

Proposed Changes to Companion Policy 44-101CP

The following are proposed changes to Companion Policy 44-101CP to National Instrument 44-101 *Short Form Prospectus Distributions*

1. Proposed changes to section 1.3

- 1.3 **Interrelationship with Continuous Disclosure (NI 51-~~102~~102, NI 51-103 and NI 81-106)** – The short form prospectus distribution system established under NI 44-101 is based on the continuous disclosure filings of reporting issuers pursuant to NI 51-~~102~~102, NI 51-103 or, in the case of an investment fund, NI 81-106. Issuers who wish to use the system should be mindful of their ongoing disclosure and filing obligations under the applicable CD rule. Issues raised in the context of a continuous disclosure review may be taken into consideration by the regulator when determining whether it is in the public interest to refuse to issue a receipt for a short form prospectus. Consequently, unresolved issues may delay or prevent the issuance of a receipt.

2. Proposed changes to subsection 1.7(3)

1.7 Definitions

- (3) **Current AIF** – An issuer’s AIF filed under the applicable CD rule is a “current AIF” until the issuer files an AIF for the next financial year, or is required by the applicable CD rule to have filed its annual financial statements for the next financial year. “Current AIF” for a venture issuer means its annual report filed in accordance with NI 51-103 which is required to include its annual financial statements, or, in the case of an SEC issuer, the alternative disclosure permitted by section 42 of NI 51-103. If an issuer fails to file a new AIF by the filing deadline under the applicable CD rule for its annual financial statements, it will not have a current AIF and will not qualify under NI 44-101 to file a prospectus in the form of a short form prospectus. If an issuer files a revised or amended AIF for the same financial year as an AIF that has previously been filed, the most recently filed AIF will be the issuer’s current AIF.

An issuer that is a ~~venture~~senior unlisted issuer for the purpose of NI 51-102, and certain investment funds, may have no obligation under the applicable CD rule to file an AIF. However, to qualify under NI 44-101 to file a prospectus in the form of a short form prospectus, that issuer will be required to file an AIF in accordance with the applicable CD rule so as to have a “current AIF”. A current AIF filed by an issuer that is a ~~venture~~senior unlisted issuer for the purposes of NI 51-102 can be expected to expire later than a ~~non-venture issuer’s~~ the AIF of an issuer that is not a venture issuer, due to the fact that the deadlines for filing annual financial statements under NI 51-102 are later for ~~venture~~senior unlisted issuers than for other issuers.

3. Proposed changes to subsection 2.1(2)

2.1 Basic Qualification Criteria – Reporting Issuers with Equity Securities Listed on a Short Form Eligible Exchange (Section 2.2 of NI 44-101)

- (2) A new reporting issuer or a successor issuer may satisfy the criteria to have current annual financial statements or a current AIF by filing its comparative annual financial statements or an AIF, respectively, in accordance with NI 51-~~102~~**102, NI 51-103** or NI 81-106, as applicable, for its most recently completed financial year. It is not necessary that the issuer be required by the applicable CD rule to have filed such documents. An issuer may voluntarily choose to file either of these documents in accordance with the applicable CD rule for the purposes of satisfying the eligibility criteria under NI 44-101.

Alternatively, an issuer may rely on the exemption from the requirement to file such documents in section 2.7 of NI 44-101. That section provides an exemption from the current AIF and current annual financial statement requirements for new reporting issuers and successor issuers who have not yet been required to file such documents and who have filed a prospectus or information circular containing disclosure which would have been included in such documents had they been filed under the applicable CD rule.

4. Proposed changes to section 3.5

- 3.5 **Undertaking in Respect of Credit Supporter Disclosure** – Under subparagraph 4.2(a)(ix) of NI 44-101, an issuer must file an undertaking to file the periodic and timely disclosure of a credit supporter. For credit supporters that are reporting issuers with a current AIF, the undertaking will likely be to continue to file the documents it is required to file under NI 51-~~102~~**102 or NI 51-103, as applicable**. For credit supporters registered under the 1934 Act, the undertaking will likely be to file the types of documents that would be required to be incorporated by reference into a Form S-3 or Form F-3 registration statement. For other credit supporters, the types of documents to be filed pursuant to the undertaking will be determined through discussions with the regulators on a case-by-case basis.

If an issuer, a parent credit supporter, and a subsidiary credit supporter satisfy the conditions of the exemption in section 13.3 of Form 44-101F1, an undertaking may provide that the subsidiary credit supporter will file periodic and timely disclosure if the issuer and the credit supporters no longer satisfy the conditions of the exemption in that section.

If an issuer and a credit supporter satisfy the conditions of the exemption in section 13.4 of Form 44-101F1, an undertaking may provide that the credit supporter will file periodic and timely disclosure if the issuer and the credit supporter no longer satisfy the conditions of the exemption in that section.

