

**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](http://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.

### **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*

Please refer your questions to any of:

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