CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice of Amendments to National Instrument 41-101 *General Prospectus Requirements*, National Instrument 44-101 *Short Form Prospectus Distributions*, National Instrument 44-102 *Shelf Distributions* and National Instrument 44-103 *Post-Receipt Pricing*

and

Changes to Companion Policy 41-101CP *to National Instrument 41-101 General Prospectus Requirements*, National Policy 41-201 *Income Trusts and Other Indirect Offerings*, Companion Policy 44-101CP *to National Instrument 44-101 Short Form Prospectus Distributions*, Companion Policy 44-102CP *to National Instrument 44-102 Shelf Distributions*, Companion Policy 44-103CP *to National Instrument 44-103 Post-Receipt Pricing* and National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*

May 30, 2013

Introduction

We, the Canadian Securities Administrators (CSA or we), are implementing amendments to:

- National Instrument 41-101 *General Prospectus Requirements* (NI 41-101),
- National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44-101),
- National Instrument 44-102 *Shelf Distributions* (NI 44-102), and
- National Instrument 44-103 *Post-Receipt Pricing* (NI 44-103).

We are also implementing changes to:

- Companion Policy 41-101CP *to National Instrument 41-101 General Prospectus Requirements* (41-101CP),

- National Policy 41-201 *Income Trusts and Other Indirect Offerings* (NP 41-201),

- Companion Policy 44-101CP *to National Instrument 44-101 Short Form Prospectus Distributions* (44-101CP),

- Companion Policy 44-102CP *to National Instrument 44-102 Shelf Distributions* (44-102CP),

- Companion Policy 44-103CP *to National Instrument 44-103 Post-Receipt Pricing* (44-103CP), and

- National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means* (NP 47-201).

The rule amendments and policy changes have been made by each member of the CSA. In some jurisdictions, Ministerial approvals are required for these changes. Provided all necessary ministerial approvals are obtained, the rule amendments and policy changes will come into force on August 13, 2013. Where applicable, Schedule J provides information about each jurisdiction's approval process.

Substance and Purpose of the Rule Amendments and Policy Changes

The rule amendments and policy changes set out modifications to the prospectus pre-marketing and marketing regime in Canada for issuers other than mutual funds and investment funds filing a prospectus on Form 41-101F2 *Information Required in an Investment Fund Prospectus* or Form 41-101F3 *Information Required in a Scholarship Plan Prospectus*. These changes will increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings. The current regulatory regime limits those activities.

Pre-marketing

"Pre-marketing" occurs when a party communicates with potential investors before a public offering and includes other promotional activity that occurs before a preliminary prospectus is filed. Unless the issuer is relying on the bought deal exemption in Part 7 of NI 44-101, pre-marketing has been prohibited in Canada. Specifically,

- securities legislation has prohibited any form of marketing for a public offering unless a preliminary prospectus has been filed and receipted, and
- investment dealers have not been permitted to solicit expressions of interest from investors until a preliminary prospectus has been filed and receipted.

The bought deal exemption provides a limited accommodation for issuers seeking certainty of financing. Generally, the bought deal exemption allows solicitations of expressions of interest before the filing of a preliminary short form prospectus if, among other things:

- the issuer has entered into an enforceable agreement with an underwriter who has agreed to purchase the full amount of the offering,
- the issuer has issued a news release announcing the agreement, and
- the issuer files a preliminary prospectus within four business days of entering into the agreement.

Marketing
"Marketing" includes oral or written communications after the filing of a preliminary prospectus. During the "waiting period" between the filing of a preliminary prospectus and a final prospectus, certain limited marketing activities have been permitted under securities legislation.

Policy rationales for existing rules
The policy rationales for the existing rules include:

- *Equal access to information*
    - Generally, material information given to investors in connection with a public offering should be in the prospectus.
    - The prospectus should be available to all investors.

- *Deterring conditioning of the market*
    - Issuers and investment dealers should not condition or prime the market before the preliminary prospectus is filed.

- *Deterring insider and tippee trading*
    - The pre-marketing restrictions reinforce the requirement that insiders and "tippees" (as described in section 3.2 of National Policy 51-201 *Disclosure Standards*) should not trade on the basis of information about a potential offering that has not been generally disclosed.

