



Agent and Syndication Provisions in Equity Underwriting Agreement

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Published on www.lorman.com - December 2018

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Agent and Syndication Provisions in Equity Underwriting Agreement

In the equity transaction, a syndicate's style of participation is most likely to be reflected in the underwriting arrangements, with a selling syndicate being identified by the underwriter for the on-selling of the securities which it has agreed to acquire. The agent type arrangements will generally be encompassed in an underwriting agreement, which will contemplate the ability of the agent to deal with a selling syndicate. The following agreement has been used to select clauses to illustrate the nature of the relationship, and the types of arrangements that need to be considered in the underwriting agreement when a selling syndicate will exist. The agreement between the agent, underwriter, and the selling syndicate will be reflected in the specific sales agreements entered into between those parties. These will be reliant on the rights which are obtained in the underwriting agreement and therefore the underwriting agreement has been selected as the source for the clauses to illustrate the syndicate relationship and suggested requirements in the underwritten equity transaction. The transaction which was selected for these clauses was a US and Canada cross-border, multi-jurisdiction, equity offering.

Over-allotment

The Corporation and Selling Shareholders hereby grant to the Underwriters an over-allotment option (the "**Over-Allotment Option**"), for the purpose of covering over-allotments, if any, and for market stabilization, to purchase [--,000] additional common shares in the capital of the Corporation (the "**Additional Shares**") upon the terms and conditions set forth herein. The Over-Allotment Option shall be exercisable into the Additional Shares from time to time, in whole or in part, within 30 days from the closing of the Offering, by [____], on behalf of the Underwriters, giving written notice to the Corporation, specifying (i) the number of Additional Shares to be purchased, and (ii) the Closing Date for the Additional Shares, provided that such Closing Date shall be not less than three Business Days and no more than seven Business Days following the date of such notice. The Underwritten Shares and the Additional Shares are referred to collectively herein as the "**Shares**". In the event that the Over-Allotment Option is not exercised in full, the pro-rata portion of the Over-Allotment granted to the Underwriters by the Corporation shall first be allocated to such exercise, followed by, on a *pro-rata* basis, the balance from the Selling Shareholders.

Distribution and Certain Obligations of Underwriters

The underwriting agreement, where there will be a selling syndicate, will need to carefully consider the role of the underwriter, and the relationship which the underwriter will have with the issuer. In some instances the full selling syndicate become underwriters, and agree to underwrite the offering of the transaction. More commonly there is one or more committed underwriter, with the selling syndicate entering into arrangements directly with the underwriter, and outside of the underwriting agreement. The issuer will want to ensure that the underwriters are appropriately considering securities law compliance requirements, as duties and obligations will be imposed on the underwriter, as to itself and as agent for its selling syndicate, relating to securities law compliance issues. These clauses outline a reasonable but robust list of the types of provisions that should be considered, and serve as an illustration of the duties and obligations of the underwriter in connection with compliance with securities law.

- (a) The Underwriters shall, and shall require any investment dealer or broker (other than the Underwriters) with which the Underwriters have a contractual relationship in respect of the distribution of the Shares (each, a "**Selling Firm**") to agree to, comply with the Securities Laws in connection with the distribution hereof and shall offer the Shares for sale to the public directly and through Selling Firms upon the terms and conditions set out in the Prospectus and this Agreement in all Qualifying Jurisdictions and, subject to

Section (c) below, the United States provided that except for state "blue sky" filings under the securities laws of applicable states in the United States no filing or comparable obligation on the part of the Corporation arises as a result of the offering of the Shares in the United States. The Underwriters shall promptly notify the Corporation when, in their opinion, the Underwriters and the Selling Firms have ceased distribution of the Shares and provide a breakdown of the number of Shares distributed in each of the Qualifying Jurisdictions where such breakdown is required for the purpose of calculating fees payable to the Securities Commissions.

