

**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.

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.

Local Matters

Schedule J is being published in any local jurisdiction that is making related changes to local securities laws, including changes to local notices or other policy instruments in that jurisdiction. It also includes any additional information that is relevant to that jurisdiction only.

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

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Schedule A

Summary of Changes to the November 2011 Materials

Application

The November 2011 Materials provided that the rule amendments and policy changes would apply to issuers other than mutual funds. The revised rule amendments and policy changes also do not apply to investment funds filing a prospectus in the form of Form 41-101F2 *Information Required in an Investment Fund Prospectus* or Form 41-101F3 *Information Required in a Scholarship Plan Prospectus*. This would maintain the status quo for these investment funds.

We have revised the rule amendments and policy changes so that NI 41-101 and 41-101CP contain separate sections for investment funds and issuers other than investment funds. CSA staff are considering potential disclosure reforms for these investment funds as part of a future stage of the CSA's point of sale project.

Testing of the Waters Exemption for IPO Issuers

Private company with public control person

The November 2011 Materials provided that due to insider/tippee trading concerns, the testing of the waters exemption for issuers planning to conduct an initial public offering (IPO issuers) would not be available to IPO issuers that are already public companies in a foreign jurisdiction. In response to the November 2011 Materials, comments were raised regarding insider and tippee trading concerns in relation to the use of the testing of the waters exemption by an IPO issuer that is the subsidiary of a public company. We have revised the amendments to NI 41-101 to specify that the testing of the waters exemption for IPO issuers cannot be used for an issuer if:

- any of the issuer's securities are held by a control person that is a public issuer, and
- the initial public offering would be a material fact or material change with respect to the control person.

Who may be solicited

The November 2011 Materials limited the class of persons who may be solicited under the testing of the waters exemption to "permitted institutional investors". We received comments recommending that:

- the definition of "permitted institutional investor" be revised to be more consistent with the definition of "accredited investