non-diluted) shares.

Some conversion price / rate adjustments not allowed without shareholder approval:

1. Adjustment resulting in share issue at less than market price (and maximum allowable discount) *if* event for which not all shareholders are compensated
   > … as a result, any 'price-based' adjustment would be limited
2. Cannot adjust for ordinary course dividends
   > ... and convertible cannot participate in dividend on as-converted basis

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Key Securities Law Considerations

Investor reporting obligation if it will "beneficially own" (on as-converted basis):

- 10% or more of any class of issuer's voting or equity securities => early warning reporting
- More than 10% of the vote => insider reporting

Resale restrictions:

- Standard restrictions apply (including 4-month restricted period) for Canadian investor
  - > … but not offshore investors in Ontario-based reporting issuer
- A "control person" (presumed at 20% of vote) requires prospectus or exemption for resale

Other Trading Considerations

- No trades with knowledge of material non-public information
  - > investor "clean team"/walls
- Exits are important
  - > Does PIPE "plumbing" allow for quick settlement?
- Do not trip takeover bid rules or issuer's shareholder rights plan

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Key Corporate & Regulatory Considerations

New class of equity security?

- May require public shareholder approval

If the investor is already an insider:

- Corporate considerations
- MI 61-101 (related party transaction)

Additional regulatory considerations:

- Application of Competition Act
- Foreign investor? Also consider:
  - application of Investment Canada Act
  - foreign ownership limits
  - foreign securities laws

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CSA Regulatory Burden Reduction Initiatives

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CSA Regulatory Burden Reduction Timeline

April 6, 2017

CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*

March 27, 2018

CSA Staff Notice 51-353 provides update on CSA Consultation Paper 51-404

Establishes six priorities:

1) Facilitating at-the-market offerings
2) Business acquisition reporting
3) Simplifying continuous disclosure
4) Electronic delivery of documents
5) Alternative prospectus models
6) Revisiting f/s requirements in IPOs

August 31, 2020

New at-the-market offering regime adopted

November 18, 2020

Amended business acquisition reporting requirements adopted

May 20, 2021

Draft amendments to quarterly and annual reporting regime published

Adoption slated for September 2023

New At-The-Market Offering Regime

- Exemptive relief no longer required to conduct ATM offerings
- Elimination of limit on total number of securities that can be offered
- No longer required to limit sales to 25% of daily trading volume
- No formal relief from translation requirements
  - > AMF has granted translation relief on application