- (b) The Underwriters shall, and shall require any Selling Firm to agree to, distribute the Shares in a manner which complies with and observes all applicable laws and regulations in each jurisdiction into and from which they may offer to sell the Shares or distribute the Preliminary Prospectus, the Prospectus or any Supplementary Material in connection with the distribution of the Shares and will not, directly or indirectly, offer, sell or deliver any Shares or deliver the Preliminary Prospectus, the Prospectus or any Supplementary Material to any person in any jurisdiction other than in the Qualifying Jurisdictions except in a manner which will not require the Corporation to comply with the registration, prospectus, filing, continuous disclosure or other similar requirements under the applicable Securities Laws of such other jurisdictions or any additional governmental filings fees which relate to such other jurisdictions. Subject to the foregoing, the Underwriters and any Selling Firm shall be entitled to offer and sell the Shares in the United States solely pursuant to an applicable exemption or exemptions from the registration requirements of the United States *Securities Act of 1933*, as amended.
- (c) For the purposes of this Section, the Underwriters shall be entitled to assume that the Shares are qualified for distribution in any Qualifying Jurisdiction where a receipt or similar document for the Prospectus shall have been obtained from the applicable Securities Commission following the filing of the Prospectus unless otherwise notified in writing.
- (d) The Corporation and the Underwriters agree that Schedule "A" to this Agreement entitled "United States Offers and Sales" is incorporated by reference in and shall form part of this Agreement. Any offer or sale of the Shares in the United States or to U.S. persons will be made in accordance with Schedule "A".
- (e) Notwithstanding the foregoing provisions of this Section, an Underwriter will not be liable to the Corporation under this Section 4 with respect to a default under this Section 4 or Schedule "A" by another Underwriter or another Underwriter's United States broker-dealer affiliate, as the case may be. However, each Underwriter shall be liable to the Corporation under this Section or Schedule "A" with respect to any breach by it or its United States broker-dealer affiliates of this Section or of the United States selling restrictions set forth in Schedule "A".

Press Releases

It is usual in the underwritten equity securities transaction for the underwriter to retain control over press releases and related information. They will generally be consulted by the issuer in this regard, and will have some say in the timing and scope of the press releases relating to the offering. The issuer is ultimately responsible at law, and pursuant to applicable securities law, as to the nature and timing of the press releases, but the underwriter will want to have participation for purposes of controlling market presentation. The issue to consider in the syndicated deal is the extent and nature of involvement of the members of the selling syndicate in such press releases. This is frequently not considered in the underwriting agreement, but should form part of the consideration in the preparation of these provisions. Using the usual provisions between the issuer and the underwriter will provide guidance as to what might be suitable for broader participation by the selling syndicate.

During the period commencing on the date hereof and until completion of the distribution of the Shares, the Corporation will promptly provide to the Underwriters drafts of any press releases of the Corporation for review (but for greater certainty not the approval) by the Underwriters and the Underwriters' counsel prior to issuances, provided that any such review will be effected in a timely manner.

Regulatory Approvals. Prior to the filing of the Prospectus with the Securities Commissions, the Corporation shall file or cause to be filed with the Exchange all necessary documents and shall take or cause to be taken all necessary steps to ensure that the Corporation has obtained all necessary approvals for the Shares issuable by the Corporation to be conditionally listed on the Exchange.

Closing

The provision which follows is intended to indicate a suitable protocol for the closing of an underwritten transaction, in this case with multiple underwriters, and a broader selling syndicate. This indicates the usual process for completing the closing of an underwritten public equity deal. Careful consideration will need to be given by the issuer, underwriter and selling syndicate participants as to the need for involvement, control, and securities delivery requirements for the selling syndicate and those persons who are acquiring from the selling syndicate. Protocols may need to be considered, dependent upon the nature of the selling syndicate, for involvement in the closing process, and mechanics for the receipt and distribution of the shares which are the subject matter of the public equity transaction.

The closing of the purchase and sale of the Shares shall be completed at the Time of Closing at the offices of [____], or at such other place as the Corporation, Selling Shareholders and the Underwriters may agree in writing. At the Time of Closing, the Corporation and the Selling Shareholders shall deliver to [____], on behalf of the Underwriters, one or more definitive share certificates representing in the aggregate the total number of the Shares, registered in the name of [____], or such name or names as shall be designated in writing by [____] on behalf of the Underwriters not less than 24 hours prior to the Time of Closing. The Corporation shall make all necessary arrangements for the exchange of such definitive share certificate(s), on the date of delivery, at the principal offices of the Transfer Agent for certificates representing the Underwritten Shares in such amounts and registered in such names as shall be designated by [____] in writing on behalf of the Underwriters not less than 24 hours prior to the Time of Closing, against payment by such Underwriter or on its behalf of the purchase price therefor as set out in the first paragraph of this Agreement, net of the fees and disbursements of the Underwriters' counsel, by certified cheque, bank draft or wire transfer payable to or as directed by the Corporation and the Selling Shareholders.

