

Request for Comment

Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations*, Form 51-102F1, Form 51-102F2, Form 51-102F3, Form 51-102F4, Form 51-102F5, Form 51-102F6 and Companion Policy 51-102CP *Continuous Disclosure Obligations*

Proposed Amendments to National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*

And

Proposed Amendments to National Instrument 71-102 *Continuous Disclosure and Other Exemptions relating to Foreign Issuers* and Companion Policy 71-102CP *Continuous Disclosure and Other Exemptions relating to Foreign Issuers*

Background

We, the Canadian Securities Administrators (CSA), are publishing for comment proposed amendments to

- National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), its related forms (the Forms) and companion policy (CP 51-102),
 - National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* (NI 52-107), and
 - National Instrument 71-102 *Continuous Disclosure and Other Exemptions relating to Foreign Issuers* (NI 71-102) and its related companion policy (CP 71-102)
- (collectively, the Instruments).

The Instruments

- harmonize continuous disclosure (CD) requirements among Canadian jurisdictions,
- replace most existing local CD requirements, and
- provide exemptions for certain foreign issuers from certain CD requirements.

NI 51-102 sets out the obligations of reporting issuers, other than investment funds, for financial statements, management's discussion and analysis (MD&A), annual information forms (AIFs), business acquisition reports (BARs), material change reporting, information circulars, proxies and proxy solicitation, restricted share disclosure, and certain other CD-related matters. NI 52-107 sets out the accounting principles and auditing standards that applies to financial statements filed in a jurisdiction. NI 71-102 provides exemptions from most CD requirements and certain other requirements for certain foreign issuers.

Since the CSA implemented the Instruments, we have monitored how they are working. We sent surveys to all issuers that filed BARs in the first year after we implemented NI 51-102, to audit firms, and to investors, to find out the effect and usefulness of business acquisition reporting.

We are publishing the proposed amendments to the Instruments with this Notice. You can find them on websites of CSA members, including the following:

- www.bcsc.bc.ca
- www.albertasecurities.com
- www.sfsc.gov.sk.ca
- www.msc.gov.mb.ca
- www.osc.gov.on.ca
- www.lautorite.qc.ca

We are publishing

- amending instruments for
 - NI 51-102 (Appendix B)
 - the Forms (Appendix C)
 - NI 52-107 (Appendix D)
 - NI 71-102 (Appendix E)
- black-lined versions of CP 51-102 and CP 71-102 (Appendices F and G)

We are also publishing a black-lined version of NI 51-102 that integrates the proposed changes from the amending instrument (Appendix H).

Substance and purpose of the amendments

The proposed amendments to the Instruments fall into the following three broad categories:

1. Amendments to clarify some provisions of the Instruments.
2. Amendments to address areas that a rule, form or companion policy does not address, including codifying discretionary exemptions that we have granted.
3. Amendments to streamline requirements in the Instruments.

Summary of proposed amendments

We have summarized the significant proposed amendments in Appendix A. This is not a complete list of all the amendments.

For interim and annual financial statements relating to fiscal years beginning on or after October 1, 2006, Canadian generally accepted accounting principles will require a statement of comprehensive income. The amendments do not refer to this additional financial statement. However, we intend to amend the Instruments for this change before we adopt the amendments.

Alternatives considered

As discussed above, many of the amendments are intended to clarify the Instruments or to streamline requirements. One alternative to amending the Instruments was to address these issues by granting discretionary relief on a case-by-case basis. We rejected this option because issuers must pay to apply for discretionary relief and it is an inefficient means of dealing with the issues.

We also considered whether we could address these issues by blanket order. However, not all jurisdictions have the power to make blanket orders.

Anticipated costs and benefits

We believe that the proposed amendments to the Instruments would reduce issuers' costs, as the amendments would address problems industry has had applying the Instruments and streamline some of the requirements. In particular, the changes we are proposing to the BAR requirement would reduce issuers' costs of filing a BAR.

