

The new prospectus rule: NI 41-101 – General Prospectus Requirements



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Session Overview

- History of the prospectus rules
- NI 41-101 rule - highlights
- Form 41-101F1: the long form prospectus form
- Issuer financial statements
- Significant acquisitions disclosure
- Companion policy to NI 41-101
- Consequential amendments
- Tips
- Q&A



History of the prospectus rules

- The Securities Act (Alberta), the ASC Rules (General) and local ASC forms and policies
- December 31, 2000:
 - OSC rule 41-501 General Prospectus Requirements (the long form prospectus rule)
 - NI 44-101 Short Form Prospectus Distributions



History of the prospectus rules

- September 30, 2003: NI 51-101 Standards of Disclosure for Oil and Gas Activities
- March 30, 2004:
 - NI 51-102 Continuous Disclosure Obligations
 - NI 52-107 Acceptable Accounting Principles, Auditing Standards and Reporting Currency
 - MI 52-110 Audit Committees
- June 1, 2005: NI 81-106 Investment Fund Continuous Disclosure
- June 30, 2005: NI 58-101 Disclosure of Corporate Governance Practices
- December 30, 2005: NI 44-101 repealed and replaced



History of the prospectus rules

- December 21, 2006: NI 41-101 published for comment
- 56 comment letters received
- December 21, 2007: Final CSA Notice published
- March 17, 2008, effective date for:
 - NI 41-101 General Prospectus Requirements
 - Repeal of national policies and CSA Notices
 - Repeal of local rules, forms, policies, blanket orders and notices - see CSA Notice Appendix L
 - Consequential amendments to other national instruments
 - Amendments to the Securities Act (Alberta)
 - MI 11-102 Passport System and NP 11-202 Process For Prospectus Reviews in Multiple Jurisdictions



The new prospectus rule - purpose

- A comprehensive set of national prospectus requirements for all issuers
- Harmonizes and consolidates the prospectus requirements across Canada
- Harmonizes with other instruments
- Reflects current policy
- Primarily based on the requirements of OSC Rule 41-501



The new prospectus requirements - long form prospectus

- Securities Act (Alberta)
- NI 41-101
- Form 41-101F1 or Form 41-101F2
- 41-101CP



The new prospectus requirements - short form prospectus

- Securities Act (Alberta)
- NI 41-101 (except parts 4 and 9) and NI 44-101
- Form 44-101F1
- 41-101CP and 44-101CP



The new prospectus requirements – shelf or PREP prospectus

- Securities Act (Alberta)
- NI 41-101 and NI 44-101/NI 44-102/NI 44-103
- Form 41-101F1 or Form 44-101F1
- 41-101CP and 44-101CP/44-102CP/44-103CP



NI 41-101 – notable changes since published for comment

- CSA notice, Appendix A:
 - Schedule 2: Summary of comments and CSA responses
 - Schedule 3: Summary of changes
- Prospectus certificates
 - Substantial beneficiary
 - Trustees
- Personal information forms
- Material contracts
- Compensation options
- Forms and CP changes



NI 41-101 Rule walkthrough – highlights

- Definitions
 - Concept of an IPO venture issuer ←NEW
 - Junior issuer concept – no changes
 - Harmonized with CD rule (venture issuer = RI)
- Subsection 2.4(1)
 - Conditions to qualify special warrants by prospectus
- Acceptable forms of prospectus (Part 3) (F1, F2, SF)



NI 41-101 Rule walkthrough – highlights

- Part 4 – FS, audit & review & approval requirements
- Part 5 – prospectus certificates
 - Section 5.2 – date of certificates
 - Who should sign (new: Trust, LP, RTO, operating entity)
 - Certificate of other persons s. 5.15 (moved from s. 116(1)(d) of the Alberta Securities Act)
 - OSC carve-outs – refer to OSA, similar provisions except 5.8, 5.13 & 5.15 (OSA receipt refusal = similar result – see CP).



NI 41-101 Rule walkthrough – highlights

- Part 6 amendments
 - Ontario carve-outs – see OSA, similar provisions
- Part 8, best efforts offering
 - extension of best efforts offering (180 days max <-new)
- Part 9 – filing requirements for long form (see 44-101 Part 4 for filing requirements for short form)



NI 41-101 Rule walkthrough – highlights

- Section 9.3 material contracts
 - o Material contract, not in ordinary course
 - o Subsection 9.3(2) identifies a number of items that are always considered material contracts
 - o refer also to CP s. 3.6 for further guidance
 - o Subsection 9.3(4) identifies what can never be redacted



NI 41-101 Rule walkthrough – highlights

Investment funds not subject to NI 81-101

- Part 14, Part 15, Part 17 – provisions for investment funds not subject to NI 81-101
 - Lapse date Ontario carve-outs but similar to OSA
- Subsection 15.2(1) addresses investment funds in continuous distribution
- NI 41-101F2
 - Concepts derived from investment funds subject to 81-101 and existing practice
 - More tailored to investment funds than OSC 41-501F1.