- *Investor protection through adequate disclosure of proposed offering*
    - A prospectus provides "full, true and plain disclosure" of all material facts.
    - The issuer and the underwriters are potentially liable for any misrepresentations in the prospectus.
    - The issuer and the underwriters should use the prospectus as the main disclosure document for investors.

We believe that the policy rationales set out above are still valid and we have attempted to address them in the rule amendments and policy changes. The purposes of the rule amendments and policy changes are to:

- ease certain regulatory burdens and restrictions that issuers and investment dealers face in trying to successfully complete a prospectus offering, while at the same time providing protection to investors, and
- clarify certain matters in order to provide clear rules and a "level playing field" for market participants involved in a prospectus offering.

In particular, the rule amendments will, subject to certain conditions:

- expressly allow non-reporting issuers, through an investment dealer, to determine interest in a potential initial public offering by communicating with accredited investors, and
- expressly allow investment dealers to use marketing materials and conduct road shows after the announcement of a bought deal, during the "waiting period", and following the receipt of a final prospectus (subject to appropriate limitations designed to address investor protection concerns).

The rule amendments and policy changes also specify when bought deals and bought deal syndicates can be enlarged, and provide greater clarity regarding certain practices used in connection with bought deals.

Schedule D sets out the amendments to NI 41-101 and the changes to 41-101CP. Schedule E sets out the changes to NP 41-201. Schedule F sets out the amendments to NI 44-101 and the changes to 44-101CP. Schedule G sets out the amendments to NI 44-102 and the changes to 44-102CP. Schedule H sets out the amendments to NI 44-103 and the changes to 44-103CP. Schedule I sets out the changes to NP 47-201.

Background

The CSA previously requested comment on proposals reflected in the rule amendments and policy changes. On November 25, 2011, we published a Notice and Request for Comment relating to the rule amendments and policy changes (the November 2011 Materials).

In developing the rule amendments and policy changes, we conducted:

- research on prospectus marketing regimes in the United States (including recent changes as a result of the *Jumpstart Our Business Startups Act*) and other foreign jurisdictions, and
- informal consultations in 2008, 2010 and 2012 with certain issuers, investment dealers, institutional investors, other market participants and advisory committees in various CSA jurisdictions.

Summary of Written Comments Received by the CSA

The comment period for the November 2011 Materials ended on February 23, 2012. We received written submissions from 16 commenters. We have considered the comments received and thank all of the commenters for their input. The names of the commenters are contained in Schedule B and a summary of their comments, together with our responses, is contained in Schedule C. The comment letters can be viewed on the Ontario Securities Commission website at www.osc.gov.on.ca.

Summary of Changes to the Instruments and Policies

After considering the comments received on the November 2011 Materials, as well as information on foreign prospectus marketing regimes and the comments we received during our informal consultations, we have made some revisions to the November 2011 Materials. Those revisions are reflected in the rule amendments and policy changes we are publishing concurrently with this notice. As these changes are not material, we are not republishing the rule

amendments and policy changes for a further comment period.

Schedule A contains a summary of notable changes between the rule amendments and policy changes and the November 2011 Materials.

Upcoming changes to SEDAR

Before the rule amendments and policy changes come into force, we will create new "document types" for prospectus filings on the System for Electronic Document Analysis and Retrieval (SEDAR). In particular, we will create new document types for "marketing materials" and "confidential marketing materials".

These new document types will allow issuers to accurately file, or deliver, on SEDAR the materials contemplated by the rule amendments. In particular,

- "marketing materials" would be used for the documents required to be filed under paragraphs 13.7(1)(e), 13.7(7)(a), 13.8(1)(e) and 13.8(7)(b) of NI 41-101, paragraphs 7.6(1)(e) and 7.6(7)(a) of NI 44-101, paragraph 9A.3(1)(e) and subparagraph 9A.3(7)(b)(ii) of NI 44-102, and paragraphs 4A.3(1)(e) and 4A.3(8)(b) of NI 44-103, and
- "confidential marketing materials" would be used for the documents required to be delivered under paragraphs 13.7(4)(c), 13.8(4)(c) and 13.12(2)(c) of NI 41-101, paragraphs 7.6(4)(c) and 7.8(2)(c) of NI 44-101, paragraphs 9A.3(4)(c) and 9A.5(2)(c) of NI 44-102 and paragraphs 4A.3(5)(c) and 4A.6(2)(c) of NI 44-103.