Indemnification by the Corporation and the Selling Shareholders

The public equity transaction will inevitably involve indemnity being provided by the issuer to the agent or underwriter. Dependent upon the structure of the syndicate, as co-underwriters or as a selling syndicate obtaining the distribution rights through the underwriter, consideration will need to be given to the extent and scope of the indemnity. The issuer and the underwriter will generally reach agreement on an indemnity which will approximate that which follows; it has been selected as being a reasonably balanced format of indemnity frequently used in a public equity markets. The issue will become whether the indemnity should extend to other participants, such as to the selling syndicate members who are not acting in an underwriting capacity. This will need to be determined transaction by transaction. The agent, or underwriter, will have primary liability, and primary duties and responsibilities around the completion of the offering, but selling syndicate members can also take on liability and responsibility to the investors. Legal counsel acting for selling syndicate members should consider whether the indemnities of the underwriting agreement directly or indirectly extend to their selling syndicate participants.

- (a) The Corporation and [_____] agree severally (the Corporation, [_____] collectively, the **"Indemnifying Parties"**) to indemnify and save harmless each of the Underwriters and their respective affiliates, their respective directors, officers and employees (collectively, the **"Indemnified Parties"** and individually an **"Indemnified Party"**) from and against all losses (other than loss of profit), claims, damages, liabilities, costs and expenses, (including the reasonable fees and expenses of the Underwriters' counsel that may be incurred in advising with respect to or defending such claim), but only to the extent that such expenses, losses, claims, damages, liabilities or actions arise out of, or are based, directly or indirectly, upon the performance of professional services rendered to the Corporation by the Underwriters in connection with the Offering, caused by or arising directly or indirectly from or in consequence of:
- (i) any breach by the Corporation or a Selling Shareholder of any of their respective representations, warranties, or covenants or obligations hereunder;
 - (ii) any information or statement (except any information or statement relating solely to any of the Underwriters) contained in any of the Offering Documents or any certificate of the Corporation delivered pursuant to this Agreement which at the time and in light of the circumstances in which it was made contains or is alleged to contain a misrepresentation;
 - (iii) any omission or alleged omission to state in the Preliminary Prospectus or the Prospectus or any certificate of the Corporation delivered under the Agreement any material fact (except facts relating solely to any of the Underwriters) required to be stated in such document or necessary to make any statement in such document not misleading in light of the circumstances under which it was made;
 - (iv) any order made or enquiry, investigation or proceeding commenced or threatened by any Securities Commission or other competent authority based upon any untrue statement or omission or alleged untrue statement or alleged omission or any misrepresentation or alleged misrepresentation (except a statement or omission or alleged statement or omission or a misrepresentation or alleged misrepresentation relating solely to any of the Underwriters) in the Preliminary Prospectus or the Prospectus; or
 - (v) the non-compliance or alleged non-compliance by the Corporation or a Selling Shareholder with any requirements of the Securities Laws, the U.S. Securities Act of 1933, as amended, (other than any failure or alleged failure to comply by any of the Underwriters),

provided that no party (including an Indemnified Party) who has engaged in any fraud, fraudulent misrepresentation negligence, bad faith or willful misconduct shall be entitled to indemnification hereunder.

