

Appendix D

Proposed Amendments to National Instrument 44-101 *Short Form Prospectus Distributions* and Companion Policy

Schedule D-1

Proposed Amendment Instrument for National Instrument 44-101 *Short Form Prospectus Distributions*

1. *National Instrument 44-101 Short Form Prospectus Distributions is amended by this Instrument.*
2. *Paragraph 4.1(a) is amended by adding the following after subparagraph (vi):*
 - (vii) **Term Sheets** – a copy of any term sheet required to be filed under subsection 13.5(1) of NI 41-101 and a copy of any term sheet required to be filed under subsection 7.5(1) of this Instrument that has not previously been filed; and.
3. *Paragraph 4.2(a) is amended by adding the following after subparagraph (xi):*
 - (xii) **Term Sheets** – a copy of any term sheet required to be filed under subsection 13.5(1) of NI 41-101 that has not previously been filed; and.
4. *Part 7 is amended by replacing sections 7.1 and 7.2 with the following:*
 - 7.1 **Definitions and Interpretations**
 - (1) In this Part:

“bought deal agreement” means an agreement among an issuer and an underwriter or underwriters

 - (a) in which the underwriter has, or underwriters have, agreed to purchase all securities offered in a distribution under a short form prospectus of the issuer on a firm commitment basis, other than securities issuable on the exercise of an over-allotment option, and
 - (b) that does not have a market-out clause; and

“market-out clause” means a provision in an agreement which permits an underwriter to terminate its commitment, or underwriters to terminate their commitment, to purchase securities in the event that the securities cannot be marketed profitably due to market conditions.
 - (2) In this Part, a reference to “amend” includes “amend and restate”.

7.2 **Solicitations of Expressions of Interest** - The prospectus requirement does not apply to solicitations of expressions of interest before the issuance of a receipt for a preliminary short form prospectus for securities to be qualified for distribution under a short form prospectus in accordance with this Instrument, if

- (a) before any solicitations of expressions of interest, the issuer has entered into a bought deal agreement with an underwriter or underwriters,
- (b) the bought deal agreement has fixed the terms of the distribution, including the number and type of securities and the price per security, and requires that the issuer file a preliminary short form prospectus for the securities and obtain from the regulator a receipt, dated as of a date that is not more than four business days after the date that the bought deal agreement is entered into, for the preliminary short form prospectus,
- (c) the issuer files a preliminary short form prospectus for the securities in accordance with this Instrument within four business days after the date that the bought deal agreement is entered into and obtains from the regulator a receipt, dated as of a date that is not more than four business days after the date the bought deal agreement is entered into, for the preliminary short form prospectus,
- (d) before any solicitations of expressions of interest, the issuer has issued and filed a news release announcing the bought deal agreement immediately upon entering into the agreement,
- (e) upon issuance of a receipt for the preliminary short form prospectus, a copy of the preliminary short form prospectus is sent to each person or company who has expressed an interest in acquiring the securities, and
- (f) except as provided in paragraph (a), no agreement of purchase and sale for the securities is entered into until the short form prospectus has been filed and a receipt obtained.

7.3 **Solicitations of Expressions of Interest – Over-allotment Options** - The prospectus requirement does not apply to solicitations of expressions of interest before the issuance of a receipt for a preliminary short form prospectus for securities to be issued pursuant to an over-allotment option that are qualified for distribution under a short form prospectus in accordance with this Instrument, if

- (a) before any solicitations of expressions of interest, the issuer has entered into a bought deal agreement with an underwriter or underwriters,
- (b) the bought deal agreement has fixed the terms of the distribution, including the number and type of securities and the price per security, and requires that the issuer file a preliminary short form prospectus for the securities and obtain from the regulator a receipt, dated as of a date that is

not more than four business days after the date that the bought deal agreement is entered into, for the preliminary short form prospectus,

- (c) the issuer files a preliminary short form prospectus for the securities in accordance with this Instrument within four business days after the date that the bought deal agreement is entered into and obtains from the regulator a receipt, dated as of a date that is not more than four business days after the date the bought deal agreement is entered into, for the preliminary short form prospectus,
- (d) before any solicitations of expressions of interest, the issuer has issued and filed a news release announcing the bought deal agreement immediately upon entering into the agreement,
- (e) upon issuance of a receipt for the preliminary short form prospectus, a copy of the preliminary short form prospectus is sent to each person or company who has expressed an interest in acquiring the securities, and
- (f) except as provided in paragraph (a), no agreement of purchase and sale for the securities is entered into until the short form prospectus has been filed and a receipt obtained.