In connection with the existing filing type for "short form prospectus (NI 44-101)", we will create a new filing subtype for "marketing materials for bought deal" in order to allow issuers to file marketing materials for a bought deal under Part 7 of NI 44-101 before the filing of the preliminary short form prospectus. However, CSA staff will not make those marketing materials public until after the preliminary short form prospectus is filed and receipted.

Local Matters

Schedule J is being published in any local jurisdiction that is making related changes to local securities laws, including changes to local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

Withdrawal of Staff Notice

As a result of the amendments to NI 44-101, CSA Staff Notice 47-302 *Pre-Marketing of Underwriters' Options on Bought Deals* (the Staff Notice) is no longer required. In particular, the new definition of "bought deal agreement" in subsection 7.1(1) of NI 44-101 provides that a bought deal agreement may not have an option, other than an over-allotment option, for any party to increase the number of securities to be purchased. Consequently, the Staff Notice will be withdrawn effective August 13, 2013.

Questions

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Schedule A

Summary of Changes to the November 2011 Materials

Application

The November 2011 Materials provided that the rule amendments and policy changes would apply to issuers other than mutual funds. The revised rule amendments and policy changes also do not apply to investment funds filing a prospectus in the form of Form 41-101F2 *Information Required in an Investment Fund Prospectus* or Form 41-101F3 *Information Required in a Scholarship Plan Prospectus*. This would maintain the status quo for these investment funds.

We have revised the rule amendments and policy changes so that NI 41-101 and 41-101CP contain separate sections for investment funds and issuers other than investment funds. CSA staff are considering potential disclosure reforms for these investment funds as part of a future stage of the CSA's point of sale project.

Testing of the Waters Exemption for IPO Issuers

Private company with public control person

The November 2011 Materials provided that due to insider/tippee trading concerns, the testing of the waters exemption for issuers planning to conduct an initial public offering (IPO issuers) would not be available to IPO issuers that are already public companies in a foreign jurisdiction. In response to the November 2011 Materials, comments were raised regarding insider and tippee trading concerns in relation to the use of the testing of the waters exemption by an IPO issuer that is the subsidiary of a public company. We have revised the amendments to NI 41-101 to specify that the testing of the waters exemption for IPO issuers cannot be used for an issuer if:

- any of the issuer's securities are held by a control person that is a public issuer, and
- the initial public offering would be a material fact or material change with respect to the control person.

Who may be solicited

The November 2011 Materials limited the class of persons who may be solicited under the testing of the waters exemption to "permitted institutional investors". We received comments recommending that:

- the definition of "permitted institutional investor" be revised to be more consistent with the definition of "accredited investor" in National Instrument 45-106 *Prospectus and Registration Exemptions*, and
- the exemption should be available for soliciting any accredited investor.

After considering the comments, we have revised the amendments to NI 41-101 to broaden the class of persons who may be solicited under the testing of the waters exemption to include all accredited investors. We note that:

- certain issuers, particularly venture issuers, may have difficulty attracting institutional investors, and therefore need a broader base of investors in order to benefit from the exemption, and
- existing securities legislation permits accredited investors to purchase securities without a prospectus on the basis that they are sophisticated investors or otherwise do not need the

protection of a prospectus.

Period of testing
We have revised the amendments to NI 41-101 to prohibit solicitation under the testing of the waters exemption for a period of 15 days before the filing of the preliminary prospectus for the initial public offering. We believe that this prohibition supports the policy rationale underlying the exemption (i.e., to assess interest in a potential initial public offering before incurring costs relating to the offering).

Approval of materials
We have revised the amendments to NI 41-101 to clarify that any materials used by a dealer to solicit an expression of interest from an investor under the exemption must be approved in writing by the issuer.

Confidentiality
The November 2011 Materials provided that an investment dealer soliciting an expression of interest from an investor under the testing of the waters exemption was required to ask the investor to confirm in writing that the investor would keep any such information confidential. We have revised the amendments to NI 41-101 to require that the investor confirm in writing that it will keep information about the proposed offering confidential until the earlier of:

- the time the information has been generally disclosed in a preliminary long form prospectus or otherwise, or
- the time the issuer has confirmed in writing that it will not be pursuing the potential offering.

