

Notice and Request for Comments

Proposed Amendments to National Instrument 54-101

*Communication with Beneficial Owners of Securities of a Reporting Issuer and
Companion Policy 54-101CP Communication with Beneficial Owners of Securities of
a Reporting Issuer*

Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Companion Policy 51-102CP Continuous Disclosure Obligations

Proposed Amendments to National Policy 11-201 *Delivery of Documents by Electronic Means*

Introduction

The Canadian Securities Administrators (the CSA or we) are publishing for a 144 day comment period proposed amendments (the Proposed Amendments) to:

- National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* and the related forms (NI 54-101),
- Companion Policy 54-101CP *Communication with Beneficial Owners of Securities of a Reporting Issuer* (54-101CP),
- National Instrument 51-102 *Continuous Disclosure Obligations* and Form 51-102F5 *Information Circular* (Form 51-102F5) (collectively, NI 51-102),
- Companion Policy 51-102 *Continuous Disclosure Obligations* (51-102CP), and
- National Policy 11-201 *Delivery of Documents by Electronic Means* (NP 11-201).

The text of the Proposed Amendments is contained in Schedules A through E of this notice and will also be available on websites of CSA jurisdictions, including:

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

Certain jurisdictions may include additional local information in Schedule F.

We are publishing the Proposed Amendments for comment for 144 days. The comment period will expire on August 31, 2010. We are providing an extended comment period to accommodate the 2010 proxy season. For more information on the comment process, see below under “How To Provide Your Comments”.

Substance and purpose of the Proposed Amendments

NI 54-101 came into effect on July 1, 2002 (in Québec, on June 27, 2003), replacing its predecessor National Policy Statement 41 *Shareholder Communications*. It is intended to give beneficial owners who hold their securities through intermediaries or nominees a reasonable opportunity to exercise the voting rights attached to those securities. It does so by establishing detailed beneficial owner communication procedures regarding sending of proxy-related materials and solicitation of voting instructions, and imposing obligations on reporting issuers, intermediaries and the Canadian Depository for Securities Limited (CDS).

In the fall of 2007, CSA staff commenced a review of how NI 54-101 currently works in practice. The review comprised both research and consultation with issuers, intermediaries, beneficial owners, a proxy advisory firm, proxy solicitors and service providers. CSA staff also met several times with an advisory group composed of members from most of these stakeholder groups, and obtained input on how to improve NI 54-101.

The Proposed Amendments are intended to improve the beneficial owner communication procedures. We have kept in mind the following fundamental principles of NI 54-101:

- all securityholders of a reporting issuer, whether registered holders or beneficial owners, should have the opportunity to be treated alike as far as is practicable;
- efficiency should be encouraged; and
- the obligation of each party in the securityholder communication process should be equitable and clearly defined.

The Proposed Amendments are also intended to improve communications with registered holders of reporting issuer securities.

Summary of the proposed substantive changes

The following are the key changes that would result from the Proposed Amendments, if adopted. This is not a complete list of all the changes.

(a) Summary of Proposed Amendments to NI 54-101

(i) Notice-and-access – section 2.7.1

Reporting issuers would have the option of sending proxy-related materials for meetings that are not special meetings by:

- posting the information circulars on a website that is not SEDAR; and
- sending a notice informing beneficial owners that the proxy-related materials have been posted, and explaining how to access them. A voting instruction form (Form 54-101F6 or Form 54-101F7 as applicable) would be sent with the notice.

At present, our notice-and-access proposal is limited to meetings that are not “special meetings” as defined in NI 54-101. Special meetings are ones where fundamental changes are being voted on, and we would like to monitor the implementation of notice-and-access before extending it to these types of meetings.

A beneficial owner would be entitled to request that the reporting issuer send a paper copy of the information circular by prepaid mail, courier or the equivalent, at the reporting issuer’s expense. There are restrictions on the reporting issuer’s access to, and use of information associated with the request. These restrictions are intended to maintain the anonymity of objecting beneficial owners (i.e. beneficial owners who do not wish to have their identities disclosed to the reporting issuer, or OBOs).

SEC issuers will be permitted to use the US notice-and-access process to comply with the requirements to send proxy-related materials to beneficial owners.