7.4 **Amendment to Bought Deal Agreement**

- (1) Subject to subsections (2), (3), (4) and (5), an issuer and other parties must not amend a bought deal agreement referred to in paragraphs 7.2(a) and 7.3(a).
- (2) An issuer and all parties to a bought deal agreement referred to in paragraphs 7.2(a) and 7.3(a) must not amend the agreement to increase the number of securities to be purchased by the underwriter or underwriters, unless
 - (a) the number of additional securities does not in the aggregate exceed ●% of the total of the base offering contemplated by the original agreement plus any securities that would be acquired upon exercise of an over-allotment option,
 - (b) the amended agreement is with the same underwriter or underwriters as the original agreement or additional underwriters have been added in the circumstances to which paragraphs (3)(a) to (d) apply,
 - (c) the amended agreement is otherwise on the same terms as the original agreement, including the price per security,
 - (d) the increase in the number of securities is not 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,

- (e) the issuer files a preliminary short form prospectus for the increased number of securities in accordance with this Instrument within four business days after the date that the original agreement is entered into and obtains from the regulator a receipt, dated as of a date that is not more than four business days after the date the original agreement is entered into, for the preliminary short form prospectus,
 - (f) the issuer has issued and filed a news release announcing the amendment to the original agreement immediately upon entering into the amendment,
 - (g) only one amendment is made to the original agreement to increase the number of securities to be purchased by the underwriter or underwriters; and
 - (h) the conditions in sections 7.2 and 7.3, if applicable, are complied with.
- (3) An issuer and all parties to a bought deal agreement referred to in paragraphs 7.2(a) and 7.3(a) must not amend the agreement to add additional underwriters and to specify the number of securities to be purchased by the additional underwriters on a several basis, unless
- (a) the addition of an underwriter is not the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement,
 - (b) the aggregate number of securities to be purchased by the underwriters remains the same or have increased in circumstances in which paragraphs (2)(a) to (f) apply,
 - (c) the amended agreement is otherwise on the same terms as the original agreement, and
 - (d) the conditions in sections 7.2 and 7.3, if applicable, are complied with.
- (4) An issuer and all parties to a bought deal agreement referred to in paragraphs 7.2(a) and 7.3(a) must not amend the agreement in order to add additional representations, warranties, indemnities and conditions, unless
- (a) the amended agreement is otherwise on the same terms as the original agreement, and

- (b) the conditions in sections 7.2 and 7.3 and paragraphs (2)(a) to (i) and (3)(a) to (d), to the extent applicable, are complied with.
- (5) An issuer and all parties to a bought deal agreement referred to in paragraphs 7.2(a) and 7.3(a) must not terminate it unless the parties decide not to proceed with the prospectus offering.

7.5 Term Sheets after Announcement of Bought Deal but before the Receipt of a Preliminary Short Form Prospectus

- (1) An investment dealer that provides a term sheet to a permitted institutional investor before the issuance of a receipt for a preliminary short form prospectus is exempt from the prospectus requirement if
 - (a) the term sheet complies with subsections (2) to (8);
 - (b) the issuer is relying on the exemption in section 7.2 or section 7.3 and has complied with paragraphs (a), (b) and (d) of section 7.2 or section 7.3, as applicable;
 - (c) the disclosure in the term sheet is fair, true and plain;
 - (d) other than contact information for the investment dealer distributing the term sheet, all information in the term sheet concerning the securities is disclosed in
 - (i) the news release described in paragraph 7.2(d) or 7.3(d), or
 - (ii) a document referred to in subsection 11.1(1) of Form 44-101F1 that the issuer has filed;
 - (e) the term sheet is approved in writing by the issuer and the underwriters and filed before it is provided;
 - (f) the term sheet is provided in the local jurisdiction only if the preliminary short form prospectus will be filed in the jurisdiction; and
 - (g) upon issuance of a receipt for the preliminary short form prospectus, a copy of the preliminary short form prospectus is sent to each permitted institutional investor that received the term sheet.
- (2) A term sheet provided under subsection (1) must be dated and state the following, on the first page, with the bracketed information completed:

A preliminary short form prospectus containing important information relating to the securities described in this [term sheet] has not yet been filed with the securities regulatory authority(ies) in [each of/certain of the provinces/provinces and territories of

Canada]. A copy of the preliminary short form prospectus and any amendment to the preliminary short form prospectus is required to be delivered to any permitted institutional investor that receives this [term sheet].

There will not be any sale or any acceptance of an offer to buy the securities until a receipt for the final short form prospectus has been issued.

