



BC Notice 2021/03

## Notice and Request for Comment

### Proposed British Columbia Instrument 51-519 *Promotional Activity Disclosure Requirements*

#### Introduction

The British Columbia Securities Commission (BCSC or we) is publishing for a 60-day comment period proposed British Columbia Instrument 51-519 *Promotional Activity Disclosure Requirements* (the Instrument) and related Companion Policy 51-519 *Promotional Activity Disclosure Requirements* (the Companion Policy). The proposed Instrument and Companion Policy are set out in Annexes A and B of this Notice.

#### Substance and Purpose

The proposed Instrument would establish a tailored framework for promotional activity disclosure in British Columbia, and is one component of a larger initiative we are pursuing to address problematic promotional activity.

The Instrument would provide investors with improved transparency about the source and reliability of promotional activity, enabling them make more informed investment decisions. The disclosure would also assist the BCSC to identify and hold responsible those issuers and persons who conduct problematic promotional activity.

#### Background

##### *Problematic promotional activity*

On November 29, 2018, the Canadian Securities Administrators published CSA Staff Notice 51-356 *Problematic promotional activities by issuers* in response to concerns about promotional activity by certain issuers, which included:

- disclosure and promotional campaigns that provide unbalanced or unsubstantiated material claims about the issuer's business and the corresponding opportunity for profit by investing in the issuer
- opinion-based content, hyperbole, or unbalanced or unsubstantiated claims about the issuer or its prospects
- content placing too much significance or emphasis on immaterial business activity, or failing to contain adequate context or factual statements
- content disguised as independent analysis or news, designed to encourage readers to make a decision to invest quickly and without getting advice
- activity undertaken in order to artificially promote interest in the issuer's securities, which artificially increases the issuer's share price and trading volume

The volume of problematic promotional activity, often involving venture issuers in emerging sectors, has increased in recent years with the popularity of social media.

Problematic promotional activity undermines the integrity of the capital markets and puts investors at risk of harm from making misinformed investment decisions.

#### *Disclosure concerns*

When issuers engage in promotional activity they do not always disclose compensation paid to third parties for promotional campaigns. As a result, investors may be unaware of amounts that an issuer spends on promotional activity, which may be very high or represent a large proportion of an issuer's operating budget, in some cases more than the amount spent on actual business activity. Also, issuers may fail to oversee promotional activity, which may be sub-contracted to third parties without any, or with inadequate, disclosure controls. Promotional activity may also be conducted by or on behalf of security holders or other third parties without the knowledge or involvement of the issuer.

Those who conduct promotional activity often use social media and general investing blogs to promote issuers, but often do not disclose their conflicts of interest, including compensation for the activity, which may include securities of the issuer.

#### *Securities Act amendments*

Amendments to the *Securities Act* (the Act) that came into force in March 2020 provide the BCSC with additional tools to address problematic promotional activity. These amendments:

- replace the definition of “investor relations activities” in section 1(1) of the Act with a new definition of “promotional activity” that captures a broader scope of activity
- introduce in section 50(3) of the Act new prohibitions against making false or misleading statements when engaging in promotional activity, if the statement is something a reasonable investor would consider important in making an investment decision
- repeal the following disclosure requirements in section 52 of the Act<sup>1</sup>:
  - every investor relations record must clearly and conspicuously disclose that it is being issued by or on behalf of the issuer or security holder, where that is the case
  - an issuer or security holder must disclose on inquiry that a person is engaged in investor relations activities on their behalf, where that is the case

#### **Summary of the Proposed Instrument**

There are four circumstances where the Instrument would require disclosure. These are disclosure:

- in promotional communications
- on inquiry
- in news releases
- in management's discussion and analysis (MD&A)

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<sup>1</sup> The repeal of section 52 is not yet in force and will be brought into force when we adopt the proposed Instrument.

### **Application of the Instrument**

The disclosure requirements for promotional communications would apply to all promotional communications or material for promotions involving any issuer. This would include, for example, a promoter making oral statements at investor meetings or sales events, publishing written materials (such as financial blogs, newsletters or emails), or making social media posts (such as Twitter, Reddit, Facebook or Instagram) or videos. Any person that retains or compensates a third party to engage in promotional activity would be required to ensure that the required disclosure is included in promotional communications.