For the purposes of such an undertaking, references to disclosure included in the short form prospectus should be replaced with references to the issuer or parent credit supporter's continuous disclosure filings. For example, if an issuer and subsidiary credit supporter(s) plan to continue to satisfy the conditions of the exemption in section 13.4 of Form 44-101F1 for continuous disclosure filings, the undertaking should provide that the issuer will file with its consolidated financial statements,

5. Proposed changes to subsection 4.4(1)

4.4 Principal Purposes – Generally

- (1) Section 4.2 of Form 44-101F1 requires disclosure of each of the principal purposes for which the net proceeds will be used by an issuer. If an issuer has negative cash flow from operating activities in its most recently completed financial year for which financial statements have been included in the short form prospectus, the issuer should prominently disclose that fact in the use of proceeds section of the short form prospectus. The issuer should also disclose whether, and if so, to what extent, the proceeds of the distribution will be used to fund any anticipated negative cash flow from operating activities in future periods. An issuer should disclose negative cash flow from operating activities as a risk factor under subsection 17.1(1) of Form 44-101F1 or section 5.2 in ~~NI Form~~ 51-102F2.2 **or section 22 in Form 51-103F1, as applicable.** For the purposes of this section, in determining cash flow from operating activities, the issuer must include cash payments related to dividends and borrowing costs.

6. Proposed changes to section 4.9

4.9 Recent and Proposed Acquisitions

- (1) ~~Subsection~~Subsections 10.2(2) and 10.3(2) of Form 44-101F1 ~~requires~~require prescribed disclosure of a proposed acquisition that has progressed to a state “where a reasonable person would believe that the likelihood of the acquisition being completed is high” and that would, if completed on the date of the short form prospectus, be a significant acquisition for the purposes of Part 8 of NI ~~51-102-102~~ 102 or a major acquisition as defined in NI 51-103, as applicable. When interpreting the phrase “where a reasonable person would believe that the likelihood of the acquisition being completed is high”, it is our view that the following factors may be relevant in determining whether the likelihood of an acquisition being completed is high:
 - (a) whether the acquisition has been publicly announced;
 - (b) whether the acquisition is the subject of an executed agreement;
and

- (c) the nature of conditions to the completion of the acquisition including any material third party consents required.

The test of whether a proposed acquisition “has progressed to a state where a reasonable person would believe that the likelihood of the acquisition being completed is high” is an objective, rather than subjective, test in that the question turns on what a “reasonable person” would believe. It is not sufficient for an officer of an issuer to determine that he or she personally believes that the likelihood of the acquisition being completed is or is not high. The officer must form an opinion as to what a reasonable person would believe in the circumstances. In the event of a dispute, an objective test requires an adjudicator to decide whether a reasonable person would believe in the circumstances that the likelihood of an acquisition being completed was high. By contrast, if the disclosure requirement involved a subjective test, the adjudicator would assess an individual’s credibility and decide whether the personal opinion of the individual as to whether the likelihood of the acquisition being completed was high was an honestly held opinion. Formulating the disclosure requirement using an objective test rather than a subjective test strengthens the basis upon which the regulator may object to an issuer’s application of the test in particular circumstances.

- (2) ~~Subsection~~**Subsections** 10.2(3) ~~and 10.3(3)~~ of Form 44-101F1 ~~requires~~**require** inclusion of the financial statements or other information relating to certain acquisitions or proposed acquisitions if the inclusion of the financial statements or other information is necessary in order for the short form prospectus to contain full, true and plain disclosure of all material facts relating to the securities being distributed. We generally presume that the inclusion of financial statements or other information is required for all acquisitions that are, or would be, significant under Part 8 of NI 51-102-**102 or a major acquisition as defined in NI 51-103, as applicable.** Issuers can rebut this presumption if they can provide evidence that the financial statements or other information are not required for full, true and plain disclosure.

~~Subsection~~**Subsections** 10.2(4) ~~and 10.3(4)~~ of Form 44-101F1 ~~provides~~**provide** that issuers must satisfy the requirements of ~~subsection~~**subsections** 10.2(3) ~~and 10.3(3)~~ of Form 44-101F1 by including either:

- (i) the financial statements or other information that would be required by Part 8 of NI 51-102 **or section 22 of NI 51-103, as applicable;** or
- (ii) satisfactory alternative financial statements or other information.

Satisfactory alternative financial statements or other information may be provided to satisfy the requirements of ~~subsection~~**subsections** 10.2(3) ~~or 10.3(3)~~ when the financial statements or other information that would be required by Part 8 of NI 51-102 **or section 22 of NI 51-103, as applicable,** relate to a financial year ended

within 90 days before the date of the prospectus or an interim period ended within 60 days before the date of the prospectus for issuers that are **senior unlisted issuers or a mid-year period ended within 60 days before the date of the prospectus for** venture issuers, and **an interim period ended within** 45 days **before the date of the prospectus** for issuers that are not **senior unlisted issuers** or venture issuers. In these circumstances, we believe that satisfactory alternative financial statements or other information would not have to include any financial statements or other information for the acquisition or probable acquisition related to:

- (a) a financial year ended within 90 days before the date of the short form prospectus; or
- (b) **for issuers that are senior unlisted issuers,** an interim period ended within 60 days before the date of the short form prospectus ;
- (c) ~~_____~~ for issuers that are venture issuers, ~~and 45 days~~ **a mid-year period ended within 60 days before the date of the short form prospectus,**
- (d) ~~_____~~ for issuers that are not **senior unlisted issuers or** venture issuers, **an interim period ended within 45 days before the date of the short form prospectus.**

An example of satisfactory alternative financial statements or other information that we will generally find acceptable would be:

- (ee) comparative annual financial statements or other information for the acquisition or probable acquisition for at least the number of financial years as would be required under Part 8 of NI 51-102 **or section 22 of NI 51-103, as applicable,** that ended more than 90 days before the date of the short form prospectus, audited for the most recently completed financial period in accordance with NI 52-107, and reviewed for the comparative period in accordance with section 4.3 of NI 44-101;
- (df) a comparative interim financial report or other information for the acquisition or probable acquisition for
 - (i) ~~_____~~ any interim period ended subsequent to the latest annual financial statements included in the short form prospectus and more than 60 days before the date of the short form prospectus for issuers that are ~~venture~~ **senior unlisted** issuers; and 45 days for issuers that are not ~~venture~~ **senior unlisted** issuers reviewed in accordance with section 4.3 of NI 44-101; ~~and/or~~

(ii) any mid-year period ended subsequent to the latest annual financial statements included in the short form prospectus and more than 60 days before the date of the short form prospectus for issuers that are venture issuers, and 45 days for issuers that are not senior unlisted issuers or venture issuers reviewed in accordance with section 4.3 of NI 44-101; and

(e)g) for issuers that are not venture issuers, pro forma financial statements or other information required under Part 8 of NI 51-102.

If the issuer intends to include financial statements as set out in the example above as satisfactory alternative financial statements or other information, we ask that this be highlighted in the cover letter to the prospectus. If the issuer does not intend to include financial statements or other information, or intends to file financial statements or other information that are different from those set out above, we encourage the utilization of pre-filing procedures.

- (3) When an issuer acquires a business or related businesses that has itself recently acquired another business or related businesses (an “indirect acquisition”), the issuer should consider whether prospectus disclosure about the indirect acquisition, including historical financial statements, is necessary to satisfy the requirement that the prospectus contain full, true and plain disclosure of all material facts relating to the securities being distributed. In making this determination, the issuer should consider the following factors:
- if the indirect acquisition would meet any of the significance tests in Part 8 of NI 51-102 **or in the definition of "major acquisition" in NI 51-103, as applicable,** when the issuer applies each of those tests to its proportionate interest in the indirect acquisition of the business; and
 - if the amount of time between the separate acquisitions is such that the effect of the first acquisition is not adequately reflected in the results of the business or related businesses the issuer is acquiring.
- (4) ~~Subsection~~ **Subsections 10.2(3) discusses and 10.3(3) of Form 41-101F1 discuss** financial statements or other information for the completed or proposed acquisition of the business or related businesses. This “other information” is intended to capture the financial information disclosures required under Part 8 of NI 51-102 **or section 22 of NI 51-103, as applicable,** other than financial statements. An example of “other information” would include the operating statements, property descriptions, production volumes and reserves disclosures described under section 8.10 of NI 51-102. **102 or section 29 of NI 51-103, as applicable.**

7. Proposed changes to section 4.11

4.11 General Financial Statement Requirements – A reporting issuer is required under the applicable CD rule to file its annual financial statements ~~and related MD&A~~ 90 days after year end (or 120 days if the issuer is a ~~venture~~ **senior unlisted** issuer as defined in NI 51-102). ~~Certain transition rules in the applicable CD rule apply to the first interim financial report required to be filed in the year of adopting IFRS in respect of an interim period beginning on or after January 1, 2011. Otherwise, an interim financial report and related MD&A must be filed 45 days after the last day of an interim period (or 60 days for or a venture issuer as defined in NI 51-103, as applicable).~~ The financial statement requirements in NI 44-101 are based on these continuous disclosure reporting time frames and do not impose accelerated filing deadlines for a reporting issuer's financial statements. However, to the extent an issuer has filed financial statements in advance of the deadline for doing so, those financial statements must be incorporated by reference in the short form prospectus. We are of the view that directors of an issuer should endeavor to consider and approve financial statements in a timely manner and should not delay the approval and filing of the financial statements for the purpose of avoiding their inclusion in a short form prospectus. Once the financial statements have been approved, they should be filed as soon as possible.

8. Proposed changes to subsection 4.14(3)

4.14 Previously Disclosed Material Forward-Looking Information – If an issuer, at the time it files a short form prospectus,

3. has not filed an MD&A with the securities regulatory authorities that discusses those events and circumstances and expected differences from the material forward-looking information, as required by section 5.8 of NI 51-102, **102 or section 37 of NI 51-103, as applicable,**