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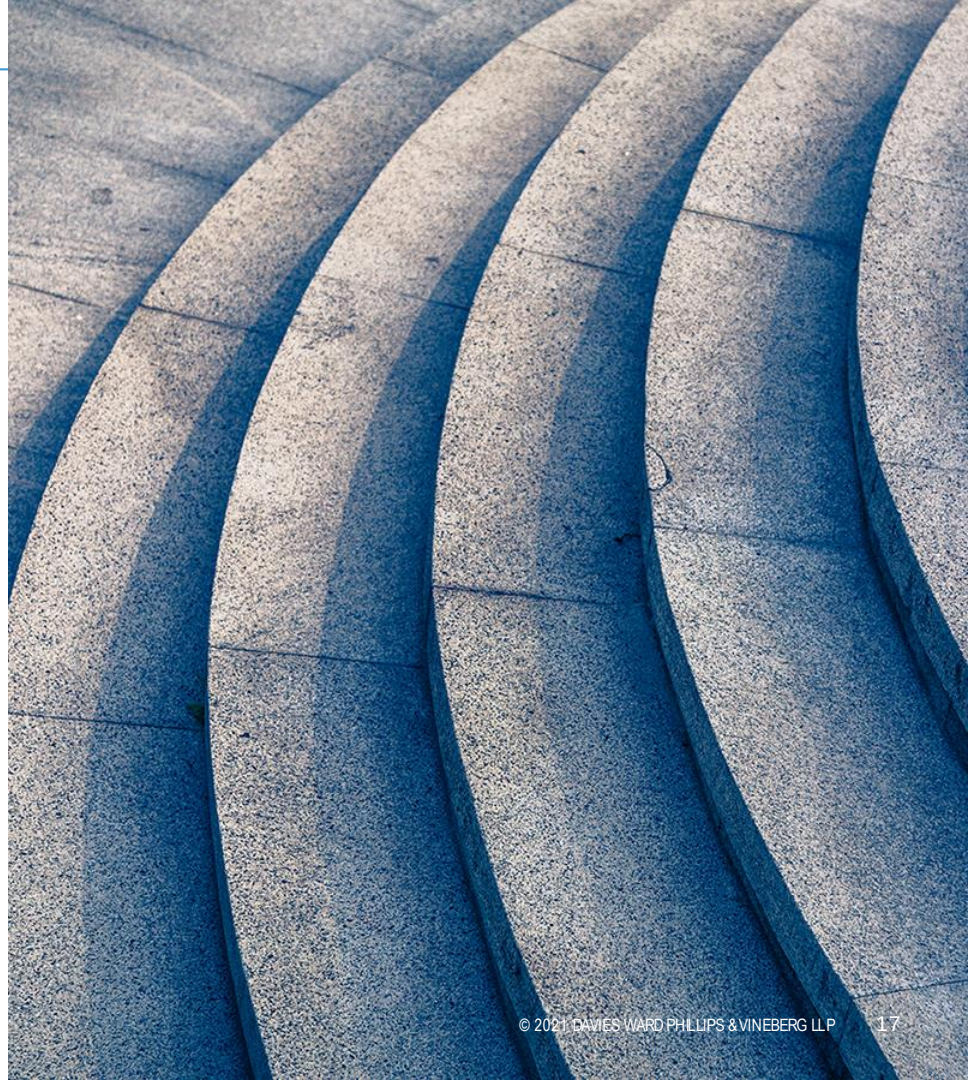
Business Acquisition Report Requirements

- Changes apply to non-venture issuers
- No business acquisition report required unless acquisition trips two of three significance tests
- Increased significance threshold to 30% from 20%
- No change to substantive requirements if report is required



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Proposed Amendments to Annual and Interim Reporting Obligations

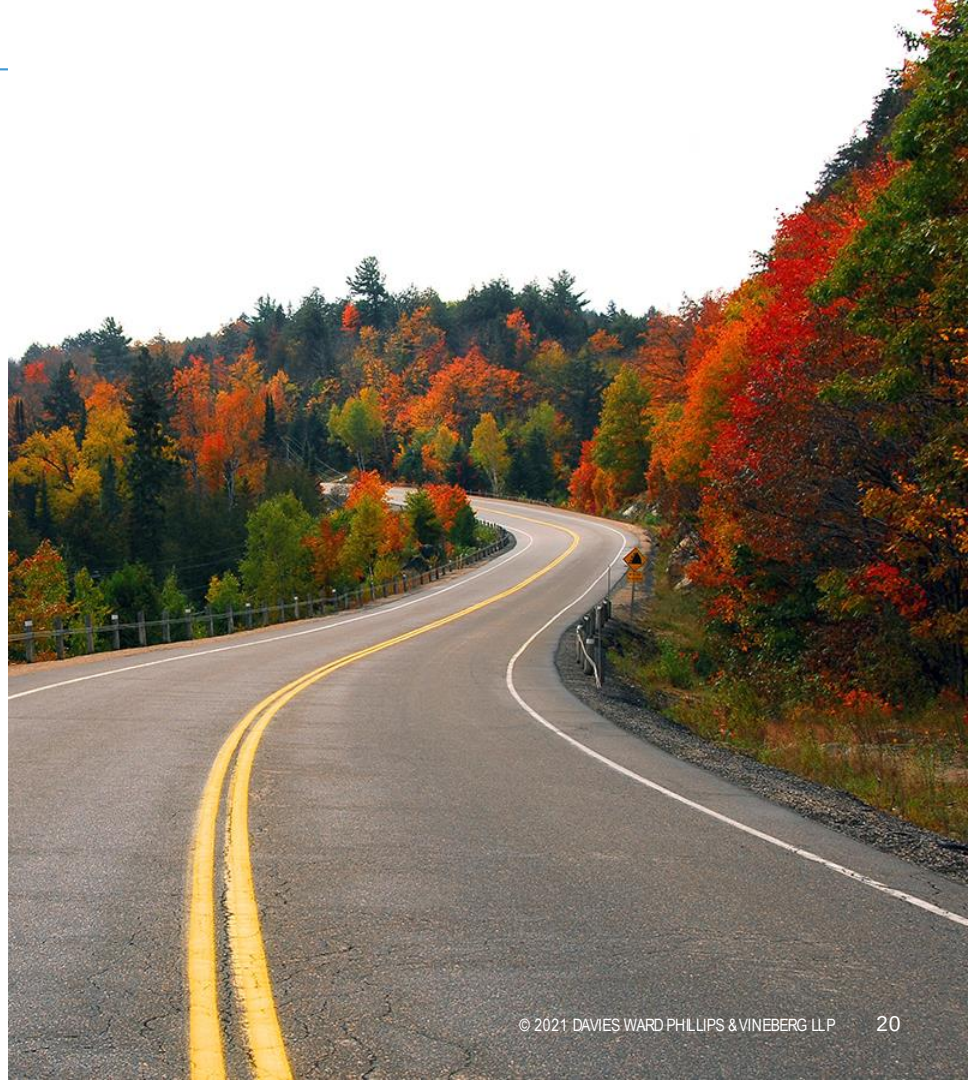
- Substantive amendments to NI 51-102 to streamline disclosure obligations
  - > Introduces certain new disclosure obligations
  - > Moves certain AIF disclosure requirements to the MD&A
    - ○ Results in enhanced disclosure for venture issuers
- New Form 51-102F1 – Annual Disclosure Statement
  - > Combines annual financial statements, MD&A and AIF into single filing
- New Form 51-102F2 – Interim Disclosure Statement
  - > Combines interim financial statements and MD&A into single filing
- No change to reporting timelines
- Comment period closes on September 17, 2021