NI 41-101 Rule walkthrough – highlights

- New Personal Information Form (PIF)
 - Existing promoters, directors and officers that have previously delivered background check information for an issuer are grandfathered.
- Who is subject to new PIF requirements?
 - New promoters, directors & officers for a RI.
 - All promoters directors & officers for an IPO.
 - TSX and TSX-V forms acceptable so long as it has been updated, certified & consented.
 - Deliver via SEDAR (**use new PIF category)



Form 41-101F1: The long form prospectus form

- Primarily based on the requirements of OSC Form 41-501F1
- Reflects current policy
- Harmonized with disclosure requirements of:
 - Continuous disclosure rules
 - Short form prospectus form
 - Corporate governance rules
 - Local requirements
- Reporting issuers
- IPO offerings



Form 41-101F1: comparison to OSC Form 41-501F1


Cross-references to NI 51-102 disclosure:

- Describe the business (5)
- ABS issuers (5.3)
- Directors and officers (16)
- Executive compensation (17)
- Indebtedness of directors and officers (18)
- Risk factors (21)
- Interests of management and others (24)
- Interests of experts (28)



Form 41-101F1: comparison to OSC Form 41-501F1

- Pricing disclosure (1.7)
- IPO venture issuer (1.9(4))
- Underwriter's compensation table (1.11(6))
- Summary: source of financial information (3.1(2))
- Use of proceeds (6.6)
- MD&A (8):
 - Venture or IPO venture issuers without significant revenues
 - Significant equity investees
 - Junior issuers



Form 41-101F1: comparison to OSC Form 41-501F1

- Earnings coverage ratios (9)
- Description of securities being distributed (10)
- Securities subject to contractual restrictions on transfer(14)
- Audit committee and corporate governance (19)
- Exemptions (31)




Form 41-101F1: comparison to OSC Form 41-501F1

- Issuer financial statements (32)
- Credit support issuer/credit supporter disclosure and exemptions (33 and 34)
- Significant acquisitions (35)
- Probable reverse takeovers (36)



Issuer financial statements (41-101F1 - item 32)

- F1 - S. 32.1 – interpretation of “issuer”
- Issuer includes:
 - predecessor entity,
 - primary business (CP 5.3)
 - continuity of interest (CP 5.4)
- If predecessor = multiple entities, consider proforma FS presentation (CP 5.10)




Issuer financial statements (41-101F1 - item 32)

- FS to be included in prospectus:
 - Venture issuer 120 days annual FS, 60 days interim FS
 - Non venture issuer 90 days annual FS, 45 days interim FS
 - IPO venture issuer 90 days annual FS, 45 days interim FS




Issuer financial statements (41-101F1 - item 32)

- Junior issuer considerations
 - unchanged from OSC 41-501
 - 1 year FS need to be audited, rest reviewed.
- IPOs
 - unchanged from OSC 41-501
 - need 3 years audited FS to enter the system see CP 5.5 & 5.6



Issuer financial statements (41-101F1 - item 32)

- IPO – 3 years audited income statement, 2 years balance sheet
- Reporting issuers – 2 years audited income statement and 2 years balance sheet.



Issuer financial statements (41-101F1 - item 32)

- Exceptions (item 32.4)
 - o Drop the oldest year back if you can substitute with a more recent audited financial year less than 90/120 days (venture / non venture),
 - o Drop the oldest year back if you can substitute with a more recently audited interim period no less than 9 months in duration & business not seasonal & all the other financial years > 9 months long



Issuer financial statements (41-101F1 - item 32)

- Issuer FS in item 32 = full traditional sets of FS (ie- BS, IS, CF)
 - anything less you must apply for relief. (ie- carveout, divisional FS, operating statements) (see 41-101 CP 5.6)
- Item 32.6 – triggers inclusion of early filings or releases of more recent financial information



Issuer financial statements (41-101F1 - item 32)

- Part 4 of 41-101
 - Ties to 52-107 for GAAP & GAAS
 - clean audit opinions on issuer FS (see also CP 5.8)
- Reminder that relief granted to IPO issuers for qualified audit opinions for issuer FS under F1 item 32.
 - When you become an RI, apply for separate relief under 52-107 if those FS will cfwd in the comparative column for next year end FS



Significant acquisitions disclosure (35)

- Does not apply to an RTO (item 32 or 36 apply)
- Consider:
 - Acquisitions completed since the beginning of the issuer's most recently completed year for which financial statements are included in the prospectus
- Significance tests, financial statement and disclosure requirements are based on the business acquisition report (BAR) requirements of NI 51-102
- IPO venture issuer treated as a venture issuer