Differences between the US and CSA proposed notice-and-access models

The Securities and Exchange Commission (SEC) has introduced its own notice-and-access process, which applies to all SEC registrants for proxy solicitations commencing in or after January 2009.

The SEC introduced its notice-and-access process (the US model) as part of a wider focus on finding ways to improve the proxy solicitation process, and to facilitate increased and informed shareholder participation in the proxy process. The US model is also intended to promote the use of the Internet as a potentially reliable and cost efficient way to communicate with shareholders.

Our notice-and-access proposal (the CSA proposal) shares the basic policy objectives of the US model to promote the use of the Internet as a potentially reliable and cost efficient means of shareholder communication. However, there are several differences between the CSA proposal and the US model. The following are some, but not all examples of where the CSA proposal differs from the US model:

- Notice-and-access would not be mandatory for reporting issuers. Posting of proxy-related materials on a non-SEDAR website is required only if the reporting issuer chooses to use notice-and-access to send proxy-related materials.
- The relevant voting instruction form (Form 54-101F6 or Form 54-101F7) must be sent with the initial notice.
- The reporting issuer is responsible for fulfilling requests for paper copies of information circulars, not the intermediary.
- The CSA proposal maintains certain basic differences between the NI 54-101 beneficial owner communication procedures and the US beneficial owner communication procedures. Reporting issuers continue to have the following options:
 - to send proxy-related materials directly to and solicit voting instructions directly from NOBOs; and
 - not to pay for intermediaries to forward proxy-related materials and Form 54-101F7 to OBOs.

We note that the SEC requested comment on various aspects of the US model in the Fall of 2009, and recently adopted several amendments.¹ We will continue to monitor developments in the US, as these may assist in identifying possible enhancements to the CSA proposal.

(ii) Simplification of beneficial owner proxy appointment process – sections 2.18 and 4.5

A beneficial owner who holds securities through an intermediary generally must be appointed proxy holder in respect of those securities if she wishes to attend and vote those securities at a meeting.

NI 54-101 currently prescribes a legal proxy process, by which a beneficial owner can instruct her intermediary using the voting instruction form (or the reporting issuer, if the direct sending procedures in section 2.9 are being used) to appoint her as proxy holder in respect of the securities she beneficially owns. The intermediary must send the beneficial owner a legal proxy, which the beneficial owner in turn must deposit by any relevant proxy cut-off established for the meeting.

¹The proposed amendments are set out in “Amendments to Rules Requiring Internet Availability of Proxy Materials” (October 14, 2009), Release No. 33-9073. Available at <http://www.sec.gov/rules/proposed/2009/33-9073.pdf>. The final amendments are set out in “Amendments to Rules Requiring Internet Availability of Proxy Materials” (February 22, 2010), Release No. 33-9108. Available at <http://www.sec.gov/rules/final/2010/33-9108.pdf>.

We have received feedback from several stakeholders that the legal proxy process is too time-consuming and confusing, and can have the unintended consequence of making it more difficult for beneficial owners to be properly appointed as proxy holders. The Proposed Amendments would require intermediaries and reporting issuers to:

- arrange to appoint the beneficial owner as proxy holder, if she so requests, at no expense to the beneficial owner; and
- deposit the proxy by any relevant proxy cut-off.

However, subject to these basic obligations, reporting issuers and intermediaries would have flexibility as to the specific arrangements used to appoint the beneficial owner as proxy holder. For example, we understand that a number of intermediaries, through their service provider, currently provide an “appointee system” option in addition to the legal proxy on their voting instruction forms. Under the appointee system, the beneficial owner can print the beneficial owner’s name or the name of her appointee in a space provided on the voting instruction form. The name of the beneficial owner or her appointee is then recorded on a cumulative proxy, which is provided to the proxy tabulator or meeting scrutineer. When the beneficial owner or her appointee arrives at the meeting, the scrutineer has all the necessary proxies and information at hand to enable the beneficial owner or other appointees to vote at the meeting. The Proposed Amendments would permit an intermediary to continue to provide the appointee system option.

