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Notice and Request for Comment

Proposed Repeal and Replacement of
National Instrument 44-101 *Short Form Prospectus Distributions,*
Form 44-101F3 *Short Form Prospectus* and
Companion Policy 44-101CP *Short Form Prospectus Distributions*

January 7, 2005

INTRODUCTION

We, the Canadian Securities Administrators ("CSA") are publishing for a 90 day comment period the following draft documents:

- amended and restated National Instrument 44-101 *Short Form Prospectus Distributions* ("Proposed NI 44-101");
- amended and restated Form 44-101F1 *Short Form Prospectus* ("Proposed Form 1"); and
- amended and restated Companion Policy 44-101CP *Short Form Prospectus Distributions* (the "Proposed CP");

(collectively, the "Proposed Rule").

The text of the Proposed Rule is being published concurrently with this notice and can be obtained on websites of CSA members, including the following:

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

The Proposed Rule is intended to replace the current short form prospectus distribution rule and related forms and companion policy (collectively, the "Current Rule") that came into effect in all CSA jurisdictions on December 31, 2000.

We are also proposing to make consequential amendments to certain other national instruments. Please see the CSA's Notice and Request for Comment "Consequential Amendments Arising from the Proposed Repeal and Replacement of National Instrument 44-101 *Short form Prospectus Distributions*: Amendments to National Instrument 44-102 *Shelf Distributions*, National Instrument 44-103 *Post-Receipt Pricing*, National Policy 43-201 *Mutual Reliance*

Review System for Prospectuses and Annual Information Forms and National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*", which is being published concurrently with this notice.

We request comments by April 8, 2005. Target implementation of the Proposed Rule is July 2005. Depending in part on the comments received, the amendments proposed may be adopted in their entirety or in part.

BACKGROUND

Current Short Form Prospectus System

National Instrument 44-101 *Short Form Prospectus Distributions* ("Current NI 44-101") was implemented on December 31, 2000 as a reformulation and replacement of National Policy Statement No. 47 *Prompt Offering Qualification System* ("NP47"). The Current Rule prescribes conditions for the use of a short form prospectus to distribute securities to the public. The system was designed to enable qualifying issuers to respond more quickly and efficiently to market opportunities without diminishing the information and protection available to investors, by reducing the disclosure otherwise required to be included in a prospectus and streamlining the regulatory review of such prospectus. The short form prospectus, Form 44-101F3 (the "Current Form"), incorporates by reference, rather than restates, information contained in the issuer's annual information form ("AIF"), financial statements and other continuous disclosure ("CD"). In addition, Current NI 44-101 sets out qualification criteria that emphasize the filing and review of an initial AIF and prescribes additional requirements meant to enhance and update the CD requirements, as they existed in 2000, including requiring business acquisition financial statement disclosure.

Regulatory and Other Developments

The Current Rule is premised on the securities regulatory environment as it existed in 2000. Since then, there have been a number of important regulatory and technical developments affecting the information available to the public. Key regulatory developments include the following:

1. the adoption on March 30, 2004 of National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102");

2. the anticipated adoption early in 2005 of National Instrument 81-106 *Investment Fund Continuous Disclosure* ("NI 81-106", and together with NI 51-102, the "CD Rules"); and

3. the implementation and continued refinement of the harmonized CD review program (the "CDR Program")[1] by many CSA jurisdictions and the progress made by the CSA to enhance consistency in the scope and level of reviews carried out by staff across Canada.

NI 51-102 has enhanced and harmonized CD requirements for reporting issuers other than investment funds, and NI 81-106 will achieve the same result for investment funds. We

[1] See CSA Staff Notice 51-312 *Harmonized Continuous Disclosure Review Program*, dated July 16, 2004.

anticipate that issuers' CD will improve in response to the CSA's increased focus and allocation of resources on CD review. In addition, advances in technology, including the inception and growth of the Internet and the development of the CSA's *System for Electronic Document Analysis and Retrieval* ("SEDAR"), have enhanced investor access to CD. Because the requirements of and access to CD have been so enhanced, we believe that the public offering system for some issuers could be simplified without diminishing investor protection.

Purpose and Substance of the Proposed Rule

If adopted, the amendments reflected in the Proposed Rule will

- streamline the system established under the Current Rule;
- eliminate duplication and inconsistencies with the CD Rules; and
- modify eligibility, disclosure and other requirements in a manner consistent with other developments and initiatives of the CSA.

The proposed changes represent our attempt to more fully integrate the disclosure regimes for the primary and secondary markets. We have also attempted to address deficiencies or ambiguities in the Current Rule which we have identified over the past four years. Finally, we have proposed revisions to the qualification criteria that would allow more issuers that are compliant with the CD Rules to participate in the system.

Expansion of Eligibility

As part of this publication, the CSA is considering and seeking comment on an alternative and much broader set of basic qualification criteria in the short form prospectus system. This proposal is premised on the view that Toronto Stock Exchange- or TSX Venture Exchange-listed issuers who have an operating business and maintain up-to-date CD relating to this business should, regardless of their market capitalization or the amount of time they have been reporting issuers, be able to access the capital markets in a more efficient and streamlined manner based on their comprehensive public disclosure. This proposal is consistent with the 2000 Concept Proposal discussed below, and is set out in Proposed NI 44-101 as an alternative set of qualification requirements (referred to as "Alternative B").

The Integrated Disclosure System Concept Proposal

In January 2000, the CSA published a Concept Proposal (the "2000 Concept Proposal") for an Integrated Disclosure System ("IDS").[2] The 2000 Concept Proposal contemplated a streamlined offering system that was designed to fit within existing provincial securities legislation, but would require participating issuers to significantly enhance their CD. After publishing the 2000 Concept Proposal and receiving and reviewing comments on the proposal, the CSA focussed its attention on the harmonization and enhancement of CD requirements and CD review. This focus has resulted in the implementation of the CD Rules, which have enhanced CD requirements for all issuers. Many of the CD enhancements included in the 2000 Concept Proposal have been implemented through the CD Rules. Other enhancements contemplated in the 2000 Concept Proposal have and will be implemented through Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and Multilateral Instrument 52-110 *Audit*

[2] CSA Notice and Request for Comment 44-401, 51-401.

Committees (the "Audit Committee Rule"), and through the implementation and continued refinement of the CDR Program.

The establishment of this "new" CD regime creates a comprehensive national standard for CD for all reporting issuers in Canada and thereby forms an appropriate foundation on which to build an integrated disclosure system. In publishing the Proposed Rule, and particularly the proposed Alternative B qualification criteria, the CSA is proposing significant changes to the current short form prospectus system. These changes are consistent with, and in some cases derived from, the ideas expressed in the 2000 Concept Proposal and are supported by the comments received on the 2000 Concept Proposal.

Our goal in amending the Current Rule is to harmonize and integrate the short form prospectus regime with the new CD regime and to create, to the extent possible, a universal, seamless, integrated and expedited offering system consistent with the objectives underlying the 2000 Concept Proposal.

We received 23 comment letters on the 2000 Concept Proposal. Attached as Appendix A to this Notice is a summary of those comments together with our responses to the comments. Where applicable, our responses to comments will reference the changes we are proposing in the Proposed Rule. Later in this Notice under the heading "REQUEST FOR COMMENT - Next Steps in Prospectus Regulation" we address other potential changes to our prospectus regimes that are not reflected in the Proposed Rule. These include the potential elimination of the requirements for preliminary prospectuses and regulatory prospectus review as well as changes to the current rules governing the marketing of distributions.

Multijurisdictional Disclosure System

A short form prospectus prepared and filed under the Current Rule would generally qualify as a home jurisdiction document for an offering of securities under the U.S. multijurisdictional disclosure system ("MJDS"). We believe that the proposed changes to the Current Rule will not adversely affect the use of a short form prospectus as a home jurisdiction document under U.S. securities law. An issuer planning to use a short form prospectus as a home jurisdiction document must satisfy the general eligibility requirements of the MJDS registration statement forms in addition to being eligible to use a short form prospectus, and so none of the proposed changes to the qualification criteria in Part 2 of Proposed NI 44-101 should have any impact on the availability to issuers of the MJDS.

SUMMARY OF CHANGES TO THE CURRENT RULE

The Current Rule continues to be in force in all Canadian jurisdictions. If the Proposed Rule is adopted, it will replace the Current Rule. The most significant changes to the Current Rule are summarized as follows:

- Eliminating the AIF filing and acceptance procedure, as all reporting issuers, except *venture issuers* (as defined in NI 51-102), are now or will be subject to a mandatory AIF requirement under the CD Rules. Proposed NI 44-101 retains the requirement that an issuer - including a venture issuer - have a current AIF to be eligible to use the short form

prospectus distribution system, but effectively incorporates the AIF form and filing requirements provided for under the CD Rules.

- Eliminating the detailed requirements relating to significant acquisitions, as eligible issuers are now subject to a mandatory Business Acquisition Report ("BAR") requirement under NI 51-102.

- Changing the requirements for auditor's consent letters and compilation reports and eliminating certain auditor's comfort letters as a result of the development of CICA Handbook section 7110 *Auditor Involvement with Offering Documents of Public and Private Entities* and the BAR requirements under NI 51-102.

- Clarifying certain issues and addressing questions that have arisen since the Current Rule came into force.

Summary of Proposed Amendments

The mandatory elements of the Proposed Rule are set out in Proposed NI 44-101 and Proposed Form 1. Proposed Form 1 also contains instructions to guide users. The Proposed CP provides explanation and additional guidance relating to Proposed NI 44-101 and Proposed Form 1.

Proposed NI 44-101

Part 1 Definitions and Interpretation of Proposed NI 44-101 identifies defined terms used in Proposed NI 44-101, Proposed Form 1 and the Proposed CP. A number of defined terms have been redefined with reference to NI 51-102 or, if applicable, NI 81-106, as the short form prospectus offering system is designed to build on the CD Rules. In addition, we have been able to remove a number of defined terms because we deleted a number of the substantive provisions of the Current Rule. Of particular note is the elimination of the significance tests for "significant acquisitions" and related provisions. We added the definition of "short form eligible exchange" in connection with the Alternative B qualification criteria, discussed below.

Part 2 Qualification to File a Prospectus in the Form of a Short Form Prospectus of Proposed NI 44-101 sets out the qualification criteria for issuers wishing to use the short form prospectus distribution system. The transitional provisions relating to NP47 that appear in Current NI 44-101 have been removed, as they became unnecessary with the passage of time.

We have included in Proposed NI 44-101 two alternative versions of Part 2. The first version ("Alternative A") represents a substantive continuation of the qualification requirements in the Current Rule after making amendments to harmonize those requirements with the CD Rules and other regulatory developments. Alternative B represents a significant shift in qualification requirements from the Current Rule.

Alternative A

Section 2.2 sets out the basic qualification criteria for eligibility to participate in the short form distribution system. They include being a SEDAR filer, having been a reporting issuer for the past 12 months in at least one jurisdiction in Canada, having filed all required CD documents, having a current AIF and current annual financial statements,

having a minimum market capitalization of $75,000,000 within 60 days of the date of filing the preliminary short form prospectus, and having filed a one-time notice of intention to be qualified to distribute securities under the short form offering system.

The adoption by most Canadian jurisdictions of the reporting issuer concept has allowed us to remove the separate qualification criteria that are included in the Current Rule for issuers who are based in a jurisdiction that does not have that concept. The following changes were also made to the basic eligibility criteria:

1. With the universal adoption of SEDAR, CD documents are accessible electronically to investors in other jurisdictions. SEDAR participation has been added as an eligibility criterion to ensure broad accessibility.

2. We have changed the 12-month "seasoning" requirement to tie into the date of filing the preliminary short form prospectus rather than the date of the most recent AIF. AIF filing deadlines are now imposed under the applicable CD Rule and so most AIFs will be filed once annually, whereas under the Current Rule an issuer could file an AIF at any time throughout the year. Accordingly, for practical purposes, the seasoning period requirement remains the same.

3. We added the requirement that the issuer have filed all required CD documents. This replaces section 10.6 of Current NI 44-101, which prohibits the filing of a preliminary short form prospectus or short form prospectus while the issuer is in default of filing or delivering to the regulator a document required to be filed or delivered under securities legislation. That prohibition is intended to ensure the completeness of the short form issuer's CD record and, in our view, is more appropriately framed as a qualification criterion.

4. We removed the provisions accelerating the filing deadlines for annual financial statements. The CD Rules have shortened the filing deadlines. Having the same filing deadlines for CD and prospectus purposes increases the integration of information available to primary and secondary market participants.

5. We continued the existing requirements to have a current AIF and current annual financial statements, but reframed those requirements to reflect the implementation of NI 51-102 and expected implementation of NI 81-106.

6. We added a one-time notice requirement to address the need for regulators and other market participants to be able to identify which filers are potentially short form issuers. This information is needed to, among other things, monitor the issuer's status under the CDR Program.

These changes to the basic eligibility criteria are generally reflected throughout the various other qualification criteria as well.

Section 2.3 of Proposed NI 44-101, like its counterpart in Current NI 44-101, provides alternative qualification criteria for an issuer that does not have a 12-month reporting

issuer history. It allows a "significant issuer" to participate in the short form prospectus system on the basis of a $300 million market capitalization.

Section 2.4 of Proposed NI 44-101 contains the qualification criteria for issuers of approved rating non-convertible securities.

Section 2.5 sets out the alternative qualification criteria for issuers of guaranteed non-convertible debt securities, preferred shares and cash settled derivatives. We amended this provision to permit U.S. credit supporters that do not have a $75,000,000 minimum market capitalization on an exchange in Canada, but who have non-convertible securities that have received an approved rating, to be eligible to act as credit supporters for issuers incorporated in a jurisdiction in Canada. Permitting these U.S. credit supporters to be eligible to act as credit supporters is consistent with the exemptive relief that the securities regulatory authorities or regulators have frequently granted in the past.

Section 2.6 provides the alternative qualification criteria for issuers of guaranteed convertible debt or preferred shares.

Section 2.7 is the alternative qualification criteria for issuers of asset-backed securities.

We removed section 2.8 of Current NI 44-101, which provides alternative qualification criteria following reorganizations. We incorporated its substance into section 2.9 of Proposed NI 44-101, which is discussed below.

Section 2.8 of Proposed NI 44-101 remains unchanged from section 2.9 of Current NI 44-101 and deals with calculation of the aggregate market value of an issuer's securities.

Section 2.9 of Proposed NI 44-101 provides exemptions from the requirements to have current annual financial statements and a current AIF for new reporting issuers and successor issuers. The exemptions further harmonize the Proposed Rule with the CD Rules. The alternative qualification criteria following reorganizations in Current NI 44-101 have led to many applications for exemptive relief and requests of staff for clarifications.

