

## CSA Staff Notice 43-310

### *Confidential Pre-File Review of Prospectuses (for non-investment fund issuers)*

March 5, 2020

#### **Introduction**

Staff of the Canadian Securities Administrators (**staff** or **we**) are introducing a harmonized process for full reviews of prospectuses on a confidential pre-file basis (the **pre-file process**) for non-investment fund issuers. Investment fund issuers should continue to use the existing pre-filing process.

#### **Purpose**

Introducing a harmonized pre-file process is part of our effort to foster capital formation and to provide issuers with greater flexibility and more certainty in planning their prospectus offerings. The harmonized pre-file process expands the availability of pre-file reviews that some Canadian Securities Administrators (CSA) jurisdictions are already conducting.

#### **Background**

The regulatory review process for prospectuses normally begins when an issuer publicly files its preliminary prospectus. If a material issue is raised during the review process, this may cause delays in receipting the prospectus and closing the offering. Market participants have expressed concern that delays can cause uncertainty in the market and have indicated that the pre-file process would help reduce this uncertainty.

CSA jurisdictions currently have various approaches to confidential pre-file reviews of prospectuses. For those allowing confidential pre-filings, the process has typically been limited to more complex filings and those involving cross-border offerings. With the exception of guidance provided for structured notes set out in question 2 below, this notice supersedes guidance on non-investment fund pre-filing reviews previously provided by staff.

The following sets out staff guidance for the pre-file process.

#### **Specific questions and related guidance**

If an issuer wants to confidentially pre-file a prospectus, the issuer should generally follow the process for pre-filing interpretations set out in Part 8 of National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions* (NP 11-202), as supplemented by the following guidance:

### **1. Which issuers can use the pre-file process?**

Any non-investment fund issuer that intends to file a prospectus in a Canadian jurisdiction can use the pre-file process.

### **2. For what types of prospectus offerings can the pre-file process be used?**

An issuer can use the pre-file process to pre-file a long form prospectus under National Instrument 41-101 *General Prospectus Requirements (NI 41-101)*, a short form prospectus under National Instrument 44-101 *Short Form Prospectus Distributions (NI 44-101)*, and a base shelf prospectus under National Instrument 44-102 *Shelf Distributions (NI 44-102)*.

However, the pre-file process does not apply to structured notes distributed under the shelf prospectus system as discussed in CSA Staff Notice 44-304 *Linked Notes Distributed under Shelf Prospectus System* and CSA Staff Notice 44-305 *2015 Update – Structured Notes Distributed Under the Shelf Prospectus System*.

Additionally, as one of the key purposes of the pre-file process is to provide certainty in respect of prospectus offerings, the pre-file process does not apply to

- non-offering prospectuses, other than non-offering prospectuses filed in connection with cross-border financings, and
- prospectuses filed solely to qualify the issuance of securities on conversion of convertible securities, such as special warrants.

For non-offering prospectuses with complex issues, an issuer may contact their principal regulator to determine if the pre-file process is appropriate.

### **3. In which jurisdictions should an issuer pre-file the prospectus?**

An issuer should pre-file the prospectus with their principal regulator only.

If the principal regulator determines, upon review, that the prospectus involves a novel and substantive issue, or raises a novel policy concern, the principal regulator will follow the procedures set out in subsections 8.2 (4) and (5) of NP 11-202 (which set out how non-principal regulators may become involved in these situations).

### **4. At what stage in the prospectus process should the prospectus be pre-filed?**

To use the pre-file process, we expect the terms and conditions of the offering, and any related transactions, to be clearly determined. We also expect that the underwriters would have substantially completed their review of the pre-filed prospectus.

Staff expect the pre-filed prospectus generally to

- be of the same form and quality as if it was the publicly filed preliminary prospectus, and
- contain the disclosure (including financial statements) prescribed under securities legislation and described in the form of prospectus that the issuer intends to use.

The price of the offering and other information derived from the price are frequently omitted from a preliminary prospectus. We ask that issuers include an estimate of any such amounts in the pre-filed prospectus where practical. Including estimates may allow staff to identify potential concerns as part of the pre-file process instead of during the review of the publicly filed preliminary prospectus.

If staff determine that the pre-filed prospectus is materially non-compliant or incomplete, the principal regulator will stop the review and ask the filer to file a revised draft with the necessary information. This will likely delay the review. In the event staff do not receive a response within a reasonable period of time, they may advise the filer that the pre-file will be closed unless a response to the request for information or comment letter is received by a specified date. Staff will consider the pre-filing to be withdrawn if there is no response within 90 days of the initial pre-filing date.

### **5. What documents should accompany the pre-filed prospectus?**

Generally, a pre-file should include all documents required to be filed with the publicly filed prospectus. In particular, for a long form prospectus under NI 41-101, the issuer should include

- a cover letter that sets out
  - the information under subsection 8.2(1) of NP 11-202 (which sets out information that should be in the application including identification of the principal regulator and non-principal regulators), and
  - when the issuer expects to file the public long form preliminary prospectus,
- copies of any material contracts required to be filed under section 9.3 of NI 41-101, and
- if the issuer has a mineral project, the technical report required to be filed with a preliminary long form prospectus under National Instrument 43-101 *Standards of Disclosure for Mineral Projects* (NI 43-101).

For a short form prospectus under NI 44-101, or a base shelf prospectus under NI 44-102, the issuer should include

- a cover letter that sets out
  - the information under subsection 8.2(1) of NP 11-202,
  - when the issuer expects to file the public preliminary short form prospectus, and
  - which of the qualifying criteria set out in Part 2 of NI 44-101 the issuer is relying on in order to be qualified to file a short form prospectus,
- the final technical report, if a technical report under NI 43-101 will be triggered by the filing of the short form prospectus, and
- the annual information form, if the issuer is a venture issuer that has not yet filed an annual information form for its most recently completed financial year.

Staff will contact the issuer if they require more documents, including personal information forms, to complete their review.

**6. How far in advance of the anticipated filing of the public preliminary prospectus should the prospectus be pre-filed?**

A filer should submit the pre-filing sufficiently in advance of filing the public preliminary prospectus. The timing of staff comments will depend upon a number of factors and staff will prioritize reviews of public prospectus filings. Generally, staff will use their best efforts to provide initial comments within 10 working days of receiving the pre-filing. However, staff may not be able to meet this suggested timing in the following circumstances:

- the pre-filing is complex or involves a novel and substantive issue, or raises a novel policy concern, or
- the issuer's disclosure is incomplete.

If staff cannot meet this timing, they may give an estimate of when they expect to be in a position to provide initial comments.

**7. What level of review will the principal regulator conduct?**

Normally, staff will conduct the same level of review that they would for the publicly filed preliminary prospectus.

The pre-file process covers full reviews of prospectuses on a confidential pre-file basis. An issuer may still seek a confidential pre-file interpretation of only a certain aspect of the prospectus under NP 11-202. In this situation, staff will focus only on that aspect and will conduct a full prospectus review at the time of the public preliminary prospectus filing.

**8. Can the principal regulator raise additional comments once the preliminary prospectus is filed publicly?**

The intention of the pre-file process is to address as many issues as possible prior to the public preliminary prospectus filing. However, staff may still raise comments at the time of the public filing including if new issues arise or if there are changes to the prospectus or any documents incorporated by reference.

To facilitate the review of the public preliminary prospectus, the issuer should also deliver a copy of the preliminary prospectus blacklined to show changes from the pre-filed prospectus at the time of the public preliminary prospectus filing.

**9. How will communication take place?**

Communications will normally take place by email, however the filer may request in its cover letter an alternative means of communication.

**10. How can an issuer pre-file a prospectus and what are the applicable fees?**

The current filing process and fees payable for the confidential pre-file system for all principal regulators that are specified jurisdictions under NI 11-202 are as follows:

<b>Principal Regulator</b>	<b>Filing process</b>	<b>Fees*</b>
<b>British Columbia</b>	Submit application by e-mail to <a href="mailto:financialreporting@bcsc.bc.ca">financialreporting@bcsc.bc.ca</a>	None
<b>Alberta</b>	Submit application by e-mail to <a href="mailto:legalapplications@asc.ca">legalapplications@asc.ca</a>	None
<b>Saskatchewan</b>	Submit application by e-mail to <a href="mailto:corpfin@gov.sk.ca">corpfin@gov.sk.ca</a>	None
<b>Manitoba</b>	Submit application by e-mail to <a href="mailto:securities@gov.mb.ca">securities@gov.mb.ca</a>	None
<b>Ontario</b>	Applications for pre-filing reviews should be submitted as a prospectus pre-file through the OSC's electronic filings portal at:  <a href="https://eforms1.osc.gov.on.ca/e-filings/pre-files/form.do?token=7de82153-df42-4c1a-9778-26b723efb13d">https://eforms1.osc.gov.on.ca/e-filings/pre-files/form.do?token=7de82153-df42-4c1a-9778-26b723efb13d</a>	\$3,800 (this payment will be credited against the filing fee for the publicly filed preliminary prospectus)
<b>Québec</b>	Submit application by e-mail to <a href="mailto:dispenses.passeport@lautorite.qc.ca">dispenses.passeport@lautorite.qc.ca</a>	None
<b>New Brunswick</b>	Submit application by e-mail to <a href="mailto:passport-passeport@fcnb.ca">passport-passeport@fcnb.ca</a>	None
<b>Nova Scotia</b>	Submit application by e-mail to <a href="mailto:NSSC_Corp_Finance@novascotia.ca">NSSC_Corp_Finance@novascotia.ca</a>	None

\*The filing fees are current as of the date of this Notice only.

## Questions

Please refer your questions to any of the following:

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