Form 51-102F1 – Annual Disclosure Statement

- MD&A will no longer include certain disclosure already addressed in financial statements
- Other deletions include:
  - Three-year summary of financial data
  - Eight quarter summary of quarterly results
- Added new disclosure requirements, including:
  - For projects or business activities that have not yet generated significant revenue
  - Expanded disclosure obligations relating to liquidity and capital resources
    - Quantitative and qualitative disclosure of debt covenants
  - For entities recording investments at fair value

Form 51-102F2 – Interim Disclosure Statement

- Instead of comparing prior quarter results in interim MD&A to the same quarter in the prior year, can compare results to the prior quarter
  - > Unless the business is seasonal



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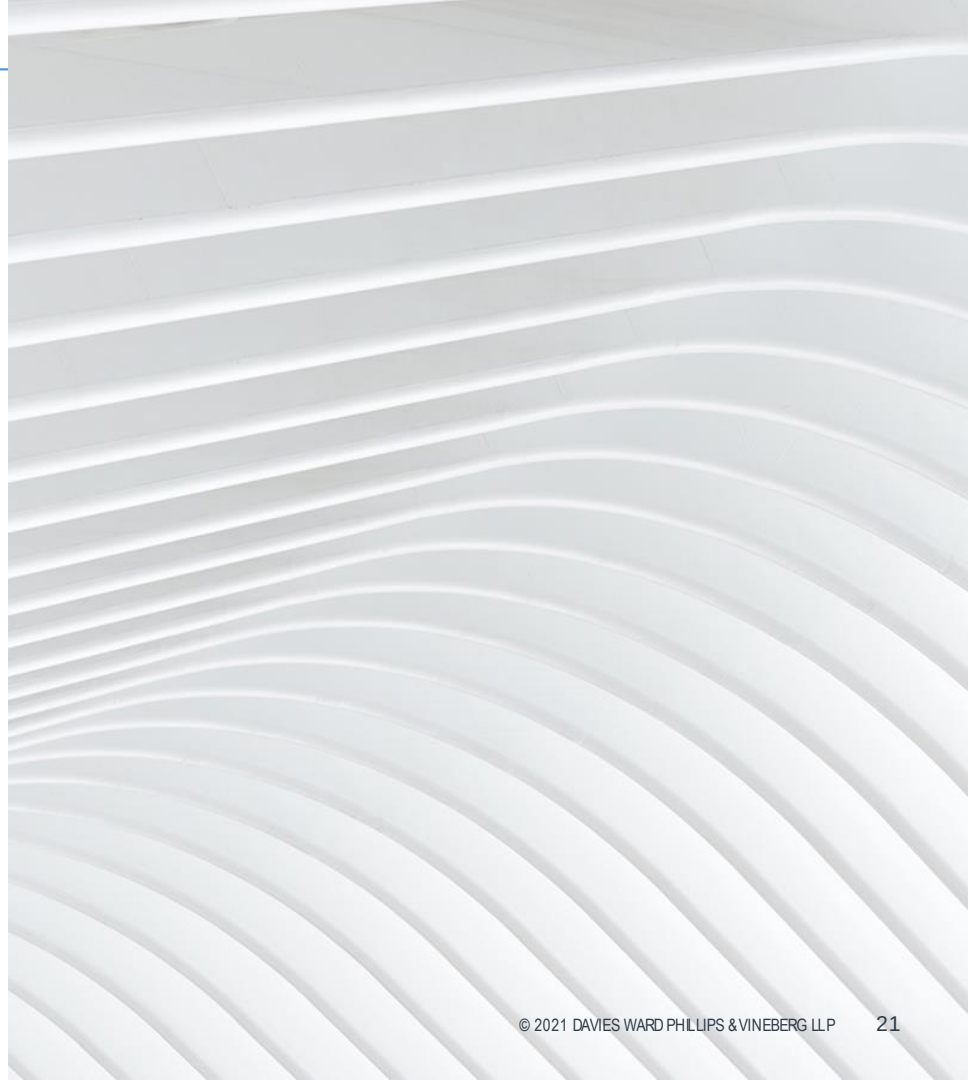
Consequential Amendments

- Substantive amendments to disclosure requirements for:
  - > Long form prospectuses (Form 41-101F1)
  - > Short form prospectuses (Form 44-101F1)
- Long form prospectus changes are more significant than would be expected



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Proposed Timeline for Implementation & Compliance

- Comments due by September 17, 2021
- CSA has committed to an aggressive timeline to adoption
  - > Plans to publish final rule in September 2023
  - > Rule will be effective on December 15, 2023
- All reporting issuers will be required to comply with the new requirements for their first fiscal year-end following the adoption date

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Burden-Reduction Initiatives – Half-Year Reporting for Venture Issuers

- Limited to "venture issuers" that are not SEC issuers
- Semi-annual reporting will be voluntary, not mandatory
- CSA intends to prescribe alternative disclosure for interim periods if no financial statements and MD&A are filed
  - > Will be due 60 days after the interim period in question, to be issued by news release and contain prescribed items
- CSA insists in the proposal it is seeking feedback on a framework for semi-annual reporting on a limited basis
  - > Semi-annual reporting is a reality in Australia, the U.K. and certain European Union countries already

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Recent Case Law

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Wong v. Pretium Resources Inc.

Why is the Decision Important?

- First decision on the merits under the secondary market liability provisions
  - > Part XXIII.1 of the *Securities Act* (Ontario)
- Meeting the test for leave to proceed does not guarantee success

Facts

- Pretium retained Strathcona Mineral Services Ltd. for bulk sample program in 2013
- Resource estimate being prepared by Snowdon Mining Industry Consultants Pty Ltd.
- Strathcona conducted tower sample on portion of the bulk sample
  - > Advised Pretium that Snowdon's resource estimate was flawed
- Pretium and Snowdon considered Strathcona's concerns
  - > Disagreed with Strathcona
  - > Strathcona was not qualified to estimate Pretium's mineral resource
- Strathcona resigned
- Pretium issued press release
  - > Did not immediately disclose the nature of its disagreement with Strathcona

At Issue

- Was the failure to immediately disclose the nature of Strathcona's concerns a misrepresentation?

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Decision

- No material misrepresentation occurred
  - > **Unreliable, misleading or erroneous information does not constitute a material fact**
- Pretium entitled to the reasonable investigation defence under the *Securities Act*
  - > Conducted a reasonable investigation
  - > Had no reasonable grounds to believe the impugned document contained a misrepresentation

Recommendations from the Capital Markets Modernization Taskforce

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The Capital Markets Modernization Taskforce Final Report – January 2021

The Taskforce

- Walied Soliman (Chair), Canadian Chair of Norton Rose
- Rupert Duchesne, CEO of Mattamy Ventures and former CEO and Director of Aimia
- Wes Hall, Founder and Executive Chair of Kingsdale Advisors
- Melissa Kennedy, Executive Vice President and Chief Legal Officer of Sun Life
- Cindy Tripp, Founding Partner, former Managing Director, Co-Head Institutional Trading of GMP Securities

The Report's Recommendations

- Improving regulatory structure (10 proposals)
- Regulation as a competitive advantage (22 proposals)
- Ensuring a level playing field (4 proposals)
- Proxy system, corporate governance and mergers & acquisitions (11 proposals)
- Fostering innovation (6 proposals)
- Modernizing enforcement and enhancing investor protection (20 proposals)

Recommendation #1 – Introduce the *Capital Markets Act* in Ontario

Recommendation

- Ministry of Finance should work with the OSC towards implementing the Ontario-version of the *Capital Markets Act* (proposed in the CCMR program in 2014/2015)
  - > Target timing end of 2021

Rationale for Recommendation

- "The implementation of the Taskforce's final report would require major changes to Ontario's current capital markets legislation. These new changes would fit better within a modern Act than within the current outdated legislation structure that is split between the *Securities Act* and the *Commodity Futures Act*."

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Recommendations #12 and #16 – Reduced Hold Periods

Reduced Hold Period for Accredited Investors

- Reduce the hold period for securities distributed under the accredited investor exemption to 30 days
  - > Issuer must have a 12-month reporting history
- OSC should develop guidelines as to reasonable steps that issuers/dealers should take to ensure that the initial purchaser is purchasing as principal and not with a view to distribution
- OSC to review impact after two years and consider whether the 30-day hold period should be eliminated

No Hold Period for Certain Distributions of up to 10% of Market Cap Annually

- Prospectus exemption for exchange-listed reporting issuers to issue freely tradeable shares
  - > Issuer must have a 12-month reporting history, not be in default of CD obligations
- Generally: annual limit of 10% of market cap
- Smaller issuers (market cap under $50MM): annual limit of lesser of (i) $5MM and (ii) 100% of market cap
- Issuers would have to file short disclosure document updating CD record and disclosing use of proceeds

Recommendations #19 and #20 – Enhanced Testing of Waters and Access-Equals-Delivery

Enhanced Testing of Waters

- Permit broader pre-marketing of transactions prior to filing a preliminary prospectus
  - > No restriction on types of prospectus deals that would be covered
- Solicitations would be limited to institutional accredited investors
- OSC/IIROC to increase monitoring and compliance examinations

Access-Equals-Delivery

- Make-access-equals delivery model the default delivery method for disclosure documents
  - > Includes prospectuses, annual and interim financial statements and related MD&A, management reports of fund performance
- Adopt access-equals-delivery for all other documents that investors receive, including proxy-related materials

Recommendation #34 – Enhance Restrictions on Providing Lending and Capital Markets Services

Prohibit Exclusivity Arrangements

- Prohibit registrants from providing capital markets services as consequence of an "exclusivity arrangement"
- Senior officer of registrant must attest that there are no exclusivity arrangements where there is a banking relationship with affiliate of registrant.

No Restrictive Clauses where Affiliated Lender

- Where affiliated registrant of lender provides capital markets services, there should be a ban on "rights to act" or "rights of first refusal" clauses in capital markets engagement letters

Independent Underwriter Requirement

- Issuer should be considered a "connected issuer" of any registrant affiliate of a bank in its lending syndicate
  - > Where offering by "connected issuer," an "independent underwriter" should be required to underwrite at least 20% of a prospectus offering (or receive at least 20% of the total fees for an offering)
- OSC should consider requiring independent bookrunner/joint bookrunner where proceeds of offering to repay commercial loan of a syndicate member or an affiliate

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