The disclosure requirements for news releases and MD&A would apply only to venture issuers<sup>2</sup> that retain or compensate third parties to conduct promotions.

The requirement to provide certain disclosure on inquiry would apply to all persons that retain or compensate third parties to conduct promotions.

### *Exclusions*

The Instrument would not apply to:

- promotional activity that is conducted by an issuer if such promotional activity relates to that issuer or its securities, and is conducted by its directors, officers and employees that identify themselves as acting in that capacity
- registrants engaging in registrable activities; the Instrument would still apply when a registrant engages in outside business activities
- international dealers or advisers that are exempt from registration
- U.S. broker-dealer or adviser firms and their representatives that have offices or employees in British Columbia and are exempt from registration
- investment funds, or persons engaged in promotional activity in respect of investment funds.

### **Disclosure in Promotional Communications**

The Instrument would require the following disclosure when engaging in promotional activity:

- Engagement: on whose behalf the person conducting the promotional activity has been retained
- Compensation: a description of the compensation the person may receive for the promotional activity, including whether it includes the securities or derivatives that are the subject of the promotional activity
- Ownership of securities or derivatives: any interest in any security or derivative that is the subject of the promotional activity, and any plan to acquire, dispose of or trade them
- Platforms: each platform or medium on or through which the promotional activity is being conducted

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<sup>2</sup> The term “venture issuer” is defined in the Instrument. Generally speaking, it means small public companies, such as companies listed on the TSX Venture Exchange or the Canadian Securities Exchange.

- Other facts: any other facts that could reasonably be seen to interfere with the objectivity of the person, such as, for example, the promotional activity being conducted by the spouse of the President or Chief Executive Officer of the issuer whose securities are the subject of the promotional activity
- Required by law: a statement that the above information is required by law, to avoid investors concluding that a person conducting promotional activity is disclosing conflicts of interest voluntarily

### **Disclosure on Inquiry**

Similar to the requirements that are currently in section 52 of the Act, the Instrument would require that anyone that retains or compensates a person to engage in promotional activity disclose, to anyone that inquires, the information required to be disclosed in the news release described below.

### **News Releases**

The Instrument would require a venture issuer that retains or compensates a person to engage in promotional activity to issue and file a news release that includes information such as the contact information of the person engaged, the platforms on which the activity will occur, and the compensation to be paid for the promotional activity. This news release would provide the public with information about when issuers are retaining or compensating others to engage in promotional activity on their behalf, and would provide the BCSC with another tool to monitor this activity. If a significant change occurs to any of the information in the news release, the venture issuer would be required to issue and file an updated news release.

### **MD&A Disclosure**

If a venture issuer's total expenditures on promotional activity exceed 10% of its total operating expenses in any annual or interim period, the Instrument would require the venture issuer to separately disclose the components of those expenditures in its interim and annual MD&A.

### **Companion Policy**

The proposed Companion Policy provides guidance on how the BCSC would interpret or apply certain provisions of the Instrument, including when we consider the promotional activity to be occurring in British Columbia because the promotional activity has a real or substantial connection to British Columbia.

### **Proposed Consequential Amendments**

The Act amendments described above included repealing section 52 and the definition of "investor relations activities" in section 1(1) of the Act, which the BCSC will ask the government to bring into force if the BCSC adopts the proposed Instrument. To reflect the repeal of those provisions, if the BCSC adopts the proposed Instrument, we would at the same time make consequential amendments to:

- BC Instrument 11-501 *Waiver of File Search Fees for the Media*, to replace the term "investor relations firm" with "promotional activity firm"

- BC Interpretation Note 33-705 *Conditions of Registration for Investment Dealers with a BC Office that Trade in the U.S. Over-the-Counter Markets*, to replace the term “investor relations activities” with “promotional activity”
- BC Interpretation Note 72-702 *Distribution of Securities to Persons Outside British Columbia*, to replace the term “investor relations activities” with “promotional activity by or on behalf of the issuer”

Section 2(b) provides that the Instrument does not apply to international dealers or international advisers that meet the criteria in subsection 8.18(3) or subsection 8.26(4) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Similarly, BC Instrument 32-525 *Exemption from the dealer registration requirement and the adviser registration requirement in respect of trades and advice for U.S. resident clients* (BCI 32-525) provides an exemption for certain broker-dealers registered under U.S. federal securities law that have offices or employees in British Columbia. If the BCSC adopts the proposed Instrument, we would at the same time amend BCI 32-525 to provide that the Instrument does not apply to broker-dealers that rely on BCI 32-525.