Use of information
We have revised the amendments to NI 41-101 to provide greater clarity regarding the use of information obtained pursuant to the testing of the waters exemption. The amendments require that an investment dealer soliciting an expression of interest from an investor under the testing of the waters exemption must ensure that the investor confirms in writing that it will not use information about the proposed offering for any purpose other than assessing the investor's interest in the offering, until the earlier of:

- the time the information has been generally disclosed in a preliminary long form prospectus or otherwise, or
- the time the issuer has confirmed in writing that it will not be pursuing the potential offering.

We have also included companion policy guidance in 41-101CP to remind investment dealers and accredited investors that they should not use information obtained under the testing of the waters exemption in a way that may be considered abusive.

Companion policy guidance
We have added further companion policy guidance to 41-101CP in order to clarify certain matters relating to the testing of the waters exemption for IPO issuers. Specifically, the guidance:

- clarifies that the exemption may be used at the same time by more than one investment dealer in respect of the same issuer, provided that the issuer has authorized each dealer in

accordance with the conditions of the exemption,
- reminds issuers, dealers and accredited investors that selective disclosure concerns would arise if accredited investors were provided with material facts that are not disclosed in the subsequent preliminary prospectus for the initial public offering, and
- reminds issuers and dealers that the purpose of the exemption is to see if there is enough interest before initiating the initial public offering process and incurring costs, rather than to pre-sell the deal.

Bought Deals

Enlarging bought deals

The November 2011 Materials provided for the enlargement of bought deals up to a specified percentage. We requested comments on what that percentage should be. After considering the comments received, we have revised the amendments to NI 44-101 to allow bought deals to be enlarged up to 100% of the size of the original deal.

We have not retained the provision in the proposed rules that would prohibit a bought deal from being enlarged if doing so "is the culmination of a formal or informal plan to offer a larger number of securities under the short form prospectus devised before the execution of the original agreement". Instead, the amendments to NI 44-101 now specify that a bought deal agreement may not contain an upsizing option.

We believe that these revisions will prevent abuse of the bought deal exemption, but will still enable issuers to benefit from increased demand for the offering.

Enlarging or reducing bought deal syndicates

The November 2011 Materials contained a prohibition against adding a new underwriter to a bought deal syndicate if doing so was "the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement".

We have revised the amendments to NI 44-101 to:
- remove the prohibition noted above, and
- specify that a bought deal agreement must not be *conditional* on syndication (except for confirmation clauses, discussed below), although the parties can add or remove an underwriter or adjust the number of securities to be purchased by each underwriter on a proportionate basis, provided that certain conditions are met.

Confirmation clauses

We understand that some bought deal agreements include "confirmation clauses". The purpose of these clauses is to allow the lead underwriter to contact potential syndicate members before confirming the bought deal. The rule amendments now define "confirmation clause" for the purpose of Part 7 of NI 44-101 to mean a provision in a bought deal agreement that provides that the agreement is conditional on the lead underwriter confirming that one or more additional underwriters has agreed to purchase certain of the securities being offered.

We have revised NI 44-101 to provide that confirmation clauses are only acceptable in certain circumstances, and have included companion policy guidance in 41-101CP regarding

confirmation clauses. Under the amendments to NI 44-101, confirmation clauses are only acceptable if, among other things:

- The lead underwriter provides a signed bought deal agreement to the issuer and the issuer signs it on the same day.
- On the following day, the lead underwriter provides a notice to the issuer either confirming the bought deal or advising that the bought deal has been terminated. If the bought deal is confirmed, the issuer must file a news release announcing the bought deal.

Timing for receipt of preliminary prospectus
We have maintained the requirement in NI 44-101 that the preliminary prospectus for a bought deal must be filed within four business days after the date a bought deal agreement is entered into. However, the revised amendments to NI 44-101 do not require the issuer to obtain a receipt for the prospectus on the fourth day.

Amending bought deal agreements to provide for different or additional classes of securities
We have revised the amendments to NI 44-101 to allow bought deal agreements to be amended to provide for different classes of securities or additional classes of securities and a different price for the securities, provided that certain conditions are met.