(iii) Enhanced disclosure regarding the beneficial owner voting process – section 2.16

The Proposed Amendments require certain information to be disclosed in the management information circular in specified circumstances. This disclosure is intended to increase transparency and provide information to assist beneficial owners in the voting process.

First, if the reporting issuer chooses not to pay for intermediaries to send proxy-related materials and Form 54-101F7 to OBOs, the Proposed Amendments require management of the reporting issuer to disclose this fact in the management information circular, and to disclose that it is the OBO’s responsibility to make arrangements with her intermediary to exercise her voting rights.

Second, the Proposed Amendments require management of the reporting issuer to disclose in the management information circular if the reporting issuer is using notice-and-access only in respect of some, but not all beneficial owners. An explanation of this decision must also be provided.

(iv) Stricter rules on use by third-parties of NOBO information and the indirect sending procedures – Part 7

The Proposed Amendments restrict the permitted use of NOBO information and the indirect sending procedures to matters connected to (i) an attempt to influence securityholder voting, or (ii) an offer to acquire securities of the securityholder. The intent is to minimize the potential for misuse of NOBO information and the indirect sending procedures.

(v) Other changes

The Proposed Amendments also make changes to certain technical aspects of the beneficial owner communication procedures in the following areas:

- persons or companies permitted to make requests for beneficial ownership information (subsection 2.5(4));
- the timing for sending proxy-related materials (sections 2.9 and 2.12, and subsection 4.2(2));
- records of voting instructions (subsections 2.17(2) and 4.4(2)); and
- the interaction of depositary and intermediary obligations to beneficial owners under corporate law with the equivalent obligations under NI 54-101 (subsections 2.18(3) and 5.4(2)).

(vi) 54-101CP amendments

We propose to amend 54-101CP to provide guidance in several areas, including:

- permitted delivery methods for proxy-related materials, including notice-and-access (new Part 5); and
- procedures reporting issuers should have in place if they choose to solicit voting instructions directly from NOBOs (new section 3.5).

(b) Proposed Amendments to NI 51-102

We propose to amend Part 9 *Proxy Solicitation and Information Circulars* to introduce notice-and-access for registered holders of reporting issuer securities. The notice-and-access proposal for registered holders is substantially similar to the proposal for beneficial owners. We also propose to amend Form 51-102F5 to require the additional disclosure set out in proposed section 2.16 of NI 54-101.

SEC issuers will be permitted to use the US notice-and-access process to comply with the requirements to send proxy-related materials to registered holders of reporting issuer securities.

We propose to amend 51-102CP to provide guidance on permitted delivery methods for proxy-related materials, including notice-and-access.

(c) Consequential amendments to NP 11-201

We propose to make consequential amendments to NP 11-201 that would be necessary should notice-and-access be adopted.

Anticipated costs and benefits

We think that the Proposed Amendments, if implemented, will yield benefits, with little additional cost to market participants.

(a) Notice-and-access

We expect that there will be costs associated with maintaining a website for the proxy-related materials, fulfillment of requests for paper circulars and other required features of notice-and-access. However, because notice-and-access is voluntary, a reporting issuer will use it only if the benefits outweigh the costs.

We do not expect notice-and-access to impose any material additional costs on intermediaries, as their obligations remain substantially the same.

Beneficial owners and registered holders who print the information circular will incur additional costs. However, beneficial owners and registered holders can elect not to incur these costs as they have an option to request paper copies of the information circular at the issuer's expense.

(b) Simplification of beneficial owner proxy appointment process

We do not anticipate any material costs to be imposed.

Beneficial owners will benefit from having a simpler proxy appointment process with fewer steps.

Reporting issuers and intermediaries will need to make some changes to the relevant voting instruction forms, but we anticipate that the costs will not be significant.

We note that the major intermediary service provider already provides on the voting instruction form two options for a beneficial owner to be appointed as proxy holder. The first option is for the beneficial owner to request a legal proxy, in the manner prescribed by NI 54-101. The second option is for the beneficial owner to indicate on the voting instruction form that she wishes to be appointed as proxy holder, whereupon the intermediary (through the service provider) will make the necessary arrangements, including depositing the proxy with the reporting issuer's transfer agent.

