REITs

The Benefits of Canada – Cross Border and Foreign REITs

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Canadian real estate investment trusts (**REITs)** are passive investment vehicles which hold interests in income producing real property. They offer investors the benefits of investing in commercial real estate, while simultaneously providing the ease and advantages of holding publicly traded stock. Investments in publicly traded Canadian REITs offer its investors liquidity, diversification and passive income in the form of high-yield distributions which are paid out before the REIT itself pays tax on the income, and minimizes the cost and risk of an investor owning investment property directly.

Over the past 20 years, a number of U.S. and European-based real estate companies have gone public in Canada. Canadian markets offer companies of all sizes, including earlier stage companies, an opportunity to access significant capital, investors and analyst coverage through a listing on a Canadian exchange.

Going public in Canada is an efficient process with a typical regulatory review being completed in five to seven weeks. Canada also offers a confidential review process that helps to de-risk IPOs by allowing the regulatory review to be completed on a confidential basis.

Following an IPO, the Canadian markets offer access to additional capital and future financing opportunities via a variety of different instruments (equity, convertible or unsecured debt, preferred securities, etc.). Notably, public issuers in Canada can raise funds through bought deals, a unique and expeditious process whereby a syndicate of underwriters purchases all securities subject to a distribution at a pre-determined price, and is responsible for reselling securities, thus removing financing risk for the issuer. The Canadian regime also provides issuers with the ability to expedite raising additional capital through a shelf offering process, and recently created a program allowing "well-known seasoned issuers" to file prospectuses on an accelerated basis.

As a U.S. or foreign real estate issuer holding properties outside Canada, an important part of the IPO process involves structuring the REIT to achieve efficient tax results for the issuer and investors. A number of structures have been developed over the years for cross-border REITs to achieve this result. Examples include, among others, Milestone Apartments REIT, which was the first IPO in the world of a qualifying US REIT by a non-US entity, and Inovalis REIT, which is a Canadian TSX-listed REIT that exclusively holds properties and assets outside of Canada (primarily in France and Germany). Appropriate structuring may also permit a Canadian REIT to be exempt from oversight of foreign securities regulatory authorities and streamline the regulatory process, for example by permitting the REIT to qualify as a foreign private issuer in the U.S.

REITs have transformed the global real estate markets over the past 25 years. As the Canadian market continues to see increased REIT activity and foreign investment, U.S. and foreign-based real estate companies should strongly consider the advantages of going public in Canada, including the creative cross-border REIT structuring opportunities.

Practice Area News

Amended Financial Statement Disclosure Requirements for IPOs. On April 14, 2022, the Canadian Securities Administrators published amendments to the CP to National Instrument 41-101 – General Prospectus Requirements that harmonize the interpretation of financial statement disclosure requirements for acquisitions completed before or in connection with an IPO (IPO prospectuses are required to include 3 years of audited financial statements of any business acquired if the primary business of the issuer is the acquired business and historically there have been inconsistent interpretation in these requirements by different provincial securities commissions). The amendments are welcome for companies that have operated for more than three years, but additional interpretative clarity is still required for REITs that are formed less than three years before their IPOs.

Publication of Non-GAAP Disclosure Rules. On May 27, 2021, the CSA published National Instrument 52-112 – Non-GAAP and Other Financial Measures Disclosure. NI 52-112 which established binding disclosure requirements for non-GAAP financial measures outside of financial statements and generally incorporates, expands upon and replaces guidance contained in CSA Staff Notice 52-306 (Revised) – Non-GAAP Financial Measures. The new rules applied to issuer's disclosure documents commencing with the 2022 fiscal year.

The new rules, which will be of particular relevance for REITs that customarily disclose non-GAAP measures, will have the force of law and provide the CSA with a much stronger tool to take appropriate regulatory or enforcement action against issuers, boards and management teams if an issuer's disclosure of non-GAAP measures does not comply with the rules.

In the Firm

Goodmans LLP is Canada's leading legal advisor in the REITs and real estate capital markets. The firm has acted on most of the major transactions in the sector, and has pioneered several highly innovative structures for its clients.

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