The exemptions are available to those issuers who are not otherwise exempt from the requirements under the CD Rules to file the documents in question, but have not yet been required by the passage of time to file them. The exemptions are conditional on the issuer having filed another disclosure document, such as a prospectus or an information circular, which includes the information that would have been required to be disclosed in the annual financial statements or AIF.

Section 2.9 also provides a successor issuer with an exemption from a portion of the seasoning period provided at least one of the participants to the reorganization that produced the successor issuer was a reporting issuer during the applicable period.

Alternative B

Alternative B in Proposed NI 44-101 would broaden access to the short form prospectus system by eliminating the seasoning requirement and the quantitative (size) requirement from the qualification criteria.

> "*Seasoning*" *Requirement*
>
> Alternative B is consistent with the CSA view that the other eligibility requirements, particularly compliance with all timely and periodic filing requirements under applicable securities legislation (including the CD Rules), are sufficiently rigorous that a seasoning requirement is not essential.
>
> We note that the 2000 Concept Proposal did not include a seasoning requirement as part of IDS because the proposed IDS would have required issuers to provide an enhanced standard of disclosure to secondary market investors that would also be available to investors in the primary market. With the implementation of the CD Rules and the CDR Program, which have superseded the enhanced standard of disclosure called for in the 2000 Concept Proposal, all reporting issuers are now subject to a level of CD and of CD reviews by their principal regulators that will support short form offering documents without imposing a seasoning period.
>
> *Quantitative (Size) Requirement*
>
> In developing Alternative B, the CSA rejected quantitative measures, such as an issuer's market capitalization, as a condition of eligibility. This is also consistent with the approach advanced in the 2000 Concept Proposal.
>
> Excluding issuers on the grounds of size alone is inconsistent with the CSA'S objective of broad market efficiency. Given the enhanced disclosure standards under the CD Rules, investors can benefit from the inclusion in the system of issuers of all sizes.

Although the CSA removed the seasoning requirement and the market capitalization requirement from the basic qualification criteria in Alternative B, it maintained a listing requirement. The basic qualification criteria are structured to allow most Canadian listed issuers to participate in the short form prospectus offering system, provided their disclosure record provides investors with satisfactory and sufficient information about the issuer and its business, operations and capital. The system would not, however, be available to an issuer whose principal asset is its exchange listing.

In Alternative B, through the definition of "short form eligible exchange", we have maintained the Canadian listing requirement that is in the Current Short Form Rule. We considered expanding eligibility to reporting issuers whose equity securities are listed only on a foreign exchange, provided that the foreign exchange's listing requirements ensured the issuer had a business and operations. However, we are not, at this time, proposing this additional expansion of eligibility. Based on the CSA's experience with the Current Short Form Rule, we do not believe that reporting issuers who are not listed on a Canadian exchange are likely to want to raise capital using the short form regime.

In Alternative B, the CSA have maintained a minimum approved rating requirement in the alternative qualification criteria based on the types of securities being issued (such as debt or asset-backed securities).

All other changes in Alternative B of section 2 are either consistent with the proposed changes in Alternative A or result from the removal of the seasoning or minimum market capitalization requirement.

We have removed the following portions of Current NI 44-101 from Proposed NI 44-101 for the following reasons:

1. Part 3 *AIF* of Current NI 44-101 mandates the form of AIF and sets out certain requirements and procedures relating to the filing of AIFs and supporting documents, and review and amendment of AIFs. These provisions have been superseded by NI 51-102 and its AIF requirements for reporting issuers other than investment funds, and will be superseded by the corresponding requirements in NI 81-106 for investment funds.

2. Part 4 *Disclosure in a Short Form Prospectus of Financial Statements for Significant Acquisitions* and Part 5 *Financial Statement Disclosure for Multiple Acquisitions That are Not Otherwise Significant or Related* – The financial statement disclosure requirements for significant acquisitions and multiple acquisitions have been replaced by reliance on the BAR requirements set out in the CD Rules. Proposed Form 1 requires the issuer to incorporate by reference any BARs filed since the beginning of the issuer's most recently completed financial year for which an AIF has been filed (either directly or through the incorporation by reference of the issuer's current AIF, which in turn incorporates by reference certain BARs). In some cases, if the issuer was not required to file a BAR, Proposed Form 1 requires comparable disclosure to be included in the short form prospectus. Although Proposed NI 44-101 does not generally accelerate the requirement to file a BAR, Proposed Form 1 requires a summary of significant acquisitions completed within 75 days prior to the short form prospectus for which a BAR has not been filed, and of certain proposed significant acquisitions.

3. Part 6 *Pro Forma Financial Statement Disclosure for Significant Dispositions* of Current NI 44-101 has been removed because the CICA has issued Handbook Section 3475 *Disposals of Long-Lived Assets and Discontinued Operations*, which expands the scope of disposition activities that require discontinued operations disclosure, thus requiring that the issuer's financial statements include the disclosure previously required by Part 6 of Current NI 44-101.

4. Part 7 *GAAP, GAAS, Auditor's Reports and Other Financial Statement Matters* of Current NI 44-101, which deals with generally accepted accounting principles, generally accepted auditing standards and other financial statement matters, has been deleted. These requirements have been included in National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* ("NI 52-107"), which is applicable to all issuers. The Part will be largely eliminated as a result of implementing consequential amendments to Current NI 44-101 relating to NI 52-107.

The remaining provisions will become unnecessary under Proposed NI 44-101 because of the new definition of *current financial statements*.

5. Part 8 *Audit Committee Review of Financial Statements Included in a Short Form Prospectus* has been replaced by a similar requirement under the Audit Committee Rule.

Part 3 Deemed Incorporation by Reference of Proposed NI 44-101 remains substantively unchanged from what is presently Part 9 of Current NI 44-101. It addresses the deemed incorporation by reference of filed and subsequently filed documents in a short form prospectus.

Part 4 Filing Requirements for a Short Form Prospectus of Proposed NI 44-101 contains provisions relating to the filing requirements and procedures for a short form prospectus and the distribution of securities under a short form prospectus that are substantially similar to the requirements set out in Part 10 of Current NI 44-101, but does reflect some changes. In particular,

1. We expanded the scope of the qualification certificate filed with the preliminary short form prospectus to certify that all previously unfiled material incorporated by reference into the short form prospectus is being filed with the preliminary short form prospectus. The filing of that material is no longer a qualification criterion but remains a filing requirement. The qualification certificate provides staff with an efficient way of confirming that the filing of the preliminary short form prospectus, including documents incorporated by reference, has been completed. We have also expanded the certificate to require the issuer to specify the qualification criteria it is relying on for eligibility.

2. We added a requirement, in connection with the filing of both a preliminary short form prospectus and a short form prospectus, that effectively accelerates the requirement under the applicable CD Rule to file certain material documents. This replaces the existing requirement to deliver all material contracts to the regulator and harmonizes the filing requirement with the CD Rule.

3. We removed the requirement to file technical reports and certificates prepared in accordance with National Policy Statement 2-B, *Guide for Engineers and Geologists Submitting Oil and Gas Reports to Canadian Provincial Securities Administrators*, because that instrument has been replaced by NI 51-101 *Standards of Disclosure for Oil and Gas Activities*. No additional filings are required.

4. We eliminated the requirement to file "other mining reports" with the short form prospectus, as those reports are already required to be filed with the preliminary short form prospectus.

5. We removed the requirement to file an auditor's comfort letter regarding unaudited financial statements with the final short form prospectus. CICA Handbook Section 7110 - *Auditor Involvement with Offering Documents of Public and Private Entities* sets out the auditor's professional responsibilities when the auditor is involved with a prospectus or other securities offering document and requires that the auditor perform various procedures prior to consenting to the use of its report or opinion, including reviewing

unaudited financial statements included in the document. Furthermore, the issuer is ultimately responsible for ensuring that the short form prospectus provides full, true and plain disclosure.

6. We added a requirement for the issuer to deliver to the regulators, no later than the filing of a short form prospectus, an undertaking to file the periodic and timely disclosure of certain credit supporters. Although the credit supporter is not, simply by providing the guarantee or alternative credit support, issuing a security, investors will nonetheless need periodic and timely disclosure relating to that credit supporter to make informed investment decisions in the secondary market.

7. We amended the provisions dealing with the language of documents to reflect and clarify current practice.

8. We replaced the prohibition, presently in section 10.6 of Current NI 44-101, against filing a short form prospectus while the issuer is in default of filing any required document under securities legislation, with a qualification requirement that all disclosure filings be up to date, as discussed above.

9. The requirement to make all material contracts available for inspection during the distribution has been eliminated. Material documents are now filed on SEDAR and therefore available for public inspection on a continuous basis.

Part 5 Amendments to a Short Form Prospectus of Proposed NI 44-101 addresses amendments to a short form prospectus, and largely continues the provisions of Part 11 of Current NI 44-101. We clarified the distinction between short form prospectuses and preliminary short form prospectuses for the purpose of that Part. The requirement to file an updated consent letter with an amendment has been revised to be consistent with the changes made to the filing requirements and to clarify that the consent must be dated the same date as the amendment. The provision relating to updated auditor's comfort letters was corrected to refer to the delivery, rather than filing, of a comfort letter.

Part 6, Non-Fixed Price Offerings and Reduction of Offering Price Under Short Form Prospectus of Proposed NI 44-101 is unchanged from Part 12 of Current NI 44-101.

Part 13 Circulars of Current NI 44-101 has been removed from Proposed NI 44-101. Part 13 generally provides that certain issuers can include their short form prospectus disclosure in a take-over bid, issuer bid or information circular, to satisfy the disclosure requirements of these circulars. We removed Part 13 because it merely restates what is already permitted under the applicable take-over bid and issuer bid forms when the issuer is entitled to use the short form prospectus system and Form 51-102F5 *Information Circular* permits all issuers to incorporate information by reference.

Part 7 Solicitations of Expressions of Interest of Proposed NI 44-101 provides relief on a national basis from securities legislation so issuers can solicit expressions of interest before filing a preliminary prospectus for a bought deal. It is substantially the same as Part 14 of Current NI 44-101, but extends the period within which the underwriting agreement must require the filing

of a preliminary short form prospectus from two business days to up to four business days. This change attempts to address the recurring situation in which issuers are unable to file a preliminary short form prospectus in time to receive a receipt no later than two business days after the execution of an underwriting agreement. Issuers and underwriters should be able to negotiate an appropriate period (up to a four day period) during which a preliminary prospectus must be filed and receipted. One consequence of this change is to extend the period during which pre-marketing of a bought deal can occur to up to four days. We have also eliminated the distinction between MRRS filings and non-MRRS filings.

Part 8 Exemption of Proposed NI 44-101 sets out the requirements for applications for exemptions and the manner in which the granting of an exemption may be evidenced, and remains substantially unchanged from Part 15 of Current NI 44-101. It has been amended to reflect the ability of the securities regulatory authority in Alberta to grant such exemptions, and to eliminate the transitional provisions relating to NP 47.

Part 9 Effective Date and Transition of Proposed NI 44-101 provides some transitional provisions to assist issuers in determining which version of the instrument to proceed under.

Appendix A has been updated with respect to contact information, the information to be provided for foreign residents, and to comply with new privacy legislation.

Form 44-101F1 ("Proposed Form 1")
Proposed Form 1 is the proposed form for a short form prospectus under the Proposed Rule.

Item 1 Cover Page Disclosure of Proposed Form 1 addresses required cover page disclosure. Several items have been added or moved:

1. We moved the requirement to state that information has been incorporated by reference in the prospectus from Section 12.4 of the Current Form to Section 1.3. This change places the statement on the cover page of the short form prospectus, rather than leaving its placement to the issuer's discretion. We believe that consistency in placement will be useful to readers of the short form prospectus, and reflects developing practice.

2. We moved the requirement, presently in Item 2.1 of the Current Form, to state the full corporate name and address of the issuer, to Item 1.5. This reflects our view that this information should be on the cover page.

3. We deleted certain requirements from Section 1.6 (Section 1.4 of the Current Form) relating to disclosure of securities issued or to be issued to the underwriters. They are now included in the proposed new underwriters' position chart in Section 1.10.

4. Section 1.9 (Section 1.7 of the Current Form) has been amended to require expanded disclosure relating to the implications of the absence of a market for the securities being distributed, where applicable.

5. We amended Section 1.10 (Section 1.8 of the Current Form) to include a chart describing the over-allotment, compensation and other options and securities to be distributed under

the prospectus or otherwise held by the underwriters and professional group. We believe that this chart will provide investors and other prospectus users with plain disclosure, in one central location, about the underwriters' securities compensation and position, most of which is already required to be disclosed in various parts of the Current Form.

6. We added Section 1.12 to require disclosure, in appropriate circumstances, concerning the ability of holders of restricted securities to participate in a takeover bids. This disclosure is consistent with requirements already in place in some jurisdictions.

Item 2 Name of Issuer and Intercorporate Relationships of the Current Form is deleted as it duplicates information now contained in the form of AIF under the applicable CD Rule.

Item 2 Summary Description of Business of Proposed Form 1 requires a summary description of the business, and is unchanged from Item 3 of the Current Form.

Item 3 Consolidated Capitalization of Proposed Form 1 is updated from Item 4 of the Current Form, and refers to financial statements filed under the applicable CD Rule. We have also removed the requirement in the Current Form to include the content of a news release disseminating financial information, as that requirement duplicates a requirement in Item 11 of Proposed Form 1.

Item 4 Use of Proceeds of Proposed Form 1 is updated from Item 5 of the Current Form, and in Subsection 4.2(2) mandates additional disclosure concerning use of proceeds. If more than 10 percent of the net proceeds of the distribution will be used to reduce or retire indebtedness that was incurred within the two preceding years, the issuer must identify the principal purposes for which the proceeds of the indebtedness were used and, if the creditor is an insider, associate or affiliate of the issuer, identify the creditor and the nature of the relationship to the issuer and the outstanding amount owed.

The language of this new requirement is identical to the language of Section 7.7 of Ontario Securities Commission Form 41-501F1 *Information Required in a Prospectus* and section 7.7 of Schedule 1 to Québec Policy Statement Q-28, *General Prospectus Requirements*. This type of disclosure is relevant for investors because making an informed investment decision requires an understanding of the extent to which a significant amount of the offering proceeds will be used to reduce or retire existing debt. It is also important for investors to be provided with details relating to debt that is incurred with a creditor that is an insider, associate or affiliate of the issuer.