Bought deal agreement replaced by a more extended form of underwriting agreement
We have revised the amendments to NI 44-101 to indicate that an original bought deal agreement can be replaced by a more extended form of underwriting agreement, provided that the more extended form of underwriting agreement complies with the bought deal requirements in NI 44-101.

Withdrawing bought deals or amending bought deals to provide for a lower price per share or a smaller offering
We have become aware of a number of cases where bought deals have been either withdrawn or amended to provide for a lower price per share or a smaller offering. We have revised the amendments to NI 44-101 to prohibit such an amendment to a bought deal agreement until the fourth business day after the bought deal was entered into.

We have also added companion policy guidance to 41-101CP that provides further details on this issue, and discusses our regulatory concerns.

Similar to the rule amendments published with the November 2011 Materials, the revised rule amendments provide that the parties to a bought deal agreement may agree to terminate the agreement if they decide not to proceed with the distribution. The revised changes to 41-101CP also clarify that the bought deal rules do not prevent a party to a bought deal agreement from exercising a termination right set out in the agreement if:

- another party or person performs, or fails to perform, certain actions, or
- certain events occur or fail to occur.

Regulatory outs
We are aware that a practice has developed in which underwriters will require in a bought deal agreement or a more extended form of underwriting agreement that the issuer obtain a receipt for

the final prospectus within a short period of time after the first comment letter relating to the preliminary prospectus is issued by staff of the principal regulator. This creates tension when staff identify significant issues that cannot be resolved within the time period specified in the agreement.

We have included companion policy guidance in 41-101CP regarding the use of regulatory outs in bought deal agreements and more extended forms of underwriting agreements, and our concerns around this practice.

Engagement letters
We have included companion policy guidance in 41-101CP indicating that if an issuer enters into an engagement letter with underwriters solely for the purpose of conducting due diligence before a potential prospectus offering, that event will not, in and of itself, indicate that "sufficient specificity" (as discussed in subsection 6.4(4) of 41-101CP) has been achieved, provided the engagement letter does not contain any other information which indicates that it is reasonable to expect that the dealer will propose to the issuer an underwriting of securities.

Due diligence outs
We have included companion policy guidance in 41-101CP regarding the use of due diligence outs in bought deal agreements and more extended forms of underwriting agreements, and our concerns around this practice.

Providing marketing materials to investors
We have revised the amendments to NI 44-101 to broaden the class of persons who may receive bought deal marketing materials before the receipt of a preliminary prospectus to include any investor. The November 2011 Materials indicated that these materials could only be given to permitted institutional investors (as defined in the November 2011 Materials).

We have also revised the amendments to NI 44-101 to provide that an investor who received marketing materials in relation to a bought deal need only to receive a copy of the preliminary prospectus if, in response to the solicitation, the investor expressed an interest in acquiring the securities.

Bought deal road shows
We have revised the amendments to NI 44-101 to include provisions for road shows after the announcement of a bought deal but before the filing of a preliminary prospectus. In this regard, the amendments to NI 44-101 relating to marketing materials for bought deals generally apply to marketing materials used in connection with road shows for bought deals.

Overnight marketed deals
We are aware of the practice of entering into "overnight marketed deals" as an alternative to bought deals. We have included companion policy guidance in 41-101CP which sets out the process that is typically followed in an overnight marketed deal.

Prospectus Notices, Standard Term Sheets and Marketing Materials

Prospectus notices

We have revised the amendments to NI 41-101 to include definitions of "preliminary prospectus notice" and "final prospectus notice". These definitions describe short notices relating to a prospectus that are currently permitted under securities legislation in certain jurisdictions.

Standard term sheets

We have revised the rule amendments and policy changes to distinguish between "standard term sheets" and "marketing materials".