(c) Enhanced disclosure regarding the beneficial owner voting process

Beneficial owners will benefit from having a better understanding of why a reporting issuer is or is not sending particular proxy-related materials to them.

We do not expect reporting issuers to incur any significant additional costs as a result of the additional disclosure in the management information circulars.

Request for comments

(a) The Proposed Amendments

We welcome your comments on the Proposed Amendments, and also invite comments on the following specific questions:

Questions relating to notice-and-access

1. We propose to exclude proxy-related materials relating to special meetings from notice-and-access. Should we expand notice-and-access to include special meetings? Should other types of meetings be excluded from notice-and-access as well?
2. We propose that reporting issuers be able to use notice-and-access to send proxy-related materials to some, but not all beneficial owners, so long as this fact is publicly disclosed and an explanation provided. Should there be restrictions on when a reporting issuer can use notice-and-access selectively?
3. The US model of notice-and-access seems to have resulted in a decrease in voting by retail shareholders. Our notice-and-access proposal has some significant differences from the US model which are intended to minimize the impact on retail shareholders. Does our notice-and-access proposal adequately meet the needs of retail shareholders who wish to vote? Are there any specific enhancements or other ways that notice-and-access can be made more user-friendly?
4. We would appreciate data from issuers, service providers and other stakeholders on the anticipated costs and savings of implementing and using the notice-and-access process. Will notice-and-access result in meaningful costs savings that make the proxy voting system more efficient?
5. We propose to give reporting issuers flexibility in the form and content of the notice provided the notice contains certain specified information. Is this approach appropriate, or should there be a prescribed form?
6. The CSA proposal does not impose any restrictions on additional materials that can be included with the notice and voting instruction form. We do not have any concerns with including additional material that explains the notice-and-access process, such as a Q&A. However, is it appropriate for reporting issuers and others to include materials that

address the substance of the matters to be voted on at the meeting? Would this create a disincentive for investors to read the full information circular? Should there be restrictions on what can be included in these types of materials? Should there be requirements prescribing basic information that these types of materials must contain?

7. Is the requirement in subsection 4.6(1) of NI 51-102 that requires reporting issuers to send an annual request form to registered holders and beneficial owners of their securities to request financial statements and management's discussion and analysis adequately integrated with the requirements to send proxy-related materials? Will notice-and-access have any impact?

Other questions

8. The Proposed Amendments require management of reporting issuers that choose not to pay for delivery to OBOs to disclose this fact in the management information circular. The intent is to make the proxy voting system more transparent and easier to navigate. Will this disclosure facilitate this objective?

(b) Other issues relating to the beneficial owner voting process generally

The focus of the Proposed Amendments is on improving the process by which beneficial owners are sent proxy-related materials and their voting instructions are solicited. This process is one aspect of the larger proxy voting system, i.e. the entire process by which votes are solicited, submitted and tabulated.

In recent months, the proxy voting system as a whole has been the subject of some debate. Questions are being raised as to whether it is functioning with appropriate reliability, integrity and transparency. We therefore also invite general comments on:

- the integrity of the proxy voting system as a whole; and
- whether there are any particular areas that require regulatory attention or reform, and if so, what priority should be assigned.

How to provide your comments

You must submit your comments in writing by **August 31, 2010**. If you are sending your comments by email, you should also send an electronic file containing the submissions (in Windows format, Microsoft Word).

Please address your comments to all of the CSA member commissions as follows:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Please send your comments only to the address below. Your comments will be forwarded to the remaining CSA jurisdictions.

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Please note that all comments received during the comment period will be made publicly available. We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

We will post all comments received during the comment period to the OSC website at www.osc.gov.on.ca to improve the transparency of the policy-making process.

Questions

Please refer your questions to any of the following:

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Schedules

- Schedule A: Proposed Amendment Instrument to NI 54-101
- Schedule B: Proposed Amendment Instrument to 54-101CP
- Schedule C: Proposed Amendment Instrument to NI 51-102
- Schedule D: Proposed Amendment Instrument to 51-102CP
- Schedule E: Proposed Amendment Instrument to NP 11-201
- Schedule F: Additional Local Information

April 9, 2010