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CSA to Pursue Six Initiatives to Cut "Red Tape" for Reporting Issuers

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The Canadian Securities Administrators (CSA) will be initiating six policy projects aimed at reducing regulatory burdens for non-investment fund reporting issuers. The projects include:

- reviewing potential alternative prospectus models;
- facilitating at-the-market (ATM) offerings;
- revisiting the "primary business" requirement for financial statements to be included in a prospectus;
- removing or modifying the criteria to file a business acquisition report (BAR);
- revisiting certain continuous disclosure requirements; and
- enhancing electronic delivery of documents.

Of the options considered by the CSA, these policy projects were generally supported by stakeholders, are most achievable within the scope of securities regulation and are viewed as having the potential to provide the most impact for reducing regulatory burden. The CSA will be initiating these policy projects in the near term and establishing a mandate, scope and timeline for each.

Background

On March 27, 2018, the CSA released CSA Staff Notice 51-353, Update on *CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. In the notice, the CSA provides an update on the progress of its consultation outlined in Consultation Paper 51-404.

During the consultation paper comment period, the CSA received 57 comment letters and conducted consultations to seek direct feedback from a variety of stakeholders. Based on the comments and feedback from stakeholders, and after considering the criteria noted above, the CSA will be initiating the following six policy projects.

Prospectus Requirements

Potential Alternative Prospectus Models

Consistent with the consultation paper, the CSA intends to consider alternative models in which disclosure in an offering document is more concise and focused than under the existing short form prospectus regime.

We believe that conditions are right to adopt such a model, recognizing advancements in the quality of Canadian continuous disclosure stemming from regulatory initiatives adopted since the early 2000s. However, in our view, a public offering in Canada should always be conducted by way of an offering document that (when read together with its incorporated documents) meets the minimum prospectus disclosure standards established by Canadian securities legislation for the protection of Canadian investors. We are also supportive of streamlining the public offering process and review procedures in Canada in conjunction with the adoption of any alternative model.

Facilitating ATM Offerings

One hurdle facing issuers considering ATM offerings under Canadian securities legislation is that exemptive relief is often required to effect such offerings. We support codifying in securities legislation the exemptive relief typically granted for Canadian ATM offerings.

As part of this policy project, the CSA should also consider additional relief that might be afforded to issuers in order to better align a Canadian ATM offering with the requirements and conditions applicable to a concurrent U.S. offering. Recently, TransCanada Corporation and Fortis Inc. each obtained exemptive relief from the CSA that reduced certain aspects of the administrative burden imposed on Canadian issuers in connection with ATM offerings. We would expect the CSA to give careful consideration to these decisions in modifying the ATM offering regime.

Revisiting the Primary Business Requirements

Although not specifically identified by the CSA in its consultation paper as an initiative – based on input from stakeholders – the CSA intends to revisit the requirement to include certain historical financial statements in an IPO prospectus for each entity considered the "primary business" of the issuer. The CSA received feedback from stakeholders that considerable time and resources are consumed when creating these statements (if none have been prepared) and that this may delay or prevent the issuer from completing an IPO. Adding to the regulatory uncertainty is the inconsistent approach the CSA has taken in granting exemptive relief from these requirements. We are supportive of the CSA revisiting the necessity of complying with this requirement in all cases and codifying the exemptive relief granted in this regard to date.

Continuous Disclosure Requirements

Removing or Modifying the Criteria to File a BAR

Complying with the requirements to file a BAR can be time-consuming, expensive and challenging, in particular where underlying information is difficult to obtain. The CSA frequently receives requests for, and grants, relief related to the BAR requirements. In light of this, we expect that the CSA will consider narrowing the BAR requirements, at a minimum, to conform to the exemptive relief that has already been granted.

Revisiting Certain Continuous Disclosure Requirements

The CSA will review certain continuous disclosure requirements with the dual objective of reducing the disclosure burden on issuers and enhancing the utility and ease of-understanding of disclosure for investors.

We support eliminating duplicative disclosure generally and, in particular, the disclosure currently required in an issuer's financial statements, management's discussion and analysis (MD&A) and certain other disclosure documents. Generally, we also see the benefit of consolidating an issuer's annual MD&A, annual information form and financials into a single annual report and consolidating interim reporting (MD&A and financials) into a single report for each quarter. A single report has the benefit of providing all the necessary disclosure in one place. While we are supportive of this consolidation, we do not believe it should be mandatory. Issuers often choose to file their annual information form on a later date than their financial statements and MD&A, as this affords them additional time to prepare and vet the associated disclosures and provide the annual CEO and CFO certifications.

Other Securities Regulation Requirements

Enhancing Electronic Delivery of Documents

The CSA received feedback from stakeholders suggesting that electronic delivery be the default delivery method and that paper documents be available as an option to investors. In addition to updating and implementing changes to securities legislation to allow for more practical ways to achieve electronic delivery, we believe the CSA should consider the circumstances in which access to a filed prospectus (and any incorporated documents) on SEDAR should be sufficient to be deemed to constitute delivery of the prospectus for purposes of prospectus delivery obligations under applicable securities legislation without actual delivery of the prospectus (in printed or

electronic form). This can be achieved through an "access-equals-delivery" or "notice-and-access" model. We expect the CSA to consider both of these models in the context of delivery of all documents to investors.

What Is Left Behind?

The consultation paper discussed five broad topics and included 33 questions for stakeholders to consider and provide a response. Given the breadth of the consultation, it is no surprise that many of the initiatives are not current priorities for the CSA.

Of note, the CSA will not (at this time) be pursuing a policy project in respect of the following initiatives:

- *Reducing the audited financial statement requirements for an IPO prospectus from three to two years*. Several stakeholders supported this initiative on the basis that the third year of financial results is not material to investors and that the change would more closely align the CSA's rules with the U.S. requirements for emerging growth companies. Notwithstanding this feedback, the CSA is not pursuing this initiative at this time.
- *Facilitating cross-border offerings*. Certain members of the CSA have adopted local rules to deal with distributions outside the province or Canada. Given the patchwork of legislation that currently exists across the country, we have urged the CSA on several occasions to adopt a modern and harmonized approach to the regulation of offerings and resales of securities outside Canada. To this end, in June 2017, the CSA published proposed amendments to National Instrument 45-102, *Resale of Securities*, intended to liberalize the resale of securities of foreign issuers through an offshore market. Although the comment period ended in the fall of 2017, market participants continue to await a further update from the CSA on the progress of the initiative. Further, the CSA has not indicated whether it will pursue a national instrument covering offshore offerings.
- *Amending the pre-marketing/marketing regime*. We and other commenters on the consultation paper noted that the rules surrounding the pre-marketing/marketing regime are overly strict. In our view, many of these rules are difficult for issuers and their advisers to adhere to. We made several recommendations to the CSA to further liberalize these rules, including expanding the context of a standard term sheet, expanding and clarifying the exceptions for U.S. cross-border offerings, and modifying the requirement that all information in a standard term sheet or marketing materials be disclosed in or derived from information in the applicable prospectus. We continue to be of the view that the pre-marketing/marketing regime can benefit from further amendments and clarifications and that the CSA should consider initiating a policy project to further review this regime.

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