With respect to standard term sheets, the rule amendments provide for the following:

- Standard term sheets can only contain limited information in respect of an issuer, securities or an offering, as prescribed by the rule amendments.
- Standard term sheets must contain a prescribed legend (or words to the same effect) with cautionary language.
- Generally, other than contact information for the investment dealer or underwriters, any information in a standard term sheet concerning an issuer, securities or an offering must be disclosed in, or derived from, the relevant prospectus. However, if the offering is a bought deal, the information must be disclosed in, or derived from, the bought deal news release or the issuer's continuous disclosure record on SEDAR, or the subsequent preliminary prospectus.
- Standard term sheets will not have to be filed on SEDAR or included or incorporated by reference in the relevant prospectus. As a result, they will not be subject to civil liability. However, they will be subject to the existing statutory prohibitions on misleading or untrue statements.

We have defined "standard term sheet" in NI 41-101 to include a written communication intended for potential investors regarding a distribution of securities under a prospectus that only contains prescribed information.

The definition of standard term sheet excludes a preliminary prospectus notice and a final prospectus notice.

Marketing materials

The rule amendments relating to marketing materials are intended to apply to situations where issuers and investment dealers would like to provide investors with information that is more detailed than the limited information that can be contained in a standard term sheet. Marketing materials are generally subject to the same conditions in the proposed rule amendments published with the November 2011 Materials relating to "term sheets", with certain revisions as discussed below.

We have replaced the proposed definition of "term sheet" in NI 41-101 with a definition of "marketing materials", which are defined as a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer, securities or an offering. The definition of marketing materials excludes a prospectus or any amendment, a standard term sheet, a preliminary prospectus notice and a final

prospectus notice.

We have also added companion policy guidance to 41-101CP to clarify that marketing materials would not include a cover letter or email that merely encloses a copy of a document such as a prospectus, a standard term sheet or marketing materials.

Comparables
"Comparables" are information that compares an issuer to other issuers. The November 2011 Materials provided that comparables could only be given to permitted institutional investors (as defined in the November 2011 Materials) in the absence of civil liability. We noted that comparables can be "cherry picked" by investment dealers and misunderstood by retail investors. We specifically requested comment on the circumstances in which comparables should be permitted to be given to retail investors.

Based on the comments that we received, we have made the following revisions:

- We have defined comparables to include information that compares an issuer to other issuers.
- Comparables can be provided to any investor (i.e., institutional, accredited or retail) in marketing materials (including marketing materials provided in connection with a road show).
- Comparables will not be subject to civil liability, if certain conditions are met. Specifically, the rule amendments provide that:
    - comparables can be removed from any version of marketing materials that is filed on SEDAR, and
    - the relevant prospectus need only include, or incorporate by reference, the version of the marketing materials with the comparables removed.

While not subject to statutory civil liability in these circumstances, comparables will be subject to statutory prohibitions on misleading or untrue statements. We have also made certain revisions that are intended to mitigate potential investor protection concerns around the use of comparables in the absence of civil liability. These include the following:

- issuers must confidentially deliver on SEDAR a complete template version of the marketing materials that contains the comparables, and
- additional disclosure (including risk disclosure) proximate to the comparables must be provided.

Companion policy guidance has also been added to 41-101CP regarding the use of comparables to provide greater clarity around this practice.

Approval of marketing materials
The revised rule amendments:

- require that before they are used, marketing materials must be approved in writing by the issuer and the lead underwriter, rather than all of the underwriters,
- allow for the approval and use of a template form for marketing materials that would permit the addition of certain non-substantive information, without requiring subsequent approvals, into a limited-use version of the marketing materials, and

- provide that where a template version of marketing materials that has been approved by the issuer and lead underwriter and filed is divided into separate sections, an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those sections.

The term "limited-use version" is defined in NI 41-101 to mean a template version of a document in which the spaces for information have been completed in accordance with certain requirements.

Filing of marketing materials
The revised rule amendments:

- require that marketing materials (with comparables removed) be filed on SEDAR on the same day they are first used, rather than before they are used, and
- indicate that if a template form of marketing materials is filed, an investment dealer may make non-substantive changes to the template in a limited-use version of the marketing materials without filing the revised document. As noted above, we have defined the term "limited-use version" in NI 41-101.

Requirement to send marketing materials
We have not retained the requirement in the November 2011 Materials for revised marketing materials to be sent to investors who received the original marketing materials in certain circumstances. Instead, if a subsequent prospectus document modifies a statement of a material fact that appeared in the original marketing materials:

- a revised blacklined copy of the marketing materials must be filed with securities regulators and made public, and
- the subsequent prospectus document must contain a statement at the beginning of the document to:
    - disclose the particular statement of material fact that has been modified, and
    - indicate that a blacklined copy of the marketing materials reflecting the modification is available for viewing on SEDAR.