Related amendments

We intend to eliminate the following national policy and staff notices relating to continuous disclosure, as they are no longer necessary:

- National Policy 3 *Unacceptable Auditors*
- CSA Staff Notice 11-305 *Withdrawal of CSA Staff Notice 42-301 and 52-301*
- CSA Staff Notice 51-307 *Status of proposed continuous disclosure rule*
- CSA Staff Notice 51-308 *Filing of Management's Discussion and Analysis and National Instrument 51-102 Continuous Disclosure Obligations*
- CSA Staff Notice 52-305 *Optional Use of US GAAP and US GAAS by SEC Issuers*
- CSA Staff Notice 52-307 *Auditor Oversight and Financial Statements Accompanied by an Audit Report Dated on or After March 30, 2004*

We are not proposing to amend any other rules, except in Quebec where National Policy 3, *Unacceptable Auditors* is a rule.

Unpublished materials

In proposing amendments to the Instruments, we have not relied on any significant unpublished study, report, or other written materials, except the results of the BAR survey we referred to above.

Request for comments

We welcome your comments on the proposed amendments to the Instruments. In addition to any general comments you may have, we also invite comments on the following specific amendments.

1. *Venture issuers and debt-only issuers* – NI 51-102 distinguishes between venture issuers and issuers that are not venture issuers for some requirements. For example, venture issuers do not have to file annual information forms and have longer to file their financial statements than issuers that are not venture issuers. We made this distinction because we recognized that some

types of issuers and their investors may have different disclosure needs and constraints. We are considering whether issuers that issue only debt to the public merit similar accommodations and, if so, whether or how the listing of debt securities, either on a Canadian or foreign exchange, might alter that consideration. (At present, even a large unlisted reporting issuer of debt is a venture issuer under NI 51-102, but a similar issuer with debt listed on a foreign exchange would not be.) Should debt-only issuers be treated as venture issuers? Should an exchange listing of debt only affect the treatment of the issuer under NI 51-102 and more specifically should a foreign exchange listing of debt only affect the treatment of a Canadian debt-only issuer?

2. *Request form* – We propose amending section 4.6 of NI 51-102 to remove the requirement for issuers to send a request form to their shareholders each year. We have not changed the requirement for issuers to mail their financial statements and MD&A to any shareholder that requests them, or to disclose in the information circular how the shareholders may request the financial statements and MD&A.

- a) Do you agree that we should remove the requirement to deliver an annual request form? Why?
- b) If we retain it, should we amend the requirement to specify
 - (i) when and how an issuer should send the request form, or
 - (ii) the content of the request form?
- c) Are there any other changes we should make to the request form, if we retain it?
- d) If we eliminate the request form, is there an alternative we could propose to replace the request form that would allow shareholders to request the financial statements and MD&A?

3. *Delivery of financial statements* – Under NI 51-102, an issuer must mail its financial statements to any securityholder that requests them. An issuer is exempt from this requirement if it mails its statements to all its securityholders. We propose to clarify in the exemption when the issuer has to deliver the financial statements to rely on the exemption.

We believe the delivery deadline should be the same if an issuer is sending the statements on request, or to all its securityholders under the exemption. We think it is important that securityholders that want paper copies of the financial statements have prompt access to them once they are filed. Their access should not be affected by the issuer relying on an exemption. As we recognize that an issuer may need time to copy the statements after filing them, we have extended the delivery deadline to no later than 10 days after the filing deadline. Do you agree with this change?

4. *Filing of certain documents* – Although we have not proposed specific amendments to Part 12 of NI 51-102, we are considering streamlining it. Under Part 12, an issuer must file

- its articles of incorporation, amalgamation, continuation, other constating document, or by-laws
- copies of securityholder or voting trust agreements, securityholder rights plans, or other documents affecting the rights of securityholders generally
- copies of material contracts entered into outside the ordinary course of business

For each of the above requirements,

- a) Is the filed information useful to investors?
- b) Do the benefits to investors outweigh the costs to issuers complying with the requirement?
- c) Should we eliminate the requirement? Why?

