CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment
Proposed Amendments and Changes to Rule and Certain Policies Related to the Business Acquisition Report Requirements

September 5, 2019

PART 1 – Introduction

The Canadian Securities Administrators (**CSA** or **we**) are publishing for a 90-day comment period, proposed amendments and changes to:

- National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**)*;*
- Companion Policy 51-102CP *Continuous Disclosure Obligations* (**Companion Policy 51-102CP**);
- Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* (**Companion Policy 41-101CP**);
- Companion Policy 44-101CP to National Instrument 44-101 *Short Form Prospectus Distributions* (**Companion Policy 44-101CP**);

(the **Proposed Amendments**).

We are issuing this Notice to solicit your comments on the Proposed Amendments.

The public comment period expires on December 4, 2019.

The text of the Proposed Amendments is published with this notice in the following annexes:

- Annex A – Proposed Amendments to NI 51-102
- Annex B – Proposed Changes to Companion Policy 51-102CP
- Annex C – Proposed Changes to Companion Policy 41-101CP
- Annex D – Proposed Changes to Companion Policy 44-101CP
- Annex E – Local Matters

This Notice is also available, as applicable, on the following websites of CSA jurisdictions:

www.lautorite.qc.ca
www.bcsc.bc.ca
www.albertasecurities.com
www.osc.gov.on.ca
nssc.novascotia.ca
www.fcaa.gov.sk.ca
www.fcnb.ca

PART 2 – Substance and Purpose

A reporting issuer that is not an investment fund is required to file a business acquisition report (**BAR**) after completing a significant acquisition. Part 8 of NI 51-102 sets out three significance tests: the asset test, the investment test and the profit or loss test. An acquisition of a business or related businesses is a significant acquisition that requires the filing of a BAR under Part 8 of NI 51-102:

- for a reporting issuer that is not a venture issuer, if the result from any one of the three significance tests exceeds 20%;
- for a venture issuer, if the result of either the asset test or investment test exceeds 100%

(collectively, the **BAR requirements**).

The BAR requirements were introduced in 2004[1] to provide investors with relatively timely access to historical financial information of a significant acquisition. They also require a reporting issuer that is not a venture issuer to prepare and file pro forma financial statements.

We have received feedback that in some cases the significance tests may produce anomalous results, that preparation of a BAR entails significant time and cost, and that the information necessary to comply with the BAR requirements may, in some instances, be difficult to obtain. In addition, some reporting issuers have applied for, and in appropriate circumstances were granted, exemptive relief from certain of the BAR requirements.

The Proposed Amendments are aimed at reducing the regulatory burden imposed by the BAR requirements in certain instances, without compromising investor protection.

PART 3 – Background

The Proposed Amendments are informed by comment letters and other stakeholder feedback received respecting the BAR requirements in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. The comment letters were summarized in CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

Comments received reflected a wide range of suggestions, such as eliminating the BAR requirements entirely, reconsidering certain aspects of the significance tests (definitional and thresholds) and the relevance of pro forma financial statements. Many commenters supported increasing the significance test threshold for reporting issuers that are not venture issuers for

[1] Certain aspects of these requirements were subsequently amended in 2015 as they apply to venture issuers.

reasons including that BAR disclosure is of limited value to investors particularly given its lack of timeliness, it is costly to prepare and can impede the completion of a transaction. Specific criticism was expressed relating to the profit or loss test for reasons including that the test often produces anomalous results when compared to the asset test or investment test.

Other commenters indicated that the BAR contains relevant information that may not be provided elsewhere. Commenters noted that not all historical financial information, pertaining to the acquired business that is provided in a BAR, is available in the issuer's other disclosure documents. In addition, the identifiable assets acquired and the liabilities assumed are initially recognized at their acquisition-date fair values in the reporting issuer's financial statements.

Based on the feedback noted above and the number of applications for exemptive relief from the BAR requirements considered by CSA staff, it appears that the current BAR requirements may in certain instances impose burden on reporting issuers without providing investors with the associated benefit of relevant information for their decision-making purposes. The Proposed Amendments are also meant to address this potential disconnect.

PART 4 – Summary of the Proposed Amendments

The Proposed Amendments:

- alter the determination of significance for reporting issuers that are not venture issuers such that an acquisition of a business or related businesses is a significant acquisition only if at least two of the existing significance tests are triggered; and

- increase the significance test threshold for reporting issuers that are not venture issuers from 20 % to 30%.

The proposed two-trigger test aligns with the consultation feedback to modify the criteria to file a BAR. Our proposal to move towards a two-trigger test was informed by considering the feedback from the consultation and by considering data (including analyzing in each jurisdiction the BARs filed and the BAR relief granted over an approximate three-year period) to assess the impact of this change on a look back basis. Many commenters supported removing the profit or loss test for reasons including that the test often produces anomalous results when compared to the asset test or the investment test. Our analysis of the data indicates that the two-trigger test is more effective in dealing with the anomalous results than most of the other suggestions, such as removing the profit or loss test, introducing a revenue test etc., and captures significant acquisitions.