The importance of this type of disclosure has come to our attention particularly in the context of income trust offerings, where investors typically make their investment decisions based on the ability of the issuer to provide a consistent stream of distributable cash. The ability of the issuer to generate that consistent stream may be affected by the amount and terms of existing debt, as well as by the extent to which an issuer will need to renegotiate that debt, or put alternate financing arrangements in place after the offering. An investor will be in a better position to make this evaluation if the information requested in Subsection 4.2(2) is provided. Although this issue came to our attention in the context of income trust offerings, we believe that the disclosure

is equally relevant in other offerings, as it will assist investors in all offering scenarios to better evaluate their investment decision.

Item 5 Plan of Distribution is an update of Item 6 of the Current Form and remains substantially unchanged. We have added to the disclosure requirements in respect of an offering with a minimum distribution such that if a minimum amount of funds is required under the issue and the securities are to be distributed on a best efforts basis, the short form prospectus must state that funds received from subscribers before the distribution is complete will be held in trust. If the minimum amount of funds is not raised, the funds will be returned to the subscribers unless the subscribers have given other instructions. We understand this is market practice and this should be disclosed in the short form prospectus. This is consistent with the requirement under long form prospectus offerings.

We have also moved into this item a requirement, presently in Item 8 of the Current Form, to disclose any constraints imposed on ownership of securities of the issuer in relationship to a required level of Canadian ownership.

Item 6 Earnings Coverage Ratios of Proposed Form 1 is amended from Item 7 of the Current Form to reflect the implementation of NI 52-107, to address recent changes to the accounting rules which may require certain debt obligations to be classified as current liabilities, and to clarify the requirements and the transition year expectations where there has been a change in year end.

Item 7 Description of Securities Being Distributed has been updated from Item 8 of the Current Form to harmonize with the CD Rules. In particular, the term "share" has been replaced with "equity security", and the issuer need not duplicate information concerning particular securities that is already included in a document incorporated by reference in the short form prospectus. Section 7.7 has been added to address disclosure concerning "restricted securities". These requirements are already part of the legislation in a number of CSA jurisdictions, and are consistent with provisions contained in NI 51-102. Section 7.9 has been expanded to refer specifically to stability ratings for securities, and is consistent with National Policy 41-201 *Income Trusts and Other Indirect Offerings*. Finally, Section 8.8 of the Current Form, which requires disclosure of constraints imposed on the ownership of securities, has been relocated to Item 5 *Plan of Distribution* as Section 5.9 of Proposed Form 1.

Section 7.6 requires issuers to disclose that a contractual right of action for rescission is available to holders of Special Warrants who receive underlying securities under a short form prospectus. Section 7.6 codifies existing requirements in many jurisdictions.

In *Item 8 Selling Securityholder* of Proposed Form 1, we removed paragraphs 6 and 7 from Section 8.1 (9.1 in the Current Form) because we do not consider them to be material information for an investor or prospective investor.

Item 9 Resource Property of Proposed Form 1 is amended to remove from Section 9.1 reference to the "old" form of AIF (current Form 44-101F1) that is being deleted as part of the amendments.

Item 10 Significant Acquisitions of Proposed Form 1 is amended from Item 11 of the Current Form to reflect the incorporation by reference of previously filed BARs. The requirement under NI 51-102 to file a BAR in respect of a significant acquisition is not accelerated. However, this item requires a summary to be provided of any significant acquisition that was completed within 75 days prior to the date of the short form prospectus and for which a BAR has not been filed, and of certain proposed significant acquisitions that meet an objective test of "highly likely". The issuer is also required to include in the short form prospectus the financial statements that would be required in a BAR if the transaction in question is a reverse takeover, or if the inclusion of the financial statements is necessary in order for the short form prospectus to contain full, true and plain disclosure. The maximum number of years for which historical financial statements must be included in a prospectus for a significant transaction is, accordingly, reduced to two, from the maximum of three years contemplated in the Current Form, consistent with the BAR requirement.

Item 11 Documents Incorporated By Reference is updated from Item 12.1 of the Current Form to provide for the mandatory incorporation by reference of the appropriate CD documents filed under the CD Rules. We also added a requirement in Section 11.1 to incorporate by reference any other disclosure document that the issuer is required to file under an undertaking to securities regulatory authorities. In identifying a gap or potential gap in an issuer's disclosure, either in a prospectus or CD, CSA staff may require the issuer to undertake to file a particular type of disclosure document on a one-time or continuous basis. Issuers are instructed to provide a list of the material change reports and BARs that are incorporated by reference, and a brief description of the subject matter of each report, in the interests of "plain" disclosure.

We added a requirement in Section 11.3 to provide substitute disclosure for issuers who are able to rely on the exemptions in Section 2.9 of Proposed NI 44-101 from the requirement to have a current AIF and current annual financial statements.

We added Section 11.4 to require alternative disclosure by an issuer in respect of a significant acquisition for which no BAR has been required to have been filed because the issuer was not a reporting issuer at the time of the acquisition.

Section 12.3 of the Current Form is deleted and its substantive requirement is addressed in Section 13.1 of Proposed Form 1 (see discussion below). Section 12.4 of the Current Form was moved to the cover page disclosure (Section 1.3). Paragraph 12.1(3) and Sections 12.5, 12.6 and 12.7 of the Current Form are removed. Other developments and amendments have rendered those sections unnecessary or inappropriate.

Item 12 Additional Disclosure for Issues of Guaranteed Securities of Proposed Form 1 requires disclosure about any applicable credit supporter of the securities being distributed, and is based on Section 13.2 of the Current Form. Section 13.1 of the Current Form is deleted because other amendments have rendered it unnecessary.

Item 13 Exemptions for Certain Issues of Guaranteed Securities of Proposed Form 1 is new and provides exemptions from the requirement to include disclosure in a short form prospectus about

both the issuer and any applicable credit supporter. These exemptions are similar to the exemptions from the requirement to provide financial statement disclosure relating to credit supporters under U.S. securities law.[3] The exemptions are based on the principle that, in certain circumstances, investors will either require only issuer disclosure or only credit supporter disclosure to make informed investment decisions.

Item 14 Relationship Between Issuer or Selling Securityholder and Underwriter of Proposed Form 1 is updated to reflect the implementation of National Instrument 33-105 *Underwriting Conflicts*.

Item 15 Experts is amended to exempt auditors of acquired businesses and predecessor auditors in certain instances from the requirement to disclose their interest in the issuer. We have eliminated the requirement that the issuer's auditor disclose its interests in the issuer if the auditor is independent of the issuer and there is disclosure of the independence. We have also clarified who the disclosure requirements relate to.

Item 16 Promoters of Proposed Form 1 is updated to harmonize with the corresponding disclosure requirement in NI 51-102.

In *Item 17 Risk Factors* of Proposed Form 1 we added an instruction to Section 17.1 to recognize that risk factors is now a required disclosure item under Form 51-102F2 (AIF).

Item 18 Other Material Facts is changed slightly to harmonize with other changes.

Item 20 Reconciliation to Canadian GAAP of the Current Form is deleted because these requirements, as well as those presently included in Part 7 of Current NI 44-101, have been superseded by the implementation of NI 52-107 and the new definition in Proposed NI 44-101 of *current financial statements*.

Item 20 Certificates of Proposed Form 1 is updated from Item 21 of the Current Form to correct the language of the certificates in light of the amendments and developments elsewhere. We added Section 20.5 to clarify that the rules concerning the dating of prospectuses applicable to other types of prospectuses apply to short form prospectuses.

The Proposed CP

The Proposed CP provides information relating to interpretation of Proposed NI 44-101 by securities regulatory authorities, and its application. It has been updated to reflect the changes made to the Current Rule, as described above. In some cases, changes have been made to the companion policy to reflect experience with the rules over the past four years.

[3] Rule 3-10 of Regulation S-X.

RELATED AMENDMENTS

We are also proposing consequential amendments to a number of national instruments in conjunction with the implementation of the Proposed Rule to make those instruments consistent with the changes we have proposed to the Current Rule. We are publishing a separate Notice relating to those proposed amendments.

AUTHORITY FOR PROPOSED NATIONAL INSTRUMENT - ONTARIO

The following provisions of the Ontario *Securities Act* (the "Ontario Act") provide the Ontario Securities Commission ("OSC") with authority to adopt the proposed National Instrument and Forms.

Paragraph 143(1)13 of the Ontario Act authorizes the OSC to make rules regulating trading or advising in securities to prevent trading or advising that is fraudulent, manipulative, deceptive or unfairly detrimental to investors.

Paragraph 143(1)16 of the Ontario Act authorizes the OSC to make rules varying the application of the Ontario Act to establish procedures for or requirements in respect of the preparation and filing of preliminary prospectuses and prospectuses and the issuing of receipts therefor that facilitate or expedite the distribution of securities or the issuing of the receipts, including, requirements in respect of distribution of securities by means of a prospectus incorporating other documents by reference and requirements in respect of pricing of distributions of securities after the issuance of a receipt for the prospectus filed in relation thereto.

Paragraph 143(1)20 of the Ontario Act authorizes the OSC to make rules providing for exemptions from the prospectus requirements under the Ontario Act and for the removal of exemptions from those requirements.

Paragraph 143(1)39 of the Ontario Act 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 Ontario Act, the regulations or the rules and all documents determined by the regulations or the rules to be ancillary to the documents, including preliminary prospectuses and prospectuses, proxies and information circulars and take-over bid circulars, issuer bid circulars and directors' circulars.

ALTERNATIVES CONSIDERED

The purposes of the amendments contemplated by the Proposed Rule are (i) to streamline the short form system, (ii) to eliminate inconsistencies with the CD Rules, and (iii) to expand eligibility into the short form system and thereby create an even more integrated, simplified and less onerous offering system for reporting issuers. One alternative means of achieving these purposes is to leave the Current Rule unamended but to grant exemptive relief on a case by case basis. Given the extent and breadth of the changes contemplated in the Proposed Rule, we believe that amendment of the Current Rule is the optimal way to achieve these purposes.

Another alternative is to create a separate offering system which issuers could access in the alternative to the Current Rule in the manner contemplated in the 2000 Concept Proposal. We focussed on amending and expanding the short form system because we believe that the

continued evolution of the current short form offering regime should be our priority. As discussed above, based on public commentary, we will continue to seek to enhance our prospectus offering regimes, as needed, either through amendments to the short form regime or through the introduction of alternative offering systems.

UNPUBLISHED MATERIALS

In proposing Proposed NI 44-101, Proposed Form 1 and Proposed CP, the CSA have not relied on any significant unpublished study, report or other material.

ANTICIPATED COSTS AND BENEFITS

The CSA expect that the amendments contemplated in the Proposed Rule will further enhance efficiency of accessing capital for short form eligible reporting issuers. Harmonizing the short form system with the CD Rules will eliminate costs of public securities offerings. There will be greater clarity regarding the application of the Proposed Rule and reduced circumstances requiring exemptive relief. To the extent that the amendments require additional disclosure, this disclosure will benefit investors to an extent that the benefit will outweigh the costs of these new requirements.

REQUEST FOR COMMENT ON THE PROPOSED RULE

We request your comments on Proposed 44-101, Proposed Form 1 and the Proposed CP. The comment period expires on April 8, 2005. In addition to any comments you wish to make, we invite comments on the following specific questions:

Proposed Qualification Criteria - Alternative A or Alternative B?

Questions

1. The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out as Alternative B?

Other Aspects of the Proposed Rule

Questions

2. Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market? If not, why not? Please also suggest alternatives to this requirement.

3. Is each of the exemptions in Item 13 of Proposed Form 1 appropriate? If not, why not? Are there any other exemptions we should include? If so, why? Is each of the conditions to the exemptions in Item 13 of Proposed Form 1 necessary to ensure that investors have all the information they need to make informed investment decisions? If not, why not? Are there any other conditions we should include? If so, why?

4. Does Item 15 of Proposed Form 1 accomplish its objective, which is to ensure disclosure of any ownership interests that would be perceived as creating a potential conflict of interest on the part of an expert? If not, what changes should be made to the parameters?

REQUEST FOR COMMENT ON POSSIBLE FURTHER CHANGES IN PROSPECTUS REGULATION

Background - Preliminary Prospectuses and Regulatory Review

On a distribution of securities, the securities legislation in all CSA jurisdictions, unless an exemption applies, requires or provides for:

- the filing of a preliminary prospectus;
- the issuance by the regulator of a receipt for the preliminary prospectus;
- the delivery of the preliminary prospectus to potential investors;
- the review of the preliminary prospectus by the regulator to determine if a receipt will be issued for the final prospectus;
- the filing of the final prospectus and the issuance by the regulator of a receipt therefore;
- the delivery of the final prospectus to the investor before the entering into of an agreement of purchase and sale; and
- a right of withdrawal and rights of rescission and damages in respect of any misrepresentation in the prospectus.

As discussed above, the Proposed Rule is our attempt to integrate the CD Rules with the short form prospectus regime within current statutory parameters. The 2000 Concept Proposal, which was also based on current legislation, also required a preliminary prospectus filing and regulatory review. However, we believe that as issuers and other market participants become more accustomed to the new CD Rules and if other proposed enhancements are adopted, including secondary market liability, our prospectus regime could evolve even further and more profoundly.

We are considering an offering system whereby certain eligible issuers could access public capital based solely on the filing of a final prospectus. This system would not require issuers to file a preliminary prospectus or obtain a receipt for their final prospectus. This system would require simply:

- the filing of the final prospectus without the issuance of any receipt by the regulator;
- the delivery of the final prospectus to a potential investor before entering into an agreement of purchase and sale with an investor; and
- a right of withdrawal and rights of rescission and damages if there is a misrepresentation in the prospectus.

The prospectus would still be required, through incorporation by reference or otherwise, to provide full, true and plain disclosure of all material facts relating to the securities proposed to be distributed and would have to comply with a prescribed form.

Such an offering system would further enhance capital markets by allowing issuers quicker and more certain access to capital without regulatory intervention. This type of offering system

could not be implemented under the current securities legislation in some jurisdictions. As a result, some jurisdictions would have to make legislative amendments before this system could be implemented.

Questions

General

5. Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?

Qualification Criteria

6. If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include additional qualification criteria and restrictions, such as the following:

    - a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;
    - a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and
    - a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.

    Do you think these are appropriate?

Marketing Restrictions

As discussed in the attached summary of comments, the Proposed Rule does not include any substantial changes to the current prospectus offering marketing regime. If the CSA moves forward with a prospectus offering system that does not require the use of a preliminary prospectus, and so eliminates the waiting period between preliminary and final prospectuses, we anticipate that we would permit marketing prior to the filing of a final prospectus regardless of whether the transaction was a bought deal. However, because of our concerns about improper use of undisclosed information about an offering, we would not permit marketing until after public disclosure is made that an offering was pending. The current shelf prospectus regime allows an unallocated prospectus to be utilized to distribute equity securities but requires a press release be issued immediately when the issuer forms a reasonable expectation that an equity offering may proceed. We note that the unallocated shelf system is not significantly utilized for equity offerings other than in cross-border or exchange offerings. We also note the concerns raised in comments to question 11 and question 25 of the 2000 Concept Proposal about the potential for premature disclosure of a pending offering.

7. Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by

issuers and dealers? If so, should the press release or public notice be required on "the issuer forming a reasonable expectation that an offering will proceed" or on some other event?

HOW TO PROVIDE YOUR COMMENTS

Please provide your comments by April 8, 2005 by addressing your submission to the securities regulatory authorities listed below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

You do not need to deliver your comments to all of the CSA member commissions. Please deliver your comments to the three addresses that follow, and they will be distributed to all other jurisdictions by CSA staff.

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Alberta Securities Commission
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If you are not sending your comments by e-mail, please send a diskette containing your comments (in DOS or Windows format, preferably Word).

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

QUESTIONS
Please refer your questions to any of:

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Appendix
Summary of Written Comments Received on the
Concept Proposal
for an
Integrated Disclosure System

Background
On January 28, 2000 the CSA published the 2000 Concept Proposal for comment. The comment period expired on June 1, 2000. The CSA received submissions from the 23 commenters identified in Schedule 1, including three whose submissions were received following the expiry of the comment period.

The questions contained in the Notice to the 2000 Concept Proposal and the CSA responses to the comments are provided below. The CSA responses are in italics. The numbers below correspond to the question numbers in the Notice to the 2000 Concept Proposal.

Generally, our responses to comments reference the proposed changes to Current NI 44-101 that are described in the Notice and Request for Comment (the "Notice") to which this appendix is attached.

A. IDS Eligibility

1. Reporting Issuer in All Jurisdictions

Question
1. Should reporting issuer (or equivalent) status in all CSA jurisdictions be a condition of IDS eligibility? What are the advantages and disadvantages of this approach? Would requiring all-jurisdiction reporting issuer status be a deterrent to IDS participation? If so, why?

Comments
No commenters supported all-jurisdiction reporting issuer status as a condition of IDS eligibility. Seventeen commenters specifically indicated that they opposed this condition.

Their concerns included the following:

- the increased costs of obtaining and maintaining reporting issuer status in all CSA jurisdictions;
- the increased complexity and administrative burden of complying with local reporting issuer requirements in all CSA jurisdictions;
- smaller issuers would be deterred from participating in the system; and
- the possibility of increased translation costs.

Also, seven commenters questioned the need for universal reporting issuer status given that the adoption of SEDAR has resulted in ready access to public documents filed in any one jurisdiction.

Some of the commenters suggested the following alternatives:

- implementing a condition that the issuer be a reporting issuer in any one of four principal jurisdictions: British Columbia, Alberta, Ontario, or Quebec, or in a main jurisdiction;

- amending the condition so that an issuer must be a reporting issuer in at least one Canadian province and file through SEDAR;

- amending the condition so that an issuer must be a reporting issuer only in those jurisdictions in which it distributes securities, but possibly granting the other "non-reporting jurisdictions" the right to "opt-in" to any IDS review undertaken by a jurisdiction, in which an issuer is reporting; and

- permitting an issuer to obtain reporting issuer status in each jurisdiction by filing its last two years of public disclosure documentation previously filed in a "Uniform Act" jurisdiction or in the United States, together with an AIF or a Form 10-K, and not mandating translation in Quebec except in those circumstances where it is currently required.

One commenter, although opposed to the condition, noted that this condition would recognize the reality that physical boundaries cannot contain secondary market activities. However, on balance, the commenter thought that issuers should be able to choose the jurisdictions in which they report without being denied access to IDS.

Response

The reasons for an all-jurisdiction reporting issuer status condition have largely been addressed by the implementation of the CD Rules, which harmonizes CD requirements across all Canadian jurisdictions. Accordingly, the CSA believe that all-jurisdiction reporting issuer status is not a necessary qualification criterion for an expedited offering system. Proposed NI 44-101 eliminates the qualification criterion under Current NI 44-101 to be a reporting issuer or equivalent in each local jurisdiction and replaces it with criteria that an issuer: (1) be a reporting issuer in at least one jurisdiction in Canada; (2) be an electronic filer under National Instrument 13-101 System for Electronic Document Analysis and Retrieval (SEDAR) *("NI 13-101"); and (3) have filed with the securities regulatory authority in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed in that jurisdiction under applicable securities legislation.*

Question

2. Do you agree with the CSA's approach to language requirements under the IDS? If not, why not? Should IDS issuers be obligated to translate all continuous disclosure filings in jurisdictions in which they have previously filed a prospectus (IDS or otherwise) or in which they have a substantial investor base? If so, how would you suggest the CSA define "substantial investor base" for this purpose? Would the imposition of such a requirement be a significant disincentive to IDS participation? Do issuers normally provide investors on a voluntary basis with translated continuous disclosure documents to accommodate their language preferences?

Comments

Two commenters supported the proposal to adopt the approach taken under the short form prospectus system with respect to translation, whereby the prospectus and CD incorporated by reference are filed in the language(s) appropriate to the jurisdictions in which the IDS prospectus is filed.

Five commenters opposed requiring translation of CD, due to the costs.

One commenter suggested that companies should be required to provide translations only when they have a minimum percentage of shareholders being of a language group (French or English) to warrant it.

With respect to the CSA defining "substantial investor base," one commenter believed that because Canadian fund managers, other than mutual fund managers, are not required to identify the companies they have invested in (contrary to the situation in the United States), companies do not know the identity of many of their shareholders.

One commenter recommended, in the event that the CSA determines that a "substantial investor base" test is necessary, the adoption of the test utilized by the SEC in regard to "foreign private issuers," which is that 50% of the beneficial shareholders are resident in the jurisdiction.

One commenter recommended that the requirements to translate CD documents be subject to exemptions depending upon the size of the issuer, the overall size of the offering, or the size of the portion of the offering in the province(s) requiring translation. The commenter was concerned about costs and translation resources of smaller issuers.

One commenter suggested that obligating an IDS issuer to translate all CD filings in jurisdictions in which they have previously filed a prospectus or in which they have a substantial investor base would be a significant disincentive to IDS participation and such decisions should remain at the discretion of the IDS issuer. This commenter argued that many larger issuers and issuers with a substantial investor base voluntarily provide investors with translated CD documents to accommodate their language preferences.

One commenter stated that unless there is a substantial investor base in Quebec, there is little benefit in requiring translation of documentation. If an issuer is not already a

reporting issuer in Quebec, it is unlikely that it will have a substantial investor base there and translation is less important.

Response
The CD Rules now prescribe the language of documents required to be filed under those instruments. Proposed NI 44-101 amends the provisions in Current NI 44-101 dealing with the language of documents to reflect and clarify current practice. Generally, a short form prospectus and any CD documents incorporated by reference must be filed in the language(s) appropriate to the jurisdictions in which the offering is made.

Question
3. Although the proposed IDS would harmonize the continuous disclosure requirements for participating issuers across Canada, differences in other reporting issuer requirements would continue to exist. Would this pose a significant burden on issuers? If so, why?

Comments
Three commenters stated that a significant burden would be placed on participating issuers. The following key points were raised:

- The impact of differences in exemptions, hold periods and required documentation is even more significant in the case of junior issuers because these issuers often suffer from limited financial resources and will therefore be unable to opt into the IDS. This would be counter to the IDS goal of encouraging broad participation.

- Given the added disclosure provided by issuers participating in the IDS, and that this information is available nationally via SEDAR, it would not be prejudicial to amend the current securities legislation and rules to allow hold periods to commence running provided that the issuer is either a reporting issuer in that particular jurisdiction or is an IDS participant. This will encourage IDS participation and improve public disclosure levels without imposing unnecessary additional burdens on issuers.

- The CSA should establish national standard forms for CD, such as a national standard form of information circular or form for disclosure of sales from control persons, as well as a national standard in regard to the timing of filing of such forms, and for the timing of filing of insider reports.

- The CSA should hasten their efforts to harmonize all reporting issuer obligations in all CSA jurisdictions in anticipation of the introduction of the proposed IDS.

- The mere fact that an IDS issuer must comply with the regulatory rules of thirteen individual jurisdictions will be a consideration for potential participants.

One commenter did not believe that issuers currently find the differing CD requirements across Canada to be a significant burden and, in any event, did not see why this would be more of a problem under IDS than at present.

Response
Most of the concerns raised by the commenters have been addressed through the implementation of the CD Rules, which have harmonized the CD requirements for all issuers across Canada. Other concerns have been addressed through the implementation of Multilateral Instrument 45-102 Resale of Securities *("MI 45-102").*

2. "Seasoning" Requirement

Question
4. Should "seasoning" be included as a condition of IDS eligibility? If so, what would be an appropriate seasoning period? Should the imposition of a seasoning requirement be dependent upon an issuer's revenues, assets or market capitalization?

Comments
No commenters supported the inclusion of seasoning as a condition of IDS eligibility. Eight commenters agreed with the CSA proposal not to impose seasoning as a condition.

One commenter agreed that, given advances in information technology and the high disclosure standard under the IDS, there is no significant additional benefit to be derived from imposing seasoning as a condition.

Another commenter stated that one advantage of the IDS is that investors are provided with more timely and complete information about the issuer; this information should be available for all issuers, not only the ones who have been reporting for a prescribed period.

Two commenters mentioned that requiring a fixed time period prior to IDS eligibility provides no certainty that an issuer will become better known in the market as there is no certainty that the issuer will develop an analyst or institutional following.

Response
Alternative A of Proposed NI 44-101 does not substantively change the seasoning qualification criterion under Current NI 44-101.

Alternative B of Proposed NI 44-101 eliminates seasoning as a qualification criterion. The Notice includes general questions relating to Alternative B.

Question
5. Are there any advantages or disadvantages of a seasoning requirement not discussed above?

Comments
One commenter suggested that an advantage could potentially be created in the area of due diligence. A seasoning period in which the issuer proves its ability to release timely, accurate information may increase the comfort level of underwriters and professional

advisors. Despite this, however, the commenter felt that seasoning should not be imposed as an IDS eligibility criterion.

Response
Please see the response to question 4 above.

3. Quantitative (Size) Requirement

Question
6. Should the IDS impose quantitative IDS eligibility criteria? If so, what should these criteria be, and why?

Comments
No commenters were in favour of imposing quantitative eligibility criteria. Ten commenters supported the CSA proposal not to impose any quantitative eligibility criteria in IDS.

One commenter stated that imposing quantitative eligibility criteria would present problems with respect to compliance and monitoring for junior resource issuers whose business is characterized by changes in asset positions based on periodic acquisitions and dispositions of property, as well as changes in commodity prices. In general, this commenter stated, it is very important that information about junior issuers be available to the public.

The same commenter suggested that, in lieu of a size test, courses regarding CD obligations be available to educate smaller issuers regarding the standard of CD which is expected.

One commenter stated that smaller issuers have much more incentive to participate in IDS than a prompt offering qualification system ("POP") issuer because the relative advantage is greater.

Response
Alternative A of Proposed NI 44-101 does not substantively change the quantitative qualification criterion under Current NI 44-101.

Alternative B of Proposed NI 44-101 eliminates size as a qualification criterion. The Notice includes general questions relating to Alternative B.

Question
7. Do larger issuers provide a higher quality of disclosure than smaller ones? Please explain.

Comments
Four commenters stated that larger issuers generally do have a higher quality of disclosure. Reasons given were that larger issuers tend to have more experienced and qualified accounting departments, tend to be followed by financial analysts, have greater

resources and may be required to meet higher standards by sophisticated investors. One of these commenters cited a Toronto Stock Exchange ("TSX") survey supporting this position and said that the quality of disclosure may be improved by imposing higher standards. Another commenter cited a Canadian Investor Relations Institute member survey suggesting that larger issuers have superior disclosure standards and submitted a Survey Report as an appendix to its comments. One of the commenters did not believe that the smaller issuers are incapable of compliance, particularly if measures are taken to harmonize the rules nationally and rationalize filing fees. This commenter added that issuers under the IDS will have an incentive to maintain a strong and up-to-date disclosure base in order to be in position to act quickly on capital market opportunities.

One commenter stated that issuer size is one of a number of factors affecting the quality of issuer disclosure. Other factors include issuers' financial and human resources and reliance on capital markets to meet ongoing financing needs. The quality of issuer disclosure does not correspond directly to issuer size.

Another commenter suggested that disclosure for smaller issuers might in fact be superior to that of larger issuers, simply because all relevant details about a smaller issuer are much easier to provide than for a larger issuer. For example, in the natural resources sector, an issuer's asset base might well consist of a single, or relatively few, mines, projects or properties.

Response
We acknowledge the comments received and have considered them in developing Alternative B of Proposed NI 44-101.

Question
8. Do you believe that the "analyst following" argument is relevant in today's markets? Please explain.

Comments
Two commenters indicated that analyst following is important. One of these commenters remarked that it will become even more critical in the future as securities regulations move away from requirements for physical delivery of documents. The second commenter stated that analyst reports offer comparative industry analysis which is not available as part of an IDS issuer's disclosure base and can provide a useful "filter" of the vast amount of information available in respect of an issuer.

Another commenter stated that, while analyst following may encourage issuers to maintain and improve their disclosure, the analyst following argument should not lead to size restrictions on IDS eligibility.

Another commenter indicated that there is some logic to the analyst following argument since empirical studies carried out in the United States indicate that the two most important factors in creating an efficient market for an issuer's securities are the number of analysts following the issuer and the liquidity of the issuer's securities. However,

analyst following is not necessarily related to market capitalization or size. There is also a correlation between the type of industry and the number of analysts following an issuer.

Another commenter stated that, since only about 1,000 of about 3,500 listed companies in Canada have an analyst following them, if an analyst-following quantitative IDS eligibility standard were used, about two-thirds of listed companies would be ineligible; the same fraction of the listed company population that would benefit most from initiatives to foster better disclosure practices.

One commenter suggested that investors are increasingly directly seeking and analyzing information themselves rather than relying on analysts. Some market participants have expressed concern that analysts are not always objective and are often not providing timely information. This commenter submitted that the IDS could be viewed as an alternative to or an improvement upon analyst following, minimizing the necessity of analyst following so that it should not be used as an eligibility requirement for IDS participation.