Acquisition financial statements

- Decision charts in Appendix A to companion policy to NI 41-101
- Exemption: Results of acquired business included in issuer's audited consolidated financial statements (35.4)
- 2 years of financial statements
- Audit requirement: 1 year (35.1(3))
- Review requirement: all other periods (NI 41-101, 4.3(1))
- Refer to NI 52-107 (GAAP/GAAS)




Acquisition financial statements

- IPO
 - Completed acquisitions (35.3)
 - Recently completed acquisitions (35.5(2)(b)(i))
 - Probable acquisitions (35.6(3)(b) or (c))
- Reporting issuers
 - Completed acquisitions/ BAR filed (35.2)
 - Recently completed acquisitions/no BAR filed (35.5(2)(b)(ii))
 - Probable acquisitions (35.6(3)(a) or (c))



Reporting issuer: significant acquisitions

- Completed acquisition and BAR filed (35.2) – include all disclosure included in the BAR
- Recently completed acquisition/no BAR filed (35.5(2)(b)(ii)) or
- Probable acquisition (35.6(3)(a) or (c))
 - o Include Form 51-102F4 disclosure
 - o Consider if financial statements necessary for full, true and plain disclosure



Reporting issuer – recently completed acquisition (35.5(2)(b)(ii))

Example

- Issuer is a venture issuer (an RI)
- Date of acquisition: January 1, 2008
- Year-end of acquired business: December 31, 2007 (within 45 days of date of acquisition)
- Date of prospectus: March 10, 2008 (less than 120 days after date of acquisition)
- No BAR filed



IPO – completed significant acquisition (35.3)

- Item 35.3 disclosure:
 - If year-end of acquired business was less than 45 days before date of acquisition and
 - date of acquisition > 90 days before the date of the prospectus (NI 51-102 allows 120 days for venture issuers) or
 - (If year-end of acquired business greater than 45 days before date of acquisition), if
 - date of acquisition > 75 days before the date of the prospectus
- Otherwise, item 35.5 disclosure (recently completed acquisitions)



IPO – completed significant acquisition (35.3)

Example:

- Date of acquisition: January 1, 2008
- Year-end of acquired business: December 31, 2007 (within 45 days of date of acquisition)
- Date of prospectus: April 10, 2008 (more than 90 days after date of acquisition)



IPO – recently completed significant acquisition (35.5)

Example:

- Date of acquisition: January 1, 2008
- Year-end of acquired business: December 31, 2007
(within 45 days of date of acquisition)
- Date of prospectus: March 1, 2008 (less than 90 days
after date of acquisition)



Satisfactory alternative financial statements

- Recently completed or probable acquisitions
- 41-101CP, 5.9(4) – refer to in prospectus cover letter
- NP 11-202 pre-filing



Pro forma financial statements

- Refer to NI 51-102 requirements
- No compilation report
- Multiple acquisitions (35.7)



Other financial statement considerations

- RTO
 - Provide disclosure for accounting parent as though they were the issuer
 - Completed (32)
 - Probable (36)
- Credit support issuer/credit supporter disclosure and exemptions (33 and 34)



Highlights from NI 41-101CP

- Material contract guidance (section 3.6)
- Part 5 – financial statements (issuer and business acquisition)
 - 5.10 - proforma presentation for multiple predecessor entities
 - 5.9 - applicable principles from NI 51-102CP
- Part 6 – consolidation of existing pre-marketing and advertising guidance in one place.



Consequential amendments to 44-101

- General prospectus provisions moved from 44-101 rule to 41-101 rule (general prospectus rules in one place).
- Alignment of 44-101 SF rule with LF rule.
 - Example: PIF requirements, material contracts
- 44-101F1 requirements to parallel disclosure in 41-101F1
- 44-101CP – general prospectus items now found in 41-101CP (general prospectus CP in one place)



Consequential amendments to 51-102

- Alignment of material contract provisions with the prospectus rules
- Update disclosure requirements in AIF to minimize prospectus versus CD differences



Prospectus Filers – Practice Pointers

- Know the 41-101 general prospectus provisions in 41-101 rule and CP
- Ensure you are using the updated 44-101F1 (amended 3/17/08)
- Shelf filers – consequential amendments to 44-102 rule and CP.
- PREP filers – consequential amendments to 44-103 rule and CP.
- Rights offering – consequential amendments to 45-101F
- Read the CSA notice to the 41-101 package posted 12/21/07



Practice Aids

- Consolidated versions of consequential amendments to affected rules, forms and CP to 44-101 and 51-102 will be posted on ASC website as soon as they become available.
- Pre-filing consultations are always encouraged. To facilitate efficient discussions supply a brief written discussion of the fact pattern in advance to the ASC Corporate Finance Department.



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