This [term sheet] does not provide full disclosure of all material facts relating to the securities offered. Investors should read the subsequent preliminary short form prospectus, any amendment to the preliminary short form prospectus, the final short form prospectus and any amendment to the final short form prospectus for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

- (3) If a term sheet is provided before the issuance of a receipt for a preliminary short form prospectus under subsection (1), the issuer must
 - (a) include the term sheet in its preliminary short form prospectus and its final short form prospectus or incorporate by reference the term sheet into its preliminary short form prospectus and its final short form prospectus in the manner contemplated by subsection 11.6(1) of Form 44-101F1, and
 - (b) indicate that the term sheet is not part of the preliminary short form prospectus or the final short form prospectus to the extent that the term sheet's contents have been modified or superseded by a statement contained in the preliminary short form prospectus or the final short form prospectus and, if a statement in the term sheet has been modified or superseded, disclose how the statement in the term sheet has been modified or superseded by the statement in the preliminary short form prospectus or the final short form prospectus.
- (4) If a term sheet is provided before the issuance of a receipt for a preliminary short form prospectus under subsection (1) but the issuer does not include the term sheet in its preliminary short form prospectus and its final short form prospectus or incorporate by reference the term sheet into its preliminary short form prospectus and its final short form prospectus in the manner contemplated by subsection 11.6(1) of Form 44-101F1, the term sheet is deemed for purposes of securities legislation to be incorporated into the issuer's final short form prospectus as of the date of the final short form prospectus to the extent not otherwise expressly modified or superseded by a statement contained in the final short form prospectus.

- (5) If the preliminary short form prospectus modifies a statement of a material fact that appeared in a term sheet provided before the issuance of a receipt for the preliminary short form prospectus under subsection (1), the issuer must prepare a revised term sheet that highlights the modified statement and the relevant investment dealer must deliver with the preliminary short form prospectus a copy of the revised term sheet to each permitted institutional investor that received the original term sheet.
- (6) Any revised term sheet provided with the preliminary short form prospectus under subsection (5) must comply with section 13.5 of NI 41-101.
- (7) If the final short form prospectus, or any amendment to the final short form prospectus, modifies a statement of a material fact that appeared in a term sheet provided before the issuance of a receipt for the preliminary short form prospectus under subsection (1), the issuer must prepare a revised term sheet that highlights the modified statement and the relevant investment dealer must deliver with the final short form prospectus, or any amendment, a copy of the revised term sheet to each purchaser of securities distributed under the final short form prospectus, or any amendment, that received the original term sheet.
- (8) Any revised term sheet provided with the final short form prospectus, or any amendment, under subsection (7) must comply with section 13.6 of NI 41-101..

5. ***Section 5.1 of Form 44-101F1 is amended in subsection (a), by replacing “[its/their] assessment of the state of the financial markets” with “[describe any “market out”, “disaster out”, “material change out” or similar provision]”.***

6. ***Item 11 of Form 44-101F1 is amended by adding the following after section 11.5:***

11.6 Term Sheets Incorporated by Reference

- (1) If a term sheet is provided to a permitted institutional investor before the issuance of a receipt for a preliminary short form prospectus under subsection 7.5(1) of the Instrument, the issuer must
 - (a) include the term sheet in the preliminary short form prospectus and the final short form prospectus or incorporate the term sheet by reference into the preliminary short form prospectus and the final short form prospectus; and
 - (b) indicate that the term sheet is not part of the final short form prospectus to the extent that the term sheet’s contents have been modified or superseded by a statement contained in the preliminary short form prospectus or the final short form prospectus and, if a statement in the term sheet has been modified or superseded, disclose how the statement in the term sheet has been modified or

superseded by the statement in the preliminary short form prospectus or the final short form prospectus, as applicable.

- (2) If a term sheet is provided during the waiting period under subsection 13.5(1) of NI 41-101, the issuer must
 - (a) include the term sheet in the final short form prospectus or incorporate the term sheet by reference into the final short form prospectus, by means of a statement in the final short form prospectus to that effect; and
 - (b) indicate that the term sheet is not part of the final short form prospectus to the extent that the term sheet's contents have been modified or superseded by a statement contained in the final short form prospectus and, if a statement in the term sheet has been modified or superseded, disclose how the statement in the term sheet has been modified or superseded by the statement in the final short form prospectus.
- (3) State that any term sheet provided under subsection 13.6(1) of NI 41-101 to a potential purchaser after the date of the final short form prospectus and before the termination of the distribution is deemed to be incorporated into the final short form prospectus.

GUIDANCE

A term sheet does not, as a matter of law, amend a preliminary short form prospectus, any amendment to a preliminary short form prospectus, a final short form prospectus or any amendment to a final short form prospectus..

7. This Instrument comes into force on ●.

