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Guidance for Public Issuers with U.S. Marijuana-Related Activities

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Canadian cannabis stocks took a downturn on October 16, 2017 when the Toronto Stock Exchange (“**TSX**”) issued staff notice 2017-0009 (“**TSX Staff Notice**”), which provided guidance to applicants and listed issuers in respect of their obligations to comply with U.S. laws, specifically the federal *Controlled Substances Act*. The **TSX Staff Notice** formalized the position of the **TSX** that issuers with ongoing business activities in contravention of U.S. federal laws regarding cannabis are, consequently, non-compliant with the **TSX**’s listing requirements, which could make the issuer subject to delisting. The **TSX Venture Exchange** issued a substantially similar bulletin to that of the **TSX Staff Notice**.

Although certain U.S. states have legalized the cultivation, sale or possession of cannabis (such as Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington), it remains an illegal substance under the U.S. federal *Controlled Substances Act*. The U.S. Department of Justice previously issued guidance to suggest that it will not enforce federal prohibitions in states that have legalized cannabis and implemented robust regulatory regimes, however the **TSX Staff Notice** notes this guidance does not have the force of law and could be revoked or amended at any time. Due to this conflict, there is still uncertainty around the legality of cannabis-related activities in the U.S., which subjects Canadian companies with U.S. operations to legal risks.

The **TSX Staff Notice** made the **TSX**’s position clear that applicants and listed issuers who are in contravention of U.S. federal law regarding the prohibition on cannabis are not in compliance with the **TSX**’s continued listing requirements. The **TSX Staff Notice** notes the following business activities as violating U.S. federal law: (i) direct or indirect ownership of, or involvement in entities engaging in activities related to, the cultivation, distribution or possession of marijuana in the U.S. (“**Subject Entities**”); (ii) commercial interests or arrangements with **Subject Entities** that are similar in substance to ownership of, or investment in, **Subject Entities**; (iii) providing services or products that are specifically designed for, or targeted at, **Subject Entities**; or (iv) commercial interests or arrangements with entities engaging in the business activities described in (iii).

As part of the **TSX**’s standard review of listed issuers, the **TSX** will conduct in-depth reviews on select issuers’ continuous disclosure records. The **TSX** urges listed issuers to address any non-compliance with **TSX** requirements, and warns that applicants or listed issuers engaging in activities contrary to the requirements could be subject to a delisting review.

Also on October 16, 2017, the Canadian Securities Administrators issued **CSA Staff Notice 51-352** (the “**CSA Staff Notice**”), also meant to provide guidance for issuers with U.S. cannabis-related activities. The **CSA Staff Notice** takes a disclosure-based approach in dealing with issuers’ compliance

with U.S. laws regarding cannabis. This means that provided issuers' U.S. cannabis-related activities are conducted in compliance with the laws and regulations of the U.S. state in which cannabis-related activities are legal, issuers will have met their obligations to the CSA by providing full and accurate disclosure of the material facts and risks involved so that investors may make informed investment decisions. Of particular importance is the disclosure an issuer provides in relation to how it is ensuring compliance with state level laws and regulations. Recommendations set out in the CSA Staff Notice include specific disclosure for issuers with U.S. cannabis-related activities that should be included in their prospectus filings, annual information forms, management discussion & analyses, etc. Such disclosure includes: (i) describing the nature of the issuer's involvement in the U.S. cannabis industry; (ii) explaining that cannabis remains illegal under U.S. federal law; (iii) stating whether and how the issuer's U.S. cannabis-related activities are conducted in a manner consistent with any U.S. federal enforcement priorities; and (iv) discussing the issuer's ability to access both public and private capital. The specific disclosure requirements are outlined in the CSA Staff Notice.

The CSA Staff Notice specifically warned that each Canadian stock exchange has its own requirements and uses its own judgments in applying their listing requirements.

The Canadian Securities Exchange ("CSE") issued comments on the CSA Staff Notice that resonated support for the disclosure-based approach. The CSE agrees with the stance that Canadian listings should remain in good standing so long as they provide the disclosure rightly required by regulators. Mark Faulkner, Vice President, Listings & Regulation at the CSE, provided this comment to Torkin Manes LLP: "As noted, the CSA recognizes that exchanges may establish different criteria for listing. While all Canadian exchanges have similar basic listing criteria, the CSE specific listing qualifications place the emphasis on disclosure and business development, rather than specific and perhaps arbitrary requirements. The CSE's approach provides for a common application of the policies across all business sectors, with each issuer taking responsibility for describing the risks and challenges specific to its business". This should provide added reassurance to issuers already listed on the CSE and those looking to apply.

Accordingly, if an issuer has or plans to have U.S. cannabis-related activities and wishes to become a public issuer and list on a Canadian stock exchange, the CSE, which presently has 49 reporting issuers listed which are engaged in cannabis-related activities, 12 of which have U.S. cannabis-related activities, should be favourably considered given its acceptance and support of such issuers, provided there is detailed disclosure.

Issuers and applicants should seek legal counsel well in advance of listing on a Canadian stock exchange, so as to map out the benefits and risks of each exchange and make an informed decision about where to list that will compliment and not restrict the issuer's business plans.

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