Response
We believe that the presence or absence of analyst following should not influence policy development given advances in information technology that facilitate widespread and timely dissemination of CD to investors.

B. IDS Continuous Disclosure

Question
9. Are there any disclosure items that should, or should not be, included in the proposed IDS AIF or QIF?

Comments
One commenter generally supported the upgrading of the disclosure requirements of reporting issuers and the proposed modifications to the AIF. This commenter also generally supported the requirement to file a quarterly information form (the "QIF"). However, this commenter also noted that the QIF requirement for a reconciliation to Canadian generally accepted accounting principles ("GAAP") would be more onerous than the current SEC requirements and recommended that the proposed reconciliation requirement be dropped.

Two other commenters were also of the view that the reconciliation of interim financial statements to Canadian GAAP should not be required. One of these commenters said that the reconciliation of annual financial statements to Canadian GAAP and GAAS is adequate to meet the needs of Canadian investors. The other opined that reconciliation of interim financial statements to Canadian GAAP is of limited use to investors and represents a substantial cost to issuers, as well as being more onerous than the U.S. requirements for foreign private issuers.

Another commenter supported the requirement for reconciliation to Canadian GAAP.

One commenter was not in favour of an MD&A or an ongoing update of supplementary information forms ("SIFs") in the quarterlies, since this constitutes a significant increase in administrative time and cost and involvement of internal and external accountants and lawyers. This ultimately hinders the involvement and thoughts of management on important information to be given to the public.

One commenter suggested that the IDS AIF and QIF should include items that are relevant to junior issuers, and emphasized that the System for Shorter Hold Periods for Issuers Filing an AIF (the "SHAIF System") and the accompanying AIF form do not. This commenter recommended that the following items be included:

- disclosure requirements in relation to available funds and proposed use of funds;

- disclosure of milestones or significant events required to accomplish the business objectives of the issuer together with a comparison of performance with previously stated milestones;

- risk factor disclosure, such as reliance on a limited number of customers or suppliers, reliance on key employees, environmental, economic or political conditions, significant competition and illiquidity or instability in the trading of the issuer's securities;

- disclosure in relation to any current relationships or relationships within the last 12 months between the issuer and any investment dealer or registrant and any investor relations consultant or market maker;

- summary tabular disclosure of the number and type of securities outstanding at the end of the last fiscal year and all sales of securities outstanding at the end of the most recent fiscal year; and

- disclosure of securities outstanding that are subject to resale restrictions, including hold periods, escrow and pooling arrangements.

Response

The AIF and MD&A content requirements are now prescribed in the CD Rules. Neither the CD Rules nor Proposed NI 44-101 require QIFs. However, the CD Rules do impose certain interim reporting requirements.

*Under NI 51-102, all non-investment fund reporting issuers are required to file interim and annual MD&A, and non-investment fund/non-venture issuers are required to file an AIF. The AIF requirements in NI 51-102 have been upgraded from the requirements of Form 44-101F1 AIF, and include disclosure of risk factors and escrowed securities. Also, disclosure of outstanding share data is required in MD&A under NI 51-102***.**

Under NI 81-106, investment funds are required to file AIFs and Management Reports of Fund Performance. The AIF requirements of NI 81-106 have been drawn from the

requirements of Form 44-101F1 AIF and adapted to address disclosure issues appropriate to investment funds.

Canadian GAAP reconciliation requirements are now prescribed in NI 52-107.

The SHAIF System has been revoked and replaced by MI 45-102.

Question

10. Are there any other continuous disclosure enhancements that should be included as part of the IDS? If so, should these enhancements be extended to all issuers?

Comments

One commenter suggested that, if a restructuring is in progress, each QIF filed prior to completion of the restructuring activities should contain current period, year-to-date and cumulative analyses of exit costs, impairment provisions, other costs relating to restructuring, and remaining accruals.

One commenter stated that aside from the adoption of standard national forms, the proposed CD enhancements in the IDS system are adequate. This commenter stated that these enhancements should not be extended to all issuers until the pilot period has expired and the effects on issuers who have chosen to participate have been ascertained.

Another commenter recommended that the CSA carefully monitor whether the IDS leads to enhanced disclosure in Canada's capital markets during the proposed pilot period and beyond.

Response

Most of the CD enhancements proposed in the 2000 Concept Proposal are now required under the CD Rules, Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings *("MI 52-109") where applicable, and the Audit Committee Rule where applicable. These instruments apply to all reporting issuers, subject to certain exemptions. With respect to the comment on restructurings, NI 51-102 requires disclosure (including financial statement disclosure) of business acquisitions. Also, if a restructuring involves securities being changed, exchanged, issued or distributed, Form 51-102F5* Information Circular *requires the same disclosure as required in a prospectus (including financial statement disclosure).*

Question

11. Are there any specified events that should, or should not, trigger the filing of an SIF?

Comments

Three commenters suggested the following additional events should trigger the filing of an SIF:

- restructuring, debt defaults, substantial modifications of debt agreements, violations of debt covenants, issuance of securities or options to acquire securities via private placements or other prospectus exemptions, events that raise questions as to the ability of the issuer to continue as a going concern; and

- listing of an issuer on an exchange or market or the quotation or trading by an issuer in a particular market, including the NASD OTC Bulletin Board or the NQB Pink Sheets; the suspension, delisting, or removal of quotation of an issuer from such market.

One commenter stated that some of the events listed would fall within the definition of "material information" under National Policy Statement 40 *Timely Disclosure* and the timely disclosure requirements of the TSX, both of which require issuers to send press releases about material information. This commenter added that the extent of an issuer's operations, the maturity of an issuer, the size of an issuer's balance sheet and other factors are important in assessing the value of filing a SIF to disclose many of the events listed in the IDS proposal.

Five commenters offered the following suggestions as to which events should *not* trigger the filing of an SIF:

- a probable prospectus offering or business combination, since the thresholds of "reasonable expectation" and "probable" are ambiguous and because, in many cases the disclosure may be premature, or may jeopardize negotiations with the target; premature announcement of an offering may also affect the reputation of the issuer; announcement should be deferred until an agreement in principle is struck;

- change in an issuer's chairperson; and

- the imposition of a penalty by a Canadian securities regulatory authority (at a minimum there should be a de minimis exception to the SIF filing requirement for penalties of this nature).

Four commenters recommended that triggering events for filing an SIF be restricted to those events which constitute a "material change" in respect of the issuer. One of these commenters noted that, by introducing a prescribed list of triggering events, the IDS may lead to unnecessary expense for issuers and create "noise" in the marketplace by requiring the public dissemination of non-material information.

One commenter said that they found no good reason to depart from the current materiality standard and had concerns with "probable" acquisition or disposition standard.

One commenter asked whether these could be tied into the material change requirement to make it just one issue for companies to deal with.

One commenter suggested that the SIF should be excluded and made part of the QIF. They stated that if the SIF is not going to replace the material change report, it's a duplication of filing.

One commenter stated that this is an enforcement problem that cannot be solved by forcing issuers to make "too fine" or "too early" a judgment, particularly in the context of business combinations and dispositions of assets or a business.

One commenter stated that it is imperative that a clear, more definitive explanation of what constitutes materiality be developed, and recommended that the definition adopted by the U.S. Supreme Court in TSC Industries Inc. v. Northway Inc. be utilized. Specifically, the commenter recommends that the definition include a change in the business, operations, capital assets or affairs of the issuer that, when considered in the total mix of the information made available, would be important to a reasonable investor in making an investment decision. According to this commenter, the concept of materiality should not, as the definition in most Canadian securities legislation currently does, encompass information that in effect results in change when that change was not reasonably foreseeable. Two commenters supported the immediate introduction of the SIF.

One commenter indicated that press releases are a quicker, more effective way of disseminating information to the public and are required under the TSX rules for disclosure of material information.

Response

The CD Rules do not require SIFs, but do require reporting issuers to file a news release and a material change report if a material change occurs in their affairs. Guidance concerning what constitutes a material change may now be found in National Policy 51-201 Disclosure Standards.

We believe the definition of "material change" and requirements to issue news releases are addressed in the CD Rules or though other CD requirements. Our goal is simply to integrate the short form offering regime with our CD regime. Proposed Form 1 requires an issuer to incorporate by reference into a short form prospectus all material change reports since the end of the financial year in respect of which the issuer's current AIF is filed. Proposed Form 1, like other prospectus forms, requires that a short form prospectus contain full, true and plain disclosure of all material facts relating to, and in Quebec not to make any misrepresentation likely to affect the value or market price of, the securities to be distributed. We have not included in Proposed NI 44-101 a separate requirement for SIFs because imposing disclosure requirements beyond the material change disclosure obligations imposed under the CD Rules would be inconsistent with our objective of creating a seamless, integrated and expedited offering system that is harmonized with the requirements of the new CD regime.

Question

12. As an alternative to requiring the filing of an SIF for changes in an IDS issuer's name and auditor as outlined in Part III.C.1(a)(iii) of the Concept Proposal, should an IDS issuer's SEDAR profile (which could include such information) be included in its IDS disclosure base? Given that an issuer's SEDAR profile is a changing document, an IDS issuer would disclose these changes by filing an amended copy of its SEDAR profile under cover of an SIF.

Comments

One commenter said that an SIF with an amended SEDAR profile is adequate for a change in name. This commenter, however, did not think this approach would suffice for a change in auditor. This commenter anticipated that proposed National Instrument 52-103 *Change of Auditor* ("Proposed NI 52-103") would carry forward the disclosure requirements of National Policy Statement 31 *Change of Auditor of a Reporting Issuer*.

One commenter said that the issuer should be given a choice whether to file a SIF disclosing its change of name or auditor and an amended SEDAR profile under cover of a SIF.

One commenter supported including an issuer's SEDAR profile in its IDS disclosure base and commented that such inclusion would be a practical way to update changes in corporate information and increase the reliability of issuers' SEDAR profiles.

One commenter supported this method for disclosure of changes to an issuer's name and auditor, but stressed that if the SEDAR profile is to become part of an IDS issuer's disclosure base generally, the contents of the profile should be examined to ensure that no unintended consequences result.

Response

An issuer's SEDAR profile is not part of its CD base under the CD Rules and the CSA have concluded that it is not appropriate to incorporate it by reference into a short form prospectus. Nevertheless, we remind issuers of their obligations under NI 13-101 to promptly amend their SEDAR profiles and under National Instrument 55-102 System for Electronic Disclosure by Insiders (SEDI) *to amend their SEDI profiles when there is a change in the information provided. The CSA acknowledge the general comment concerning the reliability of issuers' SEDAR profiles. We have undertaken some steps, and may consider other regulatory action, to ensure compliance with the requirements of NI 13-101.*

Proposed NI 52-103 has been superseded; change of auditor requirements are now set out in the CD Rules.

Question

13. The CSA propose to require IDS issuers to file SIFs containing prospectus-level disclosure about all completed business combinations within 75 days. Is the 75 day deadline appropriate? Are there business combinations for which the 75 day deadline or the prospectus-level disclosure requirement cannot be met?

Comments

One commenter stated that, based largely on experience with similar Form 8-K filing requirements in the United States, the 75 day time period seems sufficient.

One commenter supported the proposal, but only for pro forma financial information concerning the completed business acquisition; any higher standard of disclosure in such a short time period could impose an undue and unjustified burden on the issuer.

One commenter supported the 75 day deadline but stated that the CSA should grant relief upon reasonable requests by IDS issuers requiring additional time to prepare such disclosure.

One commenter suggested that the 75 day deadline may be too short for significant transactions involving certain business combinations, and would likely be problematic where transactions involve foreign issuers.

Two commenters expressed that the requirement for a post-closing SIF is unnecessary, since the issuer will almost certainly prepare and file a QIF for a fiscal quarter which ends during the 75 day period. The current standard that only material changes should be made mandatory for all reporting issuers should be maintained to avoid redundancy and confusion.

Response

NI 51-102 now requires disclosure of significant acquisitions in a BAR, not a SIF. The time period for filing a BAR is 75 days after the date of acquisition. The CSA agree with the commenters who suggested the 75 day period for filing a BAR is appropriate and will be sufficient in most circumstances. Also, the 75 day filing period represents a further move toward harmonization of Canadian and U.S. requirements.

Proposed Form 1 does not specifically require an issuer to incorporate a BAR by reference in respect of significant acquisitions completed within 75 days prior to the date of the short form prospectus, unless the issuer has already filed a BAR in respect of the acquisition. Proposed Form 1 also does not require an issuer to incorporate a BAR by reference for probable significant acquisitions. However, the issuer must include a summary of these significant acquisitions or probable significant acquisitions in the short form prospectus. The issuer must also include applicable financial statements if the acquisition or proposed acquisition is a reverse takeover or if inclusion is necessary to ensure the short form prospectus contains full, true and plain disclosure of all material facts relating to, and in Quebec, disclosure of all material facts likely to affect the value or the market price of, the securities being distributed. The CSA generally presume that issuers must include financial statements to satisfy these disclosure standards if any of the significance tests set out in NI 51-102 is satisfied at the 40% level.

Question

14. The CSA believe that IDS AIFs and QIFs should be delivered to investors in compliance with existing statutory requirements. As discussed in Part III.E of the Concept Proposal, the CSA would permit the delivery of all IDS disclosure

documents by electronic means in accordance with the principles set out in National Policy 11-201 *Delivery of Documents by Electronic Means*. Should alternative methods of delivery of IDS AIFs and QIFs be permitted under the IDS? If so, which methods would you suggest?

Comments

Five commenters supported the continued advancement of delivery by electronic means. The following suggestions were made:

- Hard copies should also be available upon request, even to those who have consented to receive or access documents through electronic means.

- This permitted means of delivery should be extended to the posting of the documents on the company's website provided that the documents are also available on SEDAR, and provided that the shareholders obtaining delivery in this manner have specifically agreed to accept delivery in such form.

- National Policy 11-201 *Delivery of Documents by Electronic Means* ("NP 11-201") should be drafted broadly enough to permit new delivery means as they evolve.

Two commenters expressed a belief that a good portion of the financial statements and reports mailed to shareholders go directly to the waste basket. One of these commenters also suggested that issuers should only be required to mail each year to each registered and beneficial shareholder a communication, together with a stamped and addressed return envelope, by which the shareholder can request to be sent the relevant disclosure materials.

Another commenter, with respect to delivery mechanisms, strongly supported all efforts to add flexibility and to allow procedures to adapt to new technologies provided they do not compromise investor protection.