- (b) If any claim contemplated by this Section shall be asserted against any of the Indemnified Parties, or if any potential claim contemplated by this Section shall come to the knowledge of any of the Indemnified Parties, the Indemnified Party concerned shall notify in writing the Indemnifying Parties as soon as possible of the nature of such claim (provided that any failure to so notify in respect of any potential claim shall affect the liability of the Indemnifying Parties under this Section only to the extent that the Indemnifying Parties are prejudiced by such failure). An Indemnifying Party shall, subject as hereinafter provided, be entitled (but not required) to assume the defence on behalf of the Indemnified Party of any suit brought to enforce such claim; provided that the defence shall be through legal counsel selected by the Indemnifying Party and acceptable to the Indemnified Party, acting reasonably and no admission of liability shall be made by the Indemnifying Parties or the Indemnified Party without, in each case, the prior written consent of all the Indemnified Parties affected and the Corporation, in each case such consent not to be unreasonably withheld. An Indemnified Party shall have the right to employ separate counsel in any such suit and participate in the defence thereof but the fees and expenses of such counsel shall be at the expense of the Indemnified Party unless:
- (i) an Indemnifying Party fails to assume the defence of such suit on behalf of the Indemnified Party within 10 days of receiving notice of such suit;
 - (ii) the employment of such counsel has been authorized by an Indemnifying Party; or
 - (iii) the named parties to any such suit (including any added or third parties) include the Indemnified Party and an Indemnifying Party, as applicable, and the Indemnified Party shall have been advised in writing by counsel that representation of the Indemnified Party by counsel for an Indemnifying Party is inappropriate as a result of the potential or actual conflicting interests of those represented.

(in each of cases (i), (ii) or (iii), the Indemnifying Parties shall not have the right to assume the defence of such suit on behalf of the Indemnified Party, but the Indemnifying Parties shall only be liable to pay the reasonable fees and disbursements of one firm of separate counsel for all Indemnified Parties. In no event shall the Corporation be required to pay the fees and disbursements of more than one set of counsel for all Indemnity Parties in respect of any particular claim or set of claims).

- (c) The Indemnifying Parties hereby acknowledge and agree that, with respect to this Section, the Underwriters are contracting on their own behalf and as agents for their affiliates, directors, officers, employees and agents and their respective directors, officers, employees and agents (collectively, the "**Beneficiaries**"). In this regard, each of the Underwriters shall act as trustee for the Beneficiaries of the covenants of the Indemnifying Parties under this Section hereof with respect to the Beneficiaries and accepts these trusts and shall hold and enforce such covenants on behalf of the Beneficiaries.

Termination by Underwriters in Certain Events

In similar manner to the public bond deal, most public equity transactions will have a recited set of events which lead to a right to terminate the underwriting participation in the offering. These will generally provide solely for an underwriter's right to terminate. Selling syndicate participants may have

incurred responsibilities to their investors, and costs and expenses in their involvement with the offering. While selling syndicate members will generally rely on the underwriter for the detailed work of assessing and completing due diligence in relation to the transaction, they may well have incurred expenses. Consideration will need to be given by all participants as to whether the indemnity, and particularly a cost lost indemnity should be extended to the syndicate participants. Further, consideration should be given as to whether the selling syndicate should have rights in the event that the underwriter determines that they wish to proceed to cancellation of the transaction, such as an ability to step into an underwriting role, an ability to acquire directly from the issuer, an ability to change from an underwritten deal to a best efforts offering, or similar. These are not frequently included but may be suitable in some circumstances. The termination rights in favour of the underwriter are generally designed to protect the underwriter from the cost and liability of completing the transaction, and therefore the termination of the underwriter may not reflect the desires of the selling syndicate as to their protection in the event of a cancellation. What might be appropriate rights and remedies for the representatives of the selling syndicate should also be considered.