5. *Guidance on Executive Compensation* –NI 51-102 defines “executive officer” to include any person who performed a policy-making function in respect of the issuer. If a reporting issuer’s executive management is provided through an external management company, we would generally consider the executive officers of the external management company to be persons performing policy-making functions in respect of the issuer. Consequently, the requirements in NI 51-102, including the disclosure in Form 51-102 F6 *Statement of Executive Compensation*, that apply to executive officers would generally apply to the executive officers of the external management company.

National Policy 41-201 *Income Trust and Other Indirect Offerings* sets out our views about how the existing regulatory framework applies to non-corporate issuers such as income trusts. It also sets out how we expect an income trust to provide executive compensation disclosure for the executives of the underlying operating entity.

Should we amend Form 51-102F6 to provide additional guidance on these matters, or are the existing instructions sufficient?

Please submit your comments on the proposed amendments to the Instruments in writing on or before March 9, 2006. If you are not sending your comments by email, you should also forward a diskette containing the submissions (in Windows format, Word).

Address your submission to all of the CSA member commissions, as follows:

British Columbia Securities Commission
 Alberta Securities Commission
 Saskatchewan Financial Services Commission – Securities Division
 Manitoba Securities Commission
 Ontario Securities Commission
 Autorité des marchés financiers
 New Brunswick Securities Commission
 Registrar of Securities, Prince Edward Island

Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Deliver your comments **only** to the addresses that follow. Your comments will be forwarded to the remaining CSA member jurisdictions.

Rosann Youck, Chair of the Continuous Disclosure Harmonization Committee
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia
V7Y 1L2
Fax: (604) 899-6814
e-mail : ryouck@bcsc.bc.ca

Anne-Marie Beaudoin, Secretary
Autorité des marchés financiers
Stock Exchange Tower
800 Victoria Square
P.O. Box 246, 22nd Floor
Montréal, Québec
H4Z 1G3
Fax : (514) 864-8381
e-mail : consultation-en-cours@lautorite.qc.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

Questions

Please refer your questions to any of:

Rosann Youck
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
(604) 899-6656 or (800) 373-6393 (if calling from B.C. or Alberta)
ryouck@bcsc.bc.ca

Carla-Marie Hait
Chief Accountant, Corporate Finance
British Columbia Securities Commission
(604) 899-6726 or (800) 373-6393 (if calling from B.C. or Alberta)
chait@bcsc.bc.ca

Michael Moretto
Manager, Corporate Finance
British Columbia Securities Commission
(604) 899-6767 or (800) 373-6393 (if calling from B.C. or Alberta)
mmoretto@bcsc.bc.ca

Mavis Legg
Manager, Securities Analysis
Alberta Securities Commission
(403) 297-2663
mavis.legg@seccom.ab.ca

Patricia Leeson
Senior Legal Counsel, Legal Services & Policy Development Division
Alberta Securities Commission
(403) 297-5222
patricia.leeson@seccom.ab.ca

Charlotte Howdle
Securities Analyst, Capital Markets
Alberta Securities Commission
(403) 297-2990
charlotte.howdle@seccom.ab.ca

Bob Bouchard
Director, Corporate Finance
Manitoba Securities Commission
(204) 945-2555
bbouchard@gov.mb.ca

Bill Slattery
Deputy Director, Corporate Finance and Administration
Nova Scotia Securities Commission
(902) 424-7355
slattejw@gov.ns.ca

David Coultice
Senior Legal Counsel, Corporate Finance
Ontario Securities Commission
(416) 204-8979
dcoultice@osc.gov.on.ca

Lisa Enright
Senior Accountant, Corporate Finance
Ontario Securities Commission
(416) 593-3686

lenright@osc.gov.on.ca

Allison McManus
Accountant, Corporate Finance
Ontario Securities Commission
(416) 593-2328
amcmanus@osc.gov.on.ca

Rosetta Gagliardi
Conseillère en réglementation
Autorité des marchés financiers
(514) 395-0558 ext. 4462
rosetta.gagliardi@lautorite.qc.ca

Ian McIntosh
Deputy Director, Corporate Finance
Saskatchewan Financial Services Commission – Securities Division
(306) 787-5867
imcintosh@sfsc.gov.sk.ca

The text of the proposed amendments follows or can be found elsewhere on a CSA member website.