Response

NI 51-102 requires issuers other than investment funds to file quarterly financial statements and MD&A rather than QIFs. Similarly, proposed NI 81-106 will require investment funds to file interim financial statements and a Management Report on Fund Performance. These documents only have to be delivered if securityholders request them. The CD Rules require all issuers to file an AIF but do not require delivery to securityholders. Electronic delivery of CD documents is permitted under NP 11-201, subject to certain conditions.

Question

15. The CSA propose to require that interim financial statements filed as part of an issuer's continuous disclosure record have been reviewed by the issuer's audit committee and approved by the issuer's board of directors or equivalent. The CSA are also considering requiring that interim financial statements have been

reviewed by an auditor, as required in the United States. Would such a requirement be appropriate? If not, why not?

Comments

Three commenters supported the proposed requirements for audit committee review and board director approval of interim financial statements prior to the release of any interim financial information. The following reasons were given:

- This will ensure that timely attention is given to the accounting and disclosure issues related to high profile events and transactions and reduce the need for significant "fourth quarter" adjustments arising from the annual audit.

- The competitiveness of Canadian capital markets is enhanced by raising Canadian CD standards to U.S. levels.

Three commenters expressed concern over the requirement that financial statements be both reviewed by the audit committee or equivalent and approved by the board of directors. Factors considered were the added cost of requiring board approval, the difficulties associated with scheduling another meeting, the significant risk that companies would be unable to meet the proposed abbreviated reporting deadlines, the fact that unaudited (reviewed) statements are permitted with a prospectus, and the appearance of duplication of effort. Two of these commenters recommended limiting the requirement to a requirement for either audit committee or board review and approval. One commenter said that the 45 day period to provide interim financial statements may be too short, especially if an auditor is to be involved and must provide a comment letter.

Five commenters opposed mandatory auditor review of interims. All of these cited the cost involved and two argued that auditor involvement should be left to the discretion of the board. One commenter was particularly concerned about the additional cost burden for smaller companies. Another commenter stated that unaudited statements are permitted with a prospectus and that the standards for IDS should be no higher.

Four commenters supported mandatory auditor review of interims. These commenters noted that the capital markets have demonstrated a significant sensitivity to interim reporting, that auditor involvement in interims would help the issuer anticipate year-end accounting and reporting problems and avoid unnecessary adjustments in subsequent reporting periods, and that the competitiveness of Canadian capital markets is enhanced by raising the Canadian CD standards to U.S. levels.

However, although they supported the auditor review requirement, two of these commenters expressed concern that retail investors do not understand that a review provides a significantly lower level of assurance than an audit, and suggested the following:

- The QIF should contain a disclaimer advising that a review is not an audit.

- The CSA should adopt the practice used with prospectuses, where a comfort letter is filed with regulators and the review engagement report is not publicly reported or filed.

Response
The CD Rules now require that an issuer's board of directors approve its interim financial statements, though approval may be delegated to the audit committee. The CD Rules also require that an issuer disclose if its auditor has not reviewed its interim financial statements. Where applicable, the Audit Committee Rule now requires audit committee review of interim financial statements.

1. Certification

Question
16. Would the proposed certification requirements materially affect the extent to which signatories participate in the preparation of IDS continuous disclosure documents? Are there practical impediments to the certification of such documents?

Comments
One commenter stated that the proposed certification requirement would have a positive impact on the disclosure process.

One commenter did not believe that the proposed certification requirements would materially affect the extent to which signatories participate in the preparation of CD documents. In particular, this commenter thought that smaller issuers would gladly accept the requirements to provide enhanced disclosure and to certify the disclosure if, as a result, such issuers were able to participate in IDS.

One commenter strongly opposed the introduction of a certification requirement, since it raises the possibility of liability for secondary market disclosure, without any consideration being given to when such liability should actually be incurred, by whom, to whom, in what amount, and the defences which would be available. Six commenters questioned how the certification requirements would interact with the civil remedies proposal. One of these commenters said that the certificate requirement creates an undue burden on officers and directors to perform sufficient due diligence within the proposed shortened time frame. One commenter questioned whether the certification of each SIF was necessary, while commenting that certification of the QIF and the AIF would likely enhance the accuracy and quality of disclosure. Two others suggested deferring any requirement for certification until the civil remedies proposal was finalized. One commenter said that, assuming the requirements for audit committee review and board of director approval of interim financial statements are adopted, that a certified statement by a senior officer of the company stating that this review and approval have been done would be sufficient "certification."

Response

Although the CD Rules do not impose any certification requirement, MI 52-109, where applicable, does. It requires the chief executive officer or person who performs similar functions (the "CEO") and the chief financial officer or person who performs similar functions (the "CFO") of all issuers to certify the issuer's annual and interim filings, subject to certain exemptions.

Question

17. Is the "full, true and plain disclosure of all material facts" standard of disclosure attainable on a timely basis in connection with IDS continuous disclosure filings? If not, why not? What alternative disclosure standard would be appropriate given the objectives of the integrated disclosure system? Would an alternative misrepresentation standard be more appropriate for some continuous disclosure documents (i.e. "The foregoing does not make a statement that, in a material respect and in the light of the circumstances is misleading or untrue and does not omit a fact that is required to be stated or that is necessary to make the foregoing not misleading")?

Comments

Five commenters had difficulty seeing under IDS how the sum of the various documents placed on the public record would at all times measure up to a "full, true and plain" disclosure standard. The following points were raised:

- CD filings under the existing short form prospectus system already fall short of this standard (due to intense time pressures and lack of rigorous CD requirements).

- Imposing a "full, true and plain" disclosure standard on all CD filings would place a significant burden on the existing reporting processes of companies.

- This standard is particularly onerous for ongoing CD, particularly in relation to SIFs and probably not practically possible. If imposed, issuers will likely be spending a disproportionate amount of time preparing and verifying documents without a commensurate regulatory purpose being served.

- In the past, the CSA have indicated that they are considering imposing civil liability in connection with an issuer's CD. In conjunction with the proposed AIF, QIF and SIF requirements under the IDS, one must consider the likelihood of honest oversights or delays in the recognition and reporting of significant developments. In this context, it is questionable whether "full, true and plain disclosure of all material facts" is a realistic standard.

- This standard of disclosure is too onerous for SIFs unless the certification is limited to the SIF itself. It is not realistic to force issuers to consider whether a "full, true and plain" disclosure standard is met on a day-to-day basis. The alternative "no misrepresentation" standard would be more appropriate for the filing and certification of all interim documents such as an SIF.

Eight commenters suggested that since neither the SIF nor the QIF will by its nature contain prospectus level disclosure, a "full, true and plain" certification requirement would not be appropriate for these forms. Two of these commenters stated that the proposed alternative "no misrepresentation" standard would be appropriate for both SIFs and QIFs, while four of these commenters suggested variations to the "no misrepresentation" certificate, as follows:

- One commenter proposed that, although a "no misrepresentation" certificate would be appropriate for a QIF, since the SIF is required to be filed at times when an issuer may not have full information, the certification standard for SIFs should be lower. The commenter suggested that SIFs be certified as follows: "The Issuer believes the information in this form to be accurate and has no reason to believe that there are material facts relating to this information which have been omitted."

- One commenter suggested using the following form of certificate for QIFs: "The contents of this QIF have been reviewed by the Company's audit committee and have been approved for release by the Company's board of directors."

- One commenter suggested that the proposed "no misrepresentation" standard be prefaced by the following phrase: "To the best of our knowledge and belief."

- One commenter indicated that the proposed "no misrepresentation" standard should be extended solely to misrepresentations of material facts and applied only in the context of the issuer's CD base. This commenter proposed the following alternative "no misrepresentation" standard to address their concerns: "The foregoing when read with the issuer's CD base does not make an untrue statement of a material fact relating to securities of the issuer and does not omit a material fact that is required to be stated or that is necessary to make a statement not misleading in a material respect and at the time and in the light of the circumstances in which it is made."

One commenter stated that the misrepresentation standard would be appropriate for documents such as SIFs.

One commenter stated that when a prospectus offering is conducted, the certificate page required in connection with the prospectus will require the issuer to verify the previously disclosed information to prospectus standards and will ensure that the standards of disclosure as compared to the current regime are not impaired.

One commenter stated that the requirement for each annual and quarterly disclosure filed to meet prospectus standards of completeness, accuracy, quality and regulatory scrutiny may simply add cost and inefficiency to the system.

Response

The CD Rules do not impose a "full, true and plain disclosure of all material facts" standard for CD documents, for many of the reasons given by the commenters. However,

a short form prospectus, when combined with CD documents incorporated by reference must give "full, true and plain disclosure of all material facts". Most of the comments received relate specifically to QIFs and SIFs. Neither the CD Rules nor Proposed NI 44-101 require QIFs or SIFs. Please see our responses to questions 9 and 11 above

Where applicable, MI 52-109 now requires the CEOs and CFOs of all issuers to certify that the issuer's annual or interim filing, as applicable, does not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of circumstances under which it was made, with respect to the period covered by the annual or interim filing, subject to certain exemptions. Where applicable, MI 52-109 also requires the CEOs and CFOs of all issuers to certify that, based on their knowledge, the annual or interim financial statements, as applicable, together with the other financial information included in the annual or interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the annual or interim filings, subject to certain exemptions.

2. Involvement of Advisors in Continuous Disclosure

Question

18. Is it realistic to expect that advisors will become more involved in continuous disclosure in order to address increased time pressure at the time of an IDS prospectus? Alternatively, will the expedited offering process result in a deterioration of the due diligence conducted by advisors in respect of information incorporated by reference in a prospectus? If so, how would this affect the ability of underwriters to certify the prospectus?

Comments

Four commenters suggested it would be unreasonable to expect that advisors will become significantly involved in CD to avoid having a deterioration in due diligence as a consequence of the expedited offering process under IDS. Two commenters cited a perceived deterioration of due diligence under the POP system to support their contention, while the other two commenters suggested that introducing civil liability for CD would be needed to increase advisor involvement in these filings.

One commenter said that it is unclear whether the IDS contemplates that securities might be offered without the involvement of an underwriter or other intermediary. This commenter said that this would almost certainly have a negative impact on the quality of offering documents in that it might eliminate two levels of due diligence – that performed by an underwriter or agent and that performed by the underwriter's legal counsel.

One commenter suggested that the CSA identify those practices which would constitute competent due diligence to assist underwriters in carrying out due diligence and managing the task effectively under the expedited IDS offering timetable. The commenter referred to the list of specified procedures included by the SEC in the "aircraft carrier" proposal, as follows:

- review of the [registration statement] and reasonable inquiry into any fact or circumstance that would cause a reasonable person to question the contents;

- discussion with management (including, at a minimum the chief financial and accounting officers) and receipt of certification as to compliance from those officers;

- receipt of a "comfort letter";

- receipt of a favourable opinion from issuer's counsel;

- receipt of a favourable opinion from underwriters' counsel; and

- employment of and consultation with an appropriately experienced and informed research analyst.

This commenter also proposed that underwriters should not be held to the standard of "full, true and plain" disclosure of all material facts as is the case for senior officers and directors of the issuer, but instead proposed the following alternate certification: "[T]o the best of the underwriter's knowledge, the underwriter is unaware of any misstatement of a material fact relating to the securities offered hereby in the prospectus or disclosure documents incorporated by reference."

One commenter said that the enhanced disclosure standard will likely require greater involvement of professional advisers than is currently the case, but that this may only be an added cost and inefficiency to the system.

Another commenter disagreed that an "aircraft carrier" style list of due diligence procedures should be produced by the CSA, stating that this is an area in which it makes more sense to let the industry deal with the practicalities of due diligence rather than try to deal with this through regulation. The commenter believed that, what was then proposed Regulation FD in the United States, simply states what is the current law in Ontario in the case of intentional disclosures and what is the current practice in the case of non-intentional disclosures.

Response

The CD Rules, MI 52-109 where applicable, and MI 52-110 where applicable, together with proposals to introduce secondary market civil liability, represent a fundamental shift in regulatory focus from primary to secondary market disclosure. The CSA believe that their combined effect will encourage issuers to seek the counsel of their advisors when preparing their CD. We also believe that by expanding the expedited offering procedures under Proposed NI 44-101 to more issuers, more issuers will seek increased involvement by underwriters, as well as other advisors, in their CD to ensure that they will be able to access the market as quickly as possible.

The CSA believe that we should not prescribe due diligence practices. What constitutes appropriate due diligence in any particular case will depend on the specific

circumstances at the time and with respect to the individual issuer. The professionals involved in the conduct of due diligence are best able to make such decisions.

C. IDS Prospectuses

1. Delivery of the Preliminary IDS Prospectus

Question

19. Do preliminary and final prospectuses assist investors in making their investment decisions and is it relied upon for this purpose today? If not, on what basis are investors in the primary market currently making their investment decisions?

Comments

Four commenters suggested that most recipients of these documents at best give them a cursory reading, and that investment professionals, including financial analysts and brokers, are the prime users.

Four commenters stated that retail investors typically rely on their brokers in making investment decisions, rather than on the prospectus. Another commenter asserted that, although the preliminary prospectus continues to serve an important function in investors' decision-making process, the final prospectus adds little additional value for primary market investors as it is delivered after the investment decision has been made.

Response

The CSA note the commenters' views that the preliminary and final prospectuses may only be given a cursory reading by some investors. Nevertheless, our securities legislation continues to require preliminary and final prospectuses. We believe that, in a non-exempt offering, a final prospectus with full, true and plain disclosure of all material facts relating to, and, in Québec, not making any misrepresentation likely to affect the value or market price of, the securities to be distributed, and from which purchasers' rights of withdrawal, rescission and damages flow, is an appropriate regulatory requirement.

In the Notice, we have asked your views on whether we should seek legislative change in order to eliminate the preliminary prospectus, prospectus receipts and prospectus review.

Question

20. As discussed in Part III.D.4(a) of the Concept Proposal, the CSA considered specifying the timing of delivery of the preliminary IDS prospectus to ensure that a prescribed minimum period of time would be available to an investor before an investment decision becomes binding. Would a prescribed minimum preliminary IDS prospectus delivery period (for example, a specified number of days before pricing or the signing of a subscription agreement) be suitable for all investors and all situations? If so, what would be an appropriate period of time? If not, why not?

Comments
Several commenters did not believe that a prescribed minimum preliminary prospectus delivery period would be suitable for all investors and all situations. Comments were as follows:

- Investors are not concerned about lack of time to review a prospectus: The timing should be geared to the needs of the investment community.

- The prescribed waiting period triggered off the delivery of the preliminary prospectus would be administratively difficult to manage and would not provide additional investor protection provided the rights of rescission and withdrawal are retained upon delivery of the final prospectus.