- (a) Each Underwriter shall also be entitled to terminate its obligation to purchase the Shares by written notice to that effect given to the Corporation and the Selling Shareholders at or prior to the Time of Closing if:
 - (i) *material adverse change* – there shall be any material change in the affairs of the Corporation, or there should be discovered any previously undisclosed material fact (other than a material fact related solely to any of the Underwriters) required to be disclosed in the Preliminary Prospectus and the Prospectus or there should occur a change (other than a change related solely to any of the Underwriters) in a material fact contained in the Preliminary Prospectus and the Prospectus, in each case which, in the sole opinion of the Underwriters, acting reasonably has or would be expected to have a materially adverse effect on the market price or value of the Common Shares;
 - (ii) *litigation* - any enquiry, action, suit, investigation or other proceeding (whether formal or informal) is commenced, announced or threatened or any order made by any federal, provincial or other governmental authority, including, without limitation, any Securities Commission, Exchange, or the SEC, in relation to the Corporation, or the Corporation's directors and officers (except for any inquiry, actions, suit, investigation or other proceeding based upon activities of the Underwriters and not upon activities of the Corporation) which in the sole opinion of the Underwriters acting reasonably, operates to prevent or restrict materially the trading of the Shares or trading of the Common Shares or materially and adversely affects the market price or value of the Shares; or
 - (iii) *disaster out* - if there should develop, occur or come into effect or existence any event, action, state, condition or major financial occurrence of national or international consequence or any law or regulation, which in the sole opinion of the Underwriters, acting reasonably, materially adversely affects, or could reasonably be expected to materially adversely affect, either the financial markets or the business, operations or affairs of the Corporation and its Subsidiaries taken as a whole on a consolidated basis.
- (b) If this Agreement is terminated by any of the Underwriters, there shall be no further liability on the part of such Underwriter or of the Corporation or Selling Shareholders to such Underwriter, except in respect of any liability which may have arisen or may thereafter arise under [_____].
- (c) The right of the Underwriters or any of them to terminate their respective obligation under this Agreement is in addition to such other remedies as they may have in respect of any default, act or failure to act of the Corporation in respect of any of the matters

contemplated by this Agreement. A notice of termination given by one Underwriter under this Section shall not be binding upon the other Underwriters.

Consideration will need to be given in the co-underwriter circumstance as to whether it is an all or nothing arrangement, that is whether in an underwritten deal there is a several obligation, and a several right to continue or whether the transaction only proceeds if fully underwritten. This will be a business determination to be made between the issuer and the underwriters.

Market Stabilization

Public offerings, whether of debt or equity, will frequently include market stabilization clauses. The lead agent, or a group of agents, will frequently want the right to provide market stabilization, going into the offering, or for a period of time after the offering, to reduce volatility in the secondary market. In a syndicated deal participation by selling syndicate members needs to be considered - whether they will be required to participate in the stabilization, or whether they will say or control over stabilization. In addition, extending restrictions and hold periods need to be considered in the context of market stabilization with a syndicated public offering. Specifically, where there are more than one underwriter or selling syndicate member, restrictions or hold periods can ensure that there is the control that is desired with regard to the secondary market. However, many market participants do not want stabilization - they have engaged in transaction anticipating market volatility beneficial to themselves or their customers, and it will be necessary to both understand the intentions of, and design appropriate controls or releases, for selling syndicate members accordingly.

In connection with the distribution of the Shares, the Underwriters and members of their selling group (if any) may effect transactions which stabilize or maintain the market price of the Common Shares at levels above those which might otherwise prevail in the open market in compliance with Securities Laws. Such stabilizing transactions, if any, may be discontinued at any time.

Obligations of the Underwriters to be Several

As noted previously, very careful consideration will need to be given by all parties, the issuer, the underwriter or agent, and the selling syndicate members as to whether the agreement to take up equities offered in the public equity transaction will be several among the underwriters or an all for one concept. This will be a business arrangement negotiated deal by deal, and the specific rights of each of the underwriter as agent, and the selling syndicate members, needs to be considered, as noted previously. The Issuer will want assurance of the success of the entire offering while the syndicate of underwriters will likely have committed only to an agreed purchase obligation. The size of the offering and the financial capability of the syndicate group will largely dictate the resolution of this issue.

Subject to the terms and conditions hereof, the obligation of the Underwriters to purchase the Underwritten Shares shall be several and not joint. The percentage of the Underwritten Shares to be severally purchased and paid for by each of the Underwriters shall be as follows:

As is often the case in a syndicated transaction, the underwriting arrangements, where there are multiple underwriters or underwriters as agents for selling syndicate, will be a need to consider refusal and defaults. It will be necessary to consider how the transaction is to proceed if one of the syndicate participants refuses or defaults in completing their portion of the share acquisition. Specifically the underwriting arrangement should consider whether the transaction will proceed, the nature of the obligations of the remaining syndicate members, and the sanctions on the defaulting or refusing syndicate member. The following clause is merely one suggestion, in a transaction by transaction consideration will be needed.