### **Request for Comments**

In addition to your comments on all aspects of the proposed Instrument, Companion Policy and consequential amendments, the BCSC seeks feedback on the following questions:

1. As outlined above under “Application of the Instrument”, the Instrument would impose disclosure requirements on all persons conducting promotional activity in British Columbia, with certain exceptions such as for registrants and investment funds. Are there other persons who conduct promotional activity that should also be exempted from the disclosure requirements for promotional communications? If so, please explain.
2. The news release and MD&A requirements in the Instrument would apply only to venture issuers. However, the other provisions in the Instrument would apply to promotional activity in respect of any issuer (other than investment funds) where the activity has a real and substantial connection to British Columbia.

Therefore, people conducting promotional activity in relation to most issuers listed, for example, on the Toronto Stock Exchange (TSX), would need to comply with the Instrument regardless of their location, since most TSX-listed issuers are reporting issuers in British Columbia. Similarly, BC-reporting issuers listed on the TSX that compensate a person to engage in promotional activity would have to ensure that promotional communications contain the disclosure required by the Instrument. See the section entitled “Real and substantial connection to the Province” in the Companion Policy.

Staff believe that investors would benefit from more disclosure around conflicted

promotional activity regardless of the size of the issuer. As an illustration, recent market events involving “meme stocks” suggest that promotional activity by third parties on social media may influence the price and volume of trading in large issuers. On the other hand, problematic promotional activity that led BCSC staff to pursue this regulatory project has occurred primarily in relation to venture issuers.

Should the proposed Instrument apply to promotional activity in respect of venture issuers only? Why or why not?

3. Promotional activity takes place in and through a variety of platforms and media, including print media, videos, websites, chat rooms, bulletin boards, social media, and oral presentations or communications that occur, for example, at meetings or sales events. We think that any potential burden associated with providing the required disclosure in all promotional communications would be outweighed by the benefit to investors and the market of having the information.

We recognize that the format and location of the required disclosure will vary with the platform or medium used.

- (a) Is there any particular platform or medium that is or may be used for promotional activity that would make providing the required disclosure difficult? If so, please explain.
  - (b) Should the proposed Instrument be prescriptive about the format or location of the required disclosure? Why or why not?
4. Venture issuers need to disclose expenditures on promotional activity in interim and annual MD&A only where it exceeds 10% of their total operating expenses. Do you think that this threshold is appropriate? Why or why not?
5. The promotional disclosure, news release and MD&A requirements do not apply to promotional activity that is conducted by an issuer if such promotional activity relates to that issuer or its securities, and is conducted by its directors, officers and employees that identify themselves as acting in that capacity. We think that, if an issuer’s directors, officers or employees are acting in that capacity, conflicts of interest for them would be easy to identify. Directors, officers and employees of issuers would still be subject to the new false or misleading statements prohibition in section 50(3) of the Act, which enables the BCSC to address circumstances where those involved with the issuer are misleading investors.

Are there persons other than directors, officers or employees whose promotional activity on behalf of an issuer should not trigger the news release or MD&A requirements for the issuer? If so, please explain.

Please submit your comments in writing on or before July 26, 2021; email submissions are preferred. Please note that, while we do not plan to publish any comment letters on our website, we cannot keep comments confidential. You should not include personal information directly in comments. It is important that you state on whose behalf you are making the submission.

Address your comments to the BCSC as follows:

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### **Annexes**

This Notice contains the following annexes:

- Annex A – Proposed BC Instrument 51-519 *Promotional Activity Disclosure Requirements*
- Annex B – Proposed Companion Policy 51-519 *Promotional Activity Disclosure Requirements*

### **Questions**

Please refer your questions to either of the following:

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Brenda M. Leong  
Chair