- The time required to evaluate the purchase of a security depends largely on the nature of the offering. The commenter was of the view that the prospectus delivery period will be driven largely by marketing considerations and that market forces, together with the statutory rescission period, offer investors sufficient protection.

- A prescribed minimum preliminary IDS prospectus delivery period would unduly interfere with the distribution process. In particular, it would be impractical to either exclude investors identified as "late" in the distribution process or, alternatively, stop the process to allow newly identified investors to "catch up." Further, the availability of the preliminary prospectus on SEDAR would provide investors with ready access to this document.

Response
The CSA do not believe a minimum delivery period for a preliminary short form prospectus is necessary. Under Proposed NI 44-101, as with Current NI 44-101, the implementing law of applicable jurisdictions removes the statutory minimum period of time between the issuance of a receipt for a preliminary short form prospectus and the issuance of a receipt for a short form prospectus as it would otherwise apply to a distribution.

Question
21. Should the IDS require filing and delivery of the preliminary IDS prospectus? Should alternative methods of delivering the preliminary IDS prospectus be permitted? If so, how?

Comments
One commenter said that, if a prospective investor can easily obtain a copy of the prospectus, this should be sufficient.

Another commenter suggested that the preliminary prospectus should be available to investors electronically (not in hard copy unless requested) and should also be included in any marketing communications. The final prospectus should be required to be delivered

to investors no later than the delivery of the confirmation of purchase to ensure investors are provided with statutory withdrawal rights.

Three commenters stated that an IDS preliminary prospectus should be delivered to investors. One of these commenters said that this would give investors the opportunity to review the information and advise them as to where the disclosure incorporated by reference in the prospectus may be obtained and reviewed. Two commenters also recommended that delivery by electronic means be permitted. One commenter added that if alternative prospectus delivery methods are introduced, they should be available to all offerings and not just IDS offerings.

One commenter recommended that the delivery requirement be eliminated because the issuer's preliminary prospectus is readily available on SEDAR and marketing communications must include a statement regarding how a potential investor may obtain the preliminary IDS prospectus.

Response
Proposed NI 44-101 does not change the statutory requirements to deliver a preliminary prospectus to potential investors. Electronic delivery of prospectuses is permitted under NP 11-201, subject to certain conditions.

In the Notice, we have asked your views on whether we should seek legislative change in order to eliminate the preliminary prospectus, prospectus receipts and prospectus review.

2. Content of IDS Prospectuses

Question
22. Are the preliminary IDS prospectus disclosure items outlined in Part III.D.2(a) of the Concept Proposal appropriate to ensure that an investor can make an informed investment decision? Please explain.

Comments
Two commenters suggested the addition of a "Current Developments" or "Recent Developments" category, which would require the issuer to provide any information necessary to update documents incorporated by reference to reflect more recent developments. One of these commenters suggested that the new requirement extend to capture recent developments that may not otherwise be required to be disclosed in an SIF.

One commenter voiced the need for a mechanism whereby a proposed acquisition cannot take place until an exchange has accepted the transaction, conditional only on the completion of the financing; otherwise there is a risk that a prospectus will be receipted for an offering where the proceeds are not allocated to what is disclosed and the issuer is raising money for a non-existent project.

Two commenters stated that the proposed IDS prospectus disclosure items are generally appropriate. One of these commenters stated that there should be certain exceptions to those documents which are incorporated by reference in the prospectus.

Another commenter strongly supported allowing issuers to incorporate by reference all of its IDS disclosure base filings, including marketing communications, in the prospectus. This would result in more readable marketing document formats and increased reliability of information, since incorporated documents must be certified. The same commenter also recommended that issuers be required to provide investors with any information that is incorporated by reference on request and in a timely manner. This would involve attaching incorporated information as an electronic file to the AIF. As well, this commenter recommended that when incorporating by reference, issuers should be required to: (1) provide specific information on how to access the referenced information; and (2) provide a hyperlink from the issuer's Web site to these reports.

Response

Proposed Form 1 generally requires a short form prospectus contain full, true and plain disclosure of all material facts relating to, and in Quebec not to make any misrepresentation likely to affect the value or market price of, the securities to be distributed. While we have not specifically required a "Recent Developments" section, we expect that issuers will include previously undisclosed material facts in such a section.

The disclosure items outlined in Proposed Form 1 are consistent with the disclosure items set out in Part III.D.2(a) of the 2000 Concept Proposal. Under Proposed Form 1, any information required in a short form prospectus may generally be incorporated by reference in the short form prospectus.

Question

23. What are the advantages and disadvantages of a streamlined form of final IDS prospectus? Which form of final IDS prospectus would issuers and investors prefer? Should the traditional form of final IDS prospectus be mandatory? If so, why?

Comments

Three commenters supported the streamlined form of final prospectus, stating that it would be of much greater utility to investors since it would highlight new information from the date of the preliminary prospectus. One of these commenters stated that the streamlined form would also be welcomed by issuers, who would benefit from reduced printing and distribution costs. Both the streamlined and the traditional alternatives should not be available to issuers; there should be only one permitted form of final prospectus. Two commenters expressed concern over the streamlined approach and made the following points:

- It may be cumbersome to clearly distinguish what portions of the preliminary prospectus have been carried forward and what portions have been deleted or

superseded. As well, the final document may be construed as a formal notice of the deficiencies in the preliminary disclosures, since it highlights necessary updates.

- The streamlined final prospectus only works if the preliminary prospectus must be delivered to potential investors, and would not necessarily reduce costs or preparation time for the issuers, since it requires the preparation of two different documents rather than simply updating the preliminary. This commenter recommended that investors be provided with the final prospectus and be advised of the existence, location and availability of a blacklined version of the final prospectus which shows all changes from the preliminary prospectus.

Response
Though some commenters support this proposal, the CSA has decided not to adopt a streamlined form of final short form prospectus which would incorporate a preliminary prospectus. We recognize the concerns raised by the commenters. Given that investors' prospectus rights flow from the final prospectus, we believe it should, through incorporation by reference of CD, be a comprehensive disclosure document.

D. IDS Marketing Regime

Question
24. Is the proposed definition of "marketing communication" in the IDS appropriate? What types of communications should be excluded from the definition, and why?

Comments
One commenter was of the view that "green sheets" should not be included in the category of marketing documents, since "green sheets" typically contain financial information of other companies in the issuer's industry, along with numerous financial ratios and calculations.

Another commenter suggested that the IDS instrument clarify that the issuer is not responsible for documents prepared by underwriters and that these documents are not considered to be incorporated by reference.

Two commenters emphasized that the broad definition of "marketing communications" requires more exceptions, and recommended that the CSA consider a definition which specifically excludes communications which indicate that they are internal or confidential.

One commenter generally supported the proposed removal of existing pre-marketing restrictions, but suggested that the proposed definition of "marketing communication" coupled with the requirement that an IDS prospectus incorporate by reference all written marketing communications disseminated by or on behalf of the issuer during the course of distribution of securities may have an unintended "chilling" effect, e.g., underwriters conducting road shows without written materials to avoid the filing and certification requirements. The CSA should not confuse the responsibility of the issuer to provide equal access to all disclosed material information with: (i) a responsibility of the issuer to

provide equal access to all information; or (ii) a responsibility of the underwriter to provide equal access to its proprietary materials.

The same commenter stated that research reports and other written commentary on the issuer, published in the ordinary course, should be excluded from the definition of marketing communications and the certification requirement, unless the issuer or the issuer's agent makes specific reference to, or widely disseminates, such materials during the distribution period. Subjecting research reports and commentary to the due diligence process and "full, true and plain" disclosure standard would be a costly, time-consuming and possibly problematic exercise. This commenter also suggested that guidance should be given to assist interpretation in the context of electronic media – for example, the criteria that would be examined in determining whether a hyperlink or other reference to third party materials on the issuer's website would constitute "dissemination" of such materials by the issuer.

Response

The CSA recognize the concerns relating to incorporating certain marketing materials into a prospectus. This question is not relevant at this time given the CSA's decision not to presently adopt the marketing restrictions set out in the 2000 Concept Proposal. See the response to item 25 below.

Question

25. What are your views concerning the proposed IDS marketing restrictions? Are others necessary for investor protection purposes? Would the proposed IDS marketing restrictions restrict valid corporate communications?

Comments

One commenter stated that the IDS marketing restrictions appear to provide issuers with more flexibility in their investor communications; the restrictions appear to strike a reasonable balance between investor protection and business expediency.

One commenter supported the elimination of the pre-marketing restrictions in the context of the proposed IDS regime based on the view that it provides greater flexibility in the capital raising process and acknowledges the diminished role of the prospectus and the increased emphasis on CD. This commenter went on to highlight two further issues:

- There is potential for abuse and pre-marketing should be closely monitored, particularly with regard to the elimination of the existing pre-marketing rules in the absence of the formulation, adoption and enforcement of a new framework to address pre-marketing issues and potential abuses under the IDS regime. Regulators should remind IDS issuers that they have an obligation to make timely disclosure of material information (by the SIF), once issuers have formed a reasonable expectation of proceeding with the offering. Regulators should also ensure enforcement of these obligations.

- Market distortion resulting from the misuse of information concerning the existence of a proposed offering is possible – for example, an institutional investor learning of a

proposed equity offering may anticipate ensuing weakness in the market price of the security and sell the security placing downward pressure on its market price. Alternatively, institutional investors may not sell after learning of a proposed equity offering but may not buy either if it anticipates a pricing fallout or announcement.

One commenter emphasized the view that existing pre-marketing rules are confusing, anomalous (given that private placements for public companies can now be pre-marketed), and favour the large, well-capitalized dealers over the smaller dealers who specialize in financing smaller issuers. It is far better, said this commenter, to rely on available enforcement remedies rather than to continue to anticipate the worst and thereby limit options.

One commenter stated that marketing materials should not be incorporated by reference in an IDS prospectus. According to the commenter, the inappropriate use of marketing material should be policed separately by the securities regulatory authorities. A requirement to incorporate marketing materials by reference could cause issuers to inadvertently make misrepresentations. Many marketing communications, because of their necessary brevity, do not contain full, true and plain disclosure. It is also becoming increasingly difficult for issuers to monitor the dissemination of marketing information that occurs through media such as bulletin boards and chat rooms. An alternative would be to require that materials produced by the issuer contain a disclaimer that the information is not complete, with a cross-reference to the prospectus and its location on SEDAR or the issuer's website.

Response

With the implementation of the CD Rules and other CSA CD initiatives, we continue to believe that the current pre-marketing restrictions could be revisited in order to allow more flexible capital-raising by issuers with less focus placed on the preliminary prospectus. However, the CSA is not currently prepared to propose any change to the prospectus regime that would permit marketing of a prospectus offering prior to public disclosure that the offering is pending. Without the prior public disclosure about a pending offering, we are concerned about the potential improper use of undisclosed information about an offering, including insider trading and tipping.

The CSA recognizes the tension, as reflected in the comments on this question as well as to question 11 above (where significant concerns were raised with the "reasonable expectation" test for disclosure of a potential offering) between an issuer's obligations to provide timely disclosure of pending offerings and concern about premature disclosure of pending offerings. Generally, issuers do not disclose a proposed prospectus offering until a bought deal is agreed upon, or, for a marketed offering, at or about the time a preliminary prospectus is filed. Recent discussions with our advisory committees suggest that the current marketing regime, particularly for bought deals, is generally sufficient. Consequently, given the current regulatory framework, it is not apparent that issuers would publicly disclose a pending prospectus offering any earlier than they are currently disclosing such offerings in order to initiate legal marketing of the offering.

Accordingly, Proposed NI 44-101 does not include any of the proposed changes to the pre-marketing regime set out in the 2000 Concept Proposal. However, as discussed in the Notice, the Proposed Rule does include a minor amendment which allows issuers and underwriters to agree to file a preliminary prospectus up to four business days after entering into a bought deal agreement. As also discussed in the Notice, to the extent that the CSA moves forward in the future with the prospectus offering regime that does not require preliminary prospectuses, a new prospectus marketing regime will be considered. See question 7 under the heading "Marketing Restrictions" in the Notice.

Question

26. How should "distribution period" be defined for purposes of determining which written marketing materials must be incorporated by reference in an IDS prospectus? Should it be defined as commencing a specified number of days (e.g. 15 days) before the first offer of the securities, upon the filing of the preliminary IDS prospectus or some other event? When should the distribution period be considered terminated for this purpose?

Comments

One commenter welcomed efforts to more clearly define this period, but deferred to the underwriting community as to what limits should be imposed.

One commenter stated that the distribution period should be commenced from the receipt of the prospectus to such time as the offering has been sold and the contractual rights of rescission and withdrawal have expired.

One commenter supported a bright line test commencing at the time the issuer determines to effect an offering and terminating upon the cessation of offers and sales under the final IDS prospectus. An issuer should not be required to incorporate by reference, and assume liability for, any document prepared prior to its determination to effect an offering and without its prior review and approval.

Another commenter proposed that the distribution period extend from the earlier of the filing of the SIF (disclosing the proposed offering of securities) and the filing of the preliminary IDS prospectus to the filing of the final IDS prospectus. This definition would have the advantage of providing certainty to market participants.

Response

Since we are no longer considering requiring marketing communications to be incorporated into a prospectus, this question is no longer relevant. See the responses to items 24 and 25 above.

E. Proposals for Changes Outsides the IDS

Question

27. Should the IDS continuous disclosure enhancements be broadly applied to all issuers?

Comments

Four commenters were opposed to broadly applying IDS enhancements to all issuers. Four commenters cited considerable additional burdens and increased expenses, particularly for smaller issuers. One of these commenters suggested that transitional provisions are required to allow time for such smaller companies to meet any new reporting requirements. One of the commenters stated that those issuers who do not benefit from the system should not have to pay the price inherent in complying with the higher standards of disclosure. This commenter argued the following concessions for smaller issuers: more time to prepare and file the required disclosures; exemption from audit committee requirements; exemption from auditor review of interim financial statements; and exemption from interim MD&A requirements. One commenter felt that the changes proposed would impose considerable burdens on issuers and increased expense. In the event that any of the CSA participants determine to adopt any of the IDS initiatives as mandatory requirements prior to completion of the pilot project, the commenter strongly recommended that an intensive educational and feedback process be conducted prior to implementation.

One commenter observed that companies considered small by U.S. standards are much larger than their Canadian counterparts. Additional latitude needs to be provided for Canadian juniors.

One commenter strongly supported the extension of certain IDS disclosure enhancements to all issuers, particularly the proposed upgraded content of annual and interim reports and accelerated filing periods for annual and interim reports.