December 9, 2005

Appendix A

Summary of proposed amendments

NI 51-102

We propose to amend NI 51-102 as follows:

Part 1 Definitions

- to amend the definition of *interim period* and add related definitions to account for issuers with financial years that are not 365 or 366 days long; this addresses differences in the definition of *month* in various *Interpretation Acts* across Canada
- to add a definition of *restructuring transaction* that would apply to disclosure in material change reports and information circulars
- to amend the definition of *venture issuer* to provide that issuers listed on the Alternative Investment Market of the London Stock Exchange are venture issuers; this will replace the blanket orders that some jurisdictions have implemented and make the application of the definition consistent across all jurisdictions

Part 3 Language of documents

- to add a requirement for a certificate as to the accuracy of translations, where a filed document has been translated from a language other than French or English; this is consistent with a requirement in NI 71-102

Part 4 Financial statements

- to eliminate inconsistencies between the interim financial statement filing requirement in section 4.3 and requirements for filings after an issuer becomes a reporting issuer in sections 4.7 and 4.10
- to eliminate the requirement to send a request form, as discussed in this Notice under the heading *Request for comments*
- to clarify the delivery deadline for foreign issuers; this will make the requirement consistent with discretionary relief we have granted
- to clarify the delivery deadline for issuers that send their financial statements to all their shareholders; this will eliminate the current ambiguity in NI 51-102 and ensure shareholders receive financial information promptly
- to clarify who has to file a change in corporate structure notice, and when
- to provide an exemption from having to provide comparative financial information in interim financial statements after a reverse takeover to parallel the exemption that applies after an issuer becomes a reporting issuer

Part 5 Management's discussion & analysis

- to clarify when an issuer does not have to provide MD&A
- to clarify when an SEC issuer has to file a supplement to its MD&A
- to require additional information from an issuer that has invested in a significant business and accounted for it using the equity method; this is consistent with business acquisition reporting for these investments

Part 8 Business acquisition report

- to streamline the business acquisition reporting requirement by
 - clarifying what is a business in connection with interests in oil and gas properties
 - eliminating the requirement for non-venture issuers to test significance at the 40% level
 - requiring only one year of audited financial statements of an acquired business, with unaudited comparative information
 - permitting issuers to average their consolidated income from continuing operations for the income test, even if their consolidated income in their most recently completed financial year was negative
 - permitting issuers to apply the income test based on certain previously filed pro forma financial information
 - providing additional exemptions from the interim financial statement requirements for an acquired business
 - eliminating the asset test and revising the income test for acquisitions of interests in oil and gas properties, unless the acquisition is of securities of another issuer
 - eliminating the requirement for a compilation report on pro forma financial statements
- to ensure that the acquired business's most recent annual financial statements are included in the business acquisition report and to give more time to file the report in some circumstances

Part 11 Additional filing requirements

- to add a requirement for an issuer to file a copy of certain documents it filed with another securities regulatory authority in Canada
- to add a requirement for an issuer to issue a press release if it is determined that the issuer filed a document that is materially deficient

Part 13 Exemptions

- to expand the exemptions in Part 13 to reflect discretionary relief we have granted since we implemented NI 51-102

Form 51-102F1 Management's Discussion and Analysis

We propose to amend the Form 51-102F1 as follows:

- to require an issuer to disclose and discuss material differences between actual results for the historical period to which its MD&A relates and future oriented financial information for that period that the issuer previously released to the public
- to eliminate the requirement to provide a sensitivity analysis relating to critical accounting estimates in every case and replace it with instructions relating to quantitative and qualitative disclosure; this amendment is subject to results from staff's continuing review of issuers' MD&A disclosure of their sensitivity analysis
- to clarify in the instructions how an issuer applies the principle of updating its annual MD&A in its interim MD&A in various circumstances