If an Underwriter (a "**Refusing Underwriter**") shall not complete the purchase and sale of the Underwritten Shares which such Underwriter has agreed to purchase hereunder for any reason whatsoever, the other Underwriter (the "**Continuing Underwriter**") shall be entitled, at its option, to purchase all but not less than all of the Underwritten Shares which would otherwise have been purchased by such Refusing Underwriter. If the Continuing Underwriter does not elect to purchase the balance of the Underwritten Shares pursuant to the foregoing:

- (a) the Continuing Underwriter shall not be obliged to purchase any of the Underwritten Shares that any Refusing Underwriter is obligated to purchase;
- (b) the Corporation shall not be obliged to sell less than all of the Underwritten Shares; and
- (c) the Corporation shall be entitled to terminate its obligations under this Agreement arising from its acceptance of this offer, in which event there shall be no further liability on the part of the Corporation or the Continuing Underwriter.

The public equity transaction will necessarily involve consideration of the underwriter's, and selling syndicate's, obligations and responsibilities as to compliance with securities laws. The nature of securities laws are such that the interface of the selling syndicate participants with the public directly involves the issuer, and liabilities and responsibilities to the issuer and the lead underwriter or agent. Accordingly, those responsibilities need to be clearly delineated. The following is a good outline of an approach for dealing with the selling syndicate's and underwriter's responsibilities as to compliance with United States securities laws. In this case a portion of the United States offering was being completed on a private placement basis and accordingly private placement language has been included.

Each of the Underwriters agrees with the Corporation that:

- (a) all offers and sales of the Shares in the United States or to U.S. Persons will be effected only by its U.S. registered broker-dealer affiliates and in accordance with all applicable laws, rules and regulations, including without limitation, the rules and regulations of the SEC and all applicable self-regulatory organizations governing the activities of U.S. registered broker-dealers;
- (b) each of its U.S. affiliates offering or selling Shares in the United States or to a U.S. Persons is an SEC registered broker-dealer;
- (c) it will not, either directly or through its U.S. affiliates, solicit offers for, or offer to sell, the Shares in the United States or to U.S. Persons by means of any form of "general solicitation or general advertising" (within the meaning of Regulation D under the U.S. Securities Act), or in any manner involving a public offering in the United States within the meaning of Section 4(2) of the U.S. Securities Act;
- (d) it will solicit (and will cause its U.S. affiliates to solicit) offers and sales for the Treasury Shares only from, and will offer and sell the Treasury Shares in the United States or to U.S. Persons only to, persons who it reasonably believes to be Accredited Investors as defined in Rule 501 of Regulation D;
- (e) it will inform (and cause its U.S. affiliates to inform) all purchasers of the Treasury Shares in the United States or that are U.S. Persons that such securities have not been and will not be registered under the U.S. Securities Act and are being sold to it pursuant to the Private Placement Exemption without registration under the U.S. Securities Act;
- (f) the U.S. Private Placement Memorandum shall be substantially in the form provided to the Underwriters concurrently with the filing of the Preliminary Prospectus;

- (g) it will cause its U.S. affiliates to deliver (i) a copy of the preliminary U.S. Private Placement Memorandum together with the Preliminary Prospectus, to each offeree in the United States and each offeree that is a U.S. Person, and (ii) at or prior to confirmation of sale of the Shares, a copy of the U.S. Private Placement Memorandum together with the Prospectus to each purchaser;
- (h) it shall cause each of its U.S. affiliates to agree, for the benefit of the Corporation, to the same provisions as are contained in sections (3) and (4); and
- (i) at the Closing, it will cause each of its U.S. affiliates selling Treasury Shares in the United States or to U.S. Persons to provide to the Corporation a certificate, substantially in the form of Appendix I to this Schedule "A", relating to the manner of the offer and sale of the Shares in the United States and to U.S. Persons; and
- (j) at or prior to confirmation of sale of the Shares, the purchaser will have sent to each distributor, dealer or person receiving a selling concession, fee or other remuneration that purchases the Shares from it a confirmation or notice substantially to the following effect:

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