One commenter stated that the requirement for a review engagement report in regard to interim financial statements should not be extended to non-IDS participants. This commenter encouraged the introduction of the requirement of MD&A in regard to the interim financial statements in regard to all issuers.

Response

The CSA acknowledge the comments of those who argued that IDS enhancements should not apply to all issuers. The CD Rules, MI 52-109 where applicable, and the Audit Committee Rule where applicable, now apply to all issuers, subject to certain exemptions. However, the CSA has recognized that smaller issuers may be disproportionately burdened by these enhanced requirements and has provided for somewhat less onerous requirements for venture issuers.

Question

28. The CSA propose to extend to non-IDS issuers the IDS certification requirements discussed in Part III.B.1 of this Notice and Part III.C.2.(c) of the Concept Proposal. Does this raise concerns unique to non-IDS issuers? If so, what are they?

Comments
One commenter saw no reason to exempt non-IDS issuers from this requirement if the certification requirements are adopted. Smaller issuers should make the same assertions as IDS issuers if allowed more time for filing and preparation.

One commenter concluded that certification by senior management and the directors will have a positive impact on the disclosure process and therefore the commenter supported the proposed extension to non-IDS issuers.

Another commenter stated that, given the predominance of secondary market trading over primary market, the main purpose of IDS should be to provide the marketplace in general with enhanced and expanded disclosure. Accordingly, IDS disclosure should logically apply to all reporting issuers. As well, broad-based IDS disclosure standards might also permit the elimination or substantial reduction of much of the complexity of current securities regulation.

Response
Where applicable, MI 52-109 now requires the CEOs and CFOs of all issuers to certify the issuer's annual and interim filings, subject to certain exemptions.

Question
29. Should the IDS marketing restrictions discussed in Part IV.B be broadly applied to non-IDS offerings?

Comments
One commenter stated that, as it believes that the creation of an enhanced disclosure base in respect of an IDS issuer is essential to the functioning of the proposed regime, it does not support the removal of pre-marketing restrictions in respect of non-IDS issuers.

One commenter supported a broad application of the prohibition on misrepresentation in marketing materials, stating that this would assist in regulating communications which potentially mislead the investing public.

Response
Please see the response to item 25 above.

Question
30. Are there any other elements of the IDS that should be broadly applied to all issuers?

Comments
One commenter recommended that more frequent and extensive regulatory review of CD materials be applied to all issuers.

Response
The CSA agree with the commenter's recommendation. The CDR Program is intended to complement the CD Rules by enhancing consistency in the scope and level of reviews

carried out by CSA staff. We believe that greater consistency in the treatment of issuers will improve the overall quality and timeliness of CD.

F. Pilot Introduction of the IDS

Question

31. Would issuers be interested in participating in the pilot introduction of the IDS? If not, why not?

Comments

One commenter stated that it is not certain that issuers will be willing to participate in a pilot introduction of the IDS because of the cost of complying with the IDS and the increased exposure as a result of the certification requirements contained in the IDS.

One commenter did not think that issuer interest would be very strong, based on MRRS pilot test experience. The non-POP issuers with the imminent need to raise capital, stated this commenter, will have the most to gain by opting into the IDS pilot program.

Another commenter believed that many junior issuers would be interested in participating, provided that the costs are not prohibitive. According to the commenter, the primary deterrent to participating in IDS is the requirement to become a reporting issuer in all jurisdictions. If this provision was removed, junior issuer participation would likely be significant. This commenter's experience with issuers utilizing the SHAIF system and the short form prospectus distributions system would appear to indicate that a system emphasizing CD and an ability to access the market quickly will be widely utilized by issuers.

Another commenter stated that exchange-listed non-POP system issuers may be particularly interested in improving their speed of access to the markets. Possible deterrents could be the additional costs of preparing the enhanced disclosure and reporting on a national basis, the reduced period in which to file annual and interim financials and the regulatory uncertainty surrounding a new system.

Response

A pilot period is not necessary with respect to Proposed NI 44-101. The CD Rules will have been in effect for a period of time prior to the implementation of Proposed NI 44-101, and Proposed NI 44-101 is a revision to rules that have been in place since 2000.

Question

32. Would issuers who are currently eligible to use the prompt offering qualification system be interested in participating in the pilot introduction of the IDS? If not, why not?

Comments

One commenter speculated that if the benefits currently enjoyed by Canadian SEC registrants under the MJDS are removed, there would be little or no benefit to the IDS prospectus system, let alone the short form prospectus distributions system, because the

more rigorous U.S. form requirements will prevail. The CD enhancements, however, will put both IDS and short form prospectus issuers in a better position to make U.S. filings.

One commenter indicated that IDS is primarily attractive to issuers that do not qualify for the short form prospectus distributions system. This commenter said that IDS introduces additional disclosure requirements that do not exist in the short form prospectus distributions system without providing any benefits for issuers eligible under that system.

Another commenter stated that there may be less incentive for POP system issuers to migrate to the new system as timing advantages would not be significant. Under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms*, regulators will use their best efforts to review and provide comments on short form prospectuses within three and a half days.

One commenter believed that relatively few issuers will perceive the IDS to offer significant advantages over the existing short form prospectus and shelf distribution procedures when compared with a significant increase in reporting issuers' compliance burden. Accordingly, there will be little incentive for issuers to participate in the pilot introduction of the IDS unless and until the CD requirements in the proposal are extended to non-IDS offerings. This commenter emphasized that investors should be entitled to receive the same quality of disclosure, regardless of whether the issuer is an IDS participant. In the event that the CD enhancements set forth in the 2000 Concept Proposal are applied universally and take effect simultaneously, the IDS will offer several compelling advantages. Issuers who are not eligible to use the short form prospectus or shelf distribution procedures will be eligible to use streamlined procedures under the IDS. Issuers who are eligible to use short form prospectus or shelf distribution procedures would benefit from faster and more predictable timing when qualifying a prospectus distribution.

Response
The CSA thank the commenters for their comments. As noted above, however, given the CSA's decision to proceed with the liberalization of existing rules rather than the development of a separate IDS, no pilot period is required.

Question
33. What do you perceive as the main benefits of the IDS, as compared with the existing distribution procedures?

Comments
Four commenters listed the following benefits:

- The main benefits of the IDS would be the speed at which the capital markets could be accessed by the issuers.

- A National Instrument will most likely be adopted as a rule in all Canadian jurisdictions, which will be a major step towards creating a virtual national securities

commission and which will narrow the gap between information on the public record at any point in time and the "full, true and plain" prospectus disclosure.

- The extent of disclosure in the prospectus document, short form included, will be significantly reduced, and mid-sized issuers will be able to obtain benefits similar to those presently enjoyed by POP issuers.

- IDS will allow all investors, not just those participating in primary offerings, to make informed investment decisions. This commenter also listed as a benefit the ability of issuers to access the market in a timely manner, which is particularly important in the current market environment.

- IDS will allow faster and more predictable access to the capital markets as an IDS prospectus would be subject to only limited review by regulators. The IDS has the potential to provide issuers with greater flexibility to go to the market more often, in lesser amounts, and at lower transaction costs. The main benefit for investors under the IDS is the potential for more complete and timely disclosure information.

Response
The CSA believe that these comments apply equally to Proposed NI 44-101. The CD Rules have enhanced CD requirements, accomplishing a significant component of IDS, and Proposed NI 44-101 generally permits more issuers to access the short form prospectus system than Current NI 44-101 does. Even more issuers will be able to access the short form prospectus system if the seasoning and quantitative size qualification criteria are eliminated as proposed under Alternative B of Proposed NI 44-101.

Question
34. If the IDS proves to be a successful alternative to the short form prospectus and shelf distribution systems, the CSA will consider eliminating the short form and shelf distribution procedures for IDS-eligible issuers. Is this appropriate? If not, why not?

Comments
One commenter suggested waiting until the results of the pilot test are known.

Another commenter wished to clarify with the CSA that the MTN program (as defined in National Instrument 44-102 *Shelf Distributions*) shelf procedures, or analogous procedures permitting the use of one-page pricing supplements, would be continued under the IDS.

Another commenter opposed elimination of short form and shelf because of the recognized efficiency of these systems. This commenter believes the better approach would be to allow IDS as an alternative offering regime.

Another commenter believed that if the IDS proves to be a successful alternative to the short form prospectus and shelf distribution systems (and following an appropriate

industry consultation), the CSA should consider eliminating the short form and shelf distribution procedures for IDS-eligible issuers.

Response
The CSA are not considering eliminating the short form and shelf distribution procedures. IDS, as described in the 2000 Concept Proposal, and Proposed NI 44-101 are quite similar to one another, with the exception of the marketing restriction proposals.

G. Other Comments

(a) Reduced filing periods for financial statements

Comments
Two commenters stated that the change requiring the filing of annual and interim financial statements to within 90 days of year end and 45 days of quarter end, respectively, is a positive change.

One commenter generally opposed the reduced filing periods because they would take away the buffer that companies have to cope with emergencies, day-to-day business and the ever-increasing regulatory burden. Another commenter opposed the requirement other than in the context of a voluntary system, but suggested that, if the requirement were adopted, consideration should be given to providing additional time for the delivery of materials to shareholders.

Two commenters, although not opposed to the requirement, recommended providing a transition period. One of these commenters suggested that current filing deadlines be maintained for two years to conform with the pilot introduction for IDS until issuers become familiar with the increased content requirements.

Four commenters believed that junior issuers would experience difficulties in meeting the new deadlines and proposed that some form of relief be provided.

One of these commenters raised the following specific concerns:

- Smaller companies are already poorly served by their auditors and rarely get their financials more than a day before the print deadline. A reduction for the annuals to 90 days would greatly increase the difficulty and costs.

- 60 days for quarterlies is generally easy to keep track of, being roughly 2 months from the quarter end, whereas the odd 45 day requirement will lead to a lot of wasted time and administrative difficulties.

- Current management time is already at a premium.

- Even if the new time frames are tied only to the IDS there is a strong incentive to apply them to all filers eventually, and the commenter was against this.

- Junior companies in Canada (unlike their U.S. counterparts) do not have the resources that would enable them to meet the new time constraints.

Suggested forms of relief that could be granted to junior issuers include:

- setting the annual filing deadline to 120 days after year end, rather than 90 days, in view of the complexities of completing a year end audit; and

- providing an exemption.

One commenter requested that the CSA clarify that the deadline for submission of the MD&A which discusses the fourth quarter financial results is 90 days after the issuer's year end. Quarterly submissions are due within 45 days after the relevant interim period, however the fourth quarter MD&A is to be included in the AIF which is due 90 days after the issuer's year end.

Response
The CD Rules have reduced the filing period for various CD documents. This was subject to extensive comment when the CD Rules were published for comment. The financial statement filing periods in NI 51-102 for annual financial statements is 120 days after year-end for venture issuers, and 90 days for non-venture issuers. The deadline for filing interim financial statements remains at 60 days for venture issuers and is reduced to 45 days after period end for non-venture issuers. The new filing deadlines apply to financial years starting on or after January 1, 2004.

(b) Eligibility criteria

Comments
One commenter said that the listing requirement needs to be clarified in order to confirm whether "recognized market" includes the junior tier of the Canadian Venture Exchange.

Response
Under the basic qualification criteria of Alternative B of Proposed NI 44-101, the issuer's securities must be listed or posted for trading on a short form eligible exchange. Alternative B of Proposed NI 44-101 defines a short form eligible exchange to be the TSX, Tier 1 and Tier 2 of the TSX Venture Exchange, and their respective successors

(c) Measures to ensure quality of disclosure

Comments
Two commenters emphasized the importance of strong regulatory review, subsequent audit and enforcement where necessary, in ensuring the quality of disclosure under IDS.

Response
The CSA agree with these comments and has implemented the CDR Program. Please see the response to item 30 above.

(d) Use of plain language

Comments
Another commenter noted that, because of the growth in the retail investor market, Canadian regulators should encourage "plain language" disclosure as in the United States.

Response
The CSA encourage the use of plain language in disclosure documents.

(e) Support for Concept Proposal

Comments
Six commenters generally supported the 2000 Concept Proposal, subject to individual concerns.

Response
The CSA note the comments. We believe that many of the benefits of the IDS as set out in the 2000 Concept Proposal are now in place under the CD Rules, MI 52-109 where applicable, and MI 52-110 where applicable, and with the implementation of other CSA initiatives. Proposed NI 44-101 harmonizes Current NI 44-101 with these new requirements.

(f) Other market developments

Comments
One commenter observed that IDS should take into account other developments in North American securities markets, such as the proposed association of stock exchanges.

Response
The CSA will continue to consider the impact of any other developments in North American securities markets.

Schedule 1

List of Commenters
(listed according to the comment letter date)

Jonathan McCullough
McCullouch O'Connor Irwin
April 17, 2000

Andrew D. Grasby, Co-Chair and Philippa P.B. Hughes, Associate, Advocacy
Canadian Advocacy Council
Association for Investment Management and Research (AIMR)
May 19, 2000

Maria Casano, Partner
BDO Dunwoody LLP
May 26, 2000

Mark Fields
Vice President and Director
Copper Ridge Exploration Inc.
May 26, 2000

Kenneth G. Hanna
May 28, 2000

John H. Deacon
Vice President, General Counsel and Corporate Secretary
NAV Canada
May 29, 2000

Maria V. Casano, Member
Task Force of the Accounting and Assurance Standards Boards
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June 1, 2000

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CBAO Business Law Section
June 5, 2000

Gordon C. Fowler, Partner, and Alan G. Van Weelden, Senior Principal
KPMG LLP
June 5, 2000

Lawson Lundell Lawson & McIntosh
June 6, 2000

Christopher Begy
Bank of Montreal
June 7, 2000

Gerald A. Romanzin
Executive Vice President
Canadian Venture Exchange
June 7, 2000

Ron Blunn, Chair, and David Mills, Past Chair
CIRI Issues Committee
Canadian Investor Relations Institute
June 9, 2000

Osler Hoskin & Harcourt
June 13, 2000

Peter McCarter
Aur Resources Inc.
June 17, 2000

Nelson Smith
Head of Investment Banking
Yorkton Securities Inc.
June 19, 2000

Joseph J. Oliver
President and Chief Executive Officer
Investment Dealers Association of Canada
June 22, 2000

Duane Poliquin
President
Almaden Resources and Fairfield Minerals
June 23, 2000

John Kruzick
President
DRC Resources
June 23, 2000

Brooke Campbell
Manager Corporate Finance and Director
Odlum Brown Limited
September 20, 2000