Fair, true and plain requirement
We have not retained the "fair, true and plain" requirement for marketing materials that was included in the November 2011 Materials. While marketing materials will not be subject to an express standard, we have included companion policy guidance in 41-101CP indicating that marketing materials are subject to provisions in securities legislation which prohibit misleading or untrue statements.

Additionally, we note that the template version of the marketing materials must be included or incorporated by reference in the relevant prospectus and, accordingly, will form part of the prospectus document that is subject to the full, true and plain standard.

Scope
We have revised the rule amendments to clarify that the rules relating to marketing materials apply to situations where an investor was shown marketing materials but not permitted to retain a copy.

Permitted information
We have revised the rule amendments to clarify that, other than contact information for the investment dealer or underwriters and any comparables, all information in marketing materials used in connection with an offering other than a bought deal must be either:

- disclosed in the relevant prospectus, or
- derived from the relevant prospectus.

Where the offering is a bought deal, the amendments to NI 44-101 provide that, other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials must be disclosed in, or derived from:

- the bought deal news release,
- the issuer's continuous disclosure record on SEDAR, or
- the subsequent preliminary prospectus that is filed on SEDAR.

Road Shows
General provisions for road shows
The November 2011 Materials contained separate requirements for:

- road shows for permitted institutional investors, and
- road shows for retail investors.

We have revised the rule amendments and policy changes to include provisions that apply to all road shows, rather than distinguishing between the requirements applicable to road shows based on who can attend.

Bought deal road shows
The November 2011 Materials contained requirements for road shows during the waiting period and after filing of the final prospectus. The revised amendments to NI 44-101 also include road show provisions for bought deals. Marketing materials provided in connection with a road show for a bought deal are subject to the same conditions as other marketing materials for bought deals.

Materials provided at a road show
The revised rule amendments and policy changes:

- refer to "marketing materials" rather than "written material" provided at a road show. Accordingly, the rule amendments and policy changes relating to marketing materials generally apply to marketing materials used in connection with a road show,
- remove the requirement for investment dealers to restrict copying of materials provided at a road show,
- clarify that the road show provisions will generally only apply to written marketing materials used in connection with a road show, rather than oral statements, and
- include companion policy guidance in 41-101CP regarding oral statements made at a road show.

Requirements for investment dealers
The November 2011 Materials provided that an investment dealer conducting a road show must establish and follow reasonable procedures to:

- verify the identity and keep a written record of any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means, and
- ensure that the investor receives a copy of the relevant prospectus.

The revised rule amendments provide that an investment dealer conducting a road show must establish and follow reasonable procedures to:

- ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information,
- keep a record of any information provided by the investor, and
- provide the investor with a copy of the relevant prospectus.

We believe that this is a more reasonable requirement to impose on investment dealers, who may not be able to "verify" the identity of all road show attendees, particularly when attendance is not in person. Additionally, as it may not always be possible to "ensure" that an investor has actually received a copy of the prospectus, we believe that it is more reasonable to require that the investment dealer "provide" the investor with the prospectus.

Cautionary language

The November 2011 Materials required that a road show commence with the oral reading of a cautionary statement. We have revised the rule amendments to only require that the cautionary statement be read at the beginning of a road show if the investment dealer conducting the road show permits investors, other than accredited investors, to attend the presentation. We have also shortened the prescribed language and indicated that the statement made at the road show can be a statement that is to the same effect as the prescribed language.

Permitted attendees

The November 2011 Materials contained restrictions on who could attend a road show. The revised rule amendments do not have these restrictions.

We have also revised the rule amendments and policy changes to clarify that members of the media can attend road shows in their capacity as members of the media, rather than only as potential investors. We have added companion policy guidance to 41-101CP on certain matters relating to media attendance at road shows. In particular, the guidance states that:

- Although members of the media may attend a road show, they should not be specifically invited by the issuer or an investment dealer.
- Road shows are intended to be presentations for potential investors, not press conferences for members of the media.
- Issuers and investment dealers should not market a prospectus offering in the media.