Form 51-102F2 Annual Information Form

We propose to amend Form 51-102F2 as follows:

- to clarify in the instructions how and when an issuer must disclose cease trade orders, bankruptcies, penalties or sanctions relating to its directors, executive officers and significant securityholders
- to require an issuer to disclose any penalties or sanctions imposed against, it or settlement agreements it entered into, during the financial year
- to require an issuer to disclose how its securityholders may contact the issuer to request the financial statements and MD&A; this would be in place of the request form

Form 51-102F3 Material Change Report

We propose to amend Form 51-102F3 to require an issuer to provide prospectus-level disclosure about restructuring transactions. This requirement would not apply if the issuer already sent an information circular or filed a prospectus or securities exchange takeover bid circular in respect of the transaction.

Form 51-102F4 Business Acquisition Report

We propose to amend Form 51-102F4 by permitting an issuer to incorporate information into the BAR by reference, including financial statements.

Form 51-102F5 Information Circular

We propose to amend Form 51-102F5 as follows:

- to require an issuer to provide the same penalties or sanctions disclosure about prospective directors that it must provide in the annual information form

- to provide that an issuer has to disclose executive compensation only if it is sending the information circular for an annual general meeting or a meeting at which directors will be elected
- to clarify when prospectus-level disclosure must be provided, and about which issuers
- to expand the exemption from the prospectus-level disclosure requirement for an issuer listed on the TSX Venture Exchange

CP 51-102

The proposed amendments to CP 51-102 reflect the changes to NI 51-102 described above and provide further guidance on how to interpret and apply NI 51-102.

NI 52-107

We propose to amend NI 52-107 to clarify the exemptions for financial statements of SEC issuers and foreign issuers.

NI 71-102

We propose to amend NI 71-102 to expand the exemptions from insider reporting to insiders of issuers that are SEDI issuers.

Appendix I

Authority for amendments – Ontario

In Ontario, the following provisions of the *Securities Act* (the Act) provide the Ontario Securities Commission (OSC) with authority to make the amendments.

Paragraph 143(1)22 authorizes the OSC to prescribe requirements in respect of the preparation and dissemination and other use, by reporting issuers, of documents providing for continuous disclosure that are in addition to the requirements under the Act, including requirements in respect of an annual report, an annual information form and supplemental analysis of financial statements.

Paragraph 143(1)23 authorizes the OSC to exempt reporting issuers from any requirement of Part XVIII (Continuous Disclosure) of the Act.

Paragraph 143(1)24 authorizes the OSC to require issuers or other persons and companies to comply, in whole or in part, with Part XVIII (Continuous Disclosure), or rules made under paragraph 143(1)22 of the Act.

Paragraph 143(1)25 authorizes the OSC to prescribe requirements in respect of financial accounting, reporting and auditing for the purposes of the Act, the regulations and the rules.

Paragraph 143(1)26 authorizes the OSC to prescribe requirements for the validity and solicitation of proxies.

Paragraph 143(1)38 authorizes the OSC to prescribe requirements in respect of reverse take-overs including requirements for disclosure that are substantially equivalent to that provided by a prospectus.

Paragraph 143(1)39 authorizes the OSC to make rules requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by the Act, the regulations or the rules and all documents determined by the regulations or the rules to be ancillary to the documents, including financial statements, proxies and information circulars.

Paragraph 143(1)44 authorizes the OSC to vary the Act to permit or require the use of an electronic or computer-based system for the filing, delivery or deposit of:

- i. documents or information required under or governed by the Act, the regulations or rules, and
- ii. documents determined by the regulations or rules to be ancillary to documents required under or governed by the Act, the regulations or rules.

Paragraph 143(1)49 authorizes the OSC to vary the Act to permit or require methods of filing or delivery, to or by the OSC, issuers, registrants, security holders or others, of documents,

information, notices, books, records, things, orders, authorizations or other communications required under or governed by Ontario securities laws.

Paragraph 143(1)56 authorizes the OSC to make rules providing for exemptions from or varying any or all time periods in the Act.