Additionally, the Proposed Amendments increase the significance test threshold that applies to a reporting issuer that is not a venture issuer. The increase in the significance test threshold from 20% to 30% is consistent with the feedback we received in the consultation to increase the significance thresholds as a way to reduce regulatory burden.

In addition to the Proposed Amendments, we considered other options to alter the BAR requirements, but determined that they either did not align with our policy objectives or that the reduction in burden did not justify a potential significant loss of information to investors.

We are not, at this time, proposing any further changes to the BAR requirements as they relate to venture issuers since the CSA reduced regulatory burden for venture issuers in 2015 by increasing the significance test threshold from 40% to 100% and by removing the requirement that BARs filed by venture issuers contain pro forma financial statements.

We will continue to monitor international developments, including the recent proposal by the U.S. Securities and Exchange Commission,[2] to further inform our approach to reducing regulatory burden for reporting issuers that are not venture issuers without compromising investor protection.

PART 5 – Request for Comments

We welcome comments on the Proposed Amendments.

Please submit your comments in writing on or before December 4, 2019.

Address your submission to all of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Deliver your comments only to the addresses listed below. Your comments will be distributed to the other participating CSA jurisdictions.

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario

[2] Amendments to Financial Disclosures about Acquired and Disposed Businesses, Release No. 33-10635; 34-85765; IC-33465; File No. S7-05-19.

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Comments Received will be Publicly Available

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

PART 6 – Questions

If you have any questions, please contact any of the CSA staff listed below.

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Proposed Amendments to
National Instrument 51-102 *Continuous Disclosure Obligations*

1. National Instrument 51-102 Continuous Disclosure Obligations is amended by this Instrument.

2. Subsection 8.3(1) is amended by replacing "subsection (3) and subsections 8.10(1) and 8.10(2)***" with "***subsection (5) and subsections 8.10(1) and (2)***".***

3. Paragraph 8.3(1)(a) is amended by replacing "any of the three***" with "***two or more of the***".***

4. In the following provisions, "20***" is replaced with "***30***":***

(a) paragraph (b) of subsection 8.3(1);

(b) paragraphs (a), (b) and (c) of subsection 8.3(2);

(c) paragraph (b) of subsection 8.3(3);

(d) paragraphs (a), (b) and (c) of subsection 8.3(4).

5. Subsection 8.3(5) is replaced with the following:

"(5) Despite subsection (1) and for the purposes of subsection (3), an acquisition of a business or related businesses is not a significant acquisition,

(a) for a reporting issuer that is not a venture issuer, if the acquisition does not satisfy at least two of the optional significance tests under subsection (4); or

(b) for a venture issuer, if the acquisition does not satisfy the optional significance tests set out in paragraphs (4) (a) and (b) if "30 percent" is read as "100 percent".***"***

6. This Instrument comes into force on ●.

PROPOSED CHANGES TO
COMPANION POLICY 51-102CP CONTINUOUS DISCLOSURE OBLIGATIONS

1. Companion Policy 51-102CP to National Instrument 51-102 Continuous Disclosure Obligations is changed by this Document.

2. Subsection 8.1(4) is amended by adding the following as the last paragraph:

"Reporting issuers are reminded that an acquisition may constitute the acquisition of a business for securities legislation purposes, even if the acquired set of activities or assets does not meet the definition of a "business" for accounting purposes.".

3. Subsection 8.2(1) is replaced by the following:

"8.2 Significance Tests

(1) **Application of Significance Tests –** Subsection 8.3(2) of the Instrument sets out the required significance tests for determining whether an acquisition of a business by a reporting issuer is a "significant acquisition". The application of the significance tests depends on whether the reporting issuer is a:

(a) **Reporting issuer that is not a venture issuer.** An acquisition is significant if it satisfies two or more of the significance tests at a 30% threshold; and

(b) **Venture issuer**. An acquisition is significant if it satisfies either of the asset or investment test at a 100% threshold.

The test must be applied as at the acquisition date using the most recent audited annual financial statements of the reporting issuer and the business.**".**

4. These changes become effective on ●.

PROPOSED CHANGES TO
COMPANION POLICY 41-101CP TO NATIONAL INSTRUMENT 41-101
GENERAL PROSPECTUS REQUIREMENTS

1. ***Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements is changed by this Document.***

2. ***Subsection 5.9(5) is changed by replacing the text of the first bullet with:***

"if the indirect acquisition would be considered a significant acquisition under subsection 35.1(4) of Form 41-101F1 if the issuer applies those provisions to its proportionate interest in the indirect acquisition of the business;***".***

3. This change becomes effective on ●.

PROPOSED CHANGES TO
COMPANION POLICY 44-101CP *TO NATIONAL INSTRUMENT 44-101 SHORT FORM PROSPECTUS DISTRIBUTIONS*

1. Companion Policy 44-101CP to National Instrument 44-101 Short Form Prospectus Distributions is changed by this Document.

2. Subsection 4.9(3) is changed by replacing the text of the first bullet with:

"if the indirect acquisition would be considered a significant acquisition under Part 8 of NI 51-102 if the issuer applies those provisions to its proportionate interest in the indirect acquisition of the business;***".***

3. This change becomes effective on ●.