Road shows for certain U.S. cross-border prospectus offerings

Due to existing Canadian waiting period restrictions, issuers in U.S. cross-border initial public offerings currently apply for exemptive relief in order to conduct internet road shows. In the notice that was published as part of the November 2011 Materials, we indicated that issuers in U.S. cross-border initial public offerings would no longer have to apply for relief when our proposals on road shows were implemented.

We received comments indicating that issuers in U.S. cross-border offerings may not want to file marketing materials provided in connection with a road show on SEDAR due to concerns regarding potential class action lawsuits in the U.S. In order to prevent U.S. underwriters from avoiding Canadian tranches in cross-border prospectus offerings, we have revised the rule amendments to provide an exception for issuers in certain U.S. cross-border prospectus offerings from the requirements to:

- file the marketing materials on SEDAR, and
- include or incorporate the marketing materials in the final prospectus.

This is intended to be a limited exception and is subject to the following conditions:

- The U.S. cross-border prospectus offering must be primarily intended to be sold in the U.S.
- The issuer and underwriters must provide a contractual right of action to any investor who viewed the marketing materials, in the event that the marketing materials contain a misrepresentation. The contractual right of action must be disclosed in the prospectus.
- A copy of the marketing materials must be confidentially delivered to securities regulators on SEDAR.

We have also provided companion policy guidance in 41-101CP clarifying that the exception does not apply to marketing materials relating to the U.S. cross-border offering other than the marketing materials provided in connection with the road show.

Marketing after a Receipt for a Final Prospectus

The November 2011 Materials contained provisions prescribing when investment dealers could provide term sheets (now marketing materials) and conduct road shows after a receipt for a final prospectus and a final base shelf prospectus. Where we have made changes to the conditions for marketing materials and road shows during the waiting period, we have generally made the same changes for marketing materials and road shows after the receipt of a final prospectus, with certain accommodations for offerings pursuant to a draw-down under a final base shelf prospectus or an offering under the PREP procedures.

Shelf prospectuses

All information in standard term sheets (other than contact information for the investment dealer or underwriters) and marketing materials (other than contact information for the investment dealer or underwriters and comparables) for a draw-down under a final base shelf prospectus must:

- currently be disclosed in, or derived from, the final base shelf prospectus, any amendment to the final base shelf prospectus or an applicable shelf prospectus supplement that has been filed, or
- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is filed.

We have moved the rule amendments relating to final base shelf prospectuses, including provisions relating to standard term sheets, marketing materials and road shows in the context of a draw-down under a final base shelf prospectus, from NI 41-101 to NI 44-102. However, companion policy guidance with respect to these provisions will still be contained in 41-101CP.

Base PREP prospectuses

All information in standard term sheets (other than contact information for the investment dealer or underwriters) and marketing materials (other than contact information for the investment dealer or underwriters and comparables) after the receipt for a final base PREP prospectus must:

- currently be disclosed in, or derived from, the final base PREP prospectus, the supplemented PREP prospectus or any amendment that has been filed, or
- later be disclosed in, or derived from, the supplemented PREP prospectus that is filed.

We have included rule amendments relating to final base PREP prospectuses, including provisions relating to standard term sheets, marketing materials and road shows in the context of a final base PREP prospectus in NI 44-103. However, companion policy guidance with respect to these provisions is contained in 41-101CP.

Other

We have also:

- included new definitions in the rules to reflect the above changes (e.g., a definition of "lead underwriter"),
- revised the companion policies to the rules to reflect the above changes, and
- made certain drafting changes to the provisions.

Schedule B

List of Commenters

1. BMO Capital Markets
2. Borden Ladner Gervais LLP
3. Burnet, Duckworth & Palmer LLP
4. Business Law Section of the Ontario Bar Association
5. Caisse de dépôt et placement du Québec
6. Canada Pension Plan Investment Board
7. Cassels Brock & Blackwell LLP
8. CIBC
9. Davies Ward Phillips & Vineberg LLP
10. Fiore Financial Corporation
11. Investment Industry Association of Canada
12. Kenmar Associates
13. Norton Rose Canada LLP
14. Osler, Hoskin & Harcourt LLP
15. RBC Global Asset Management Inc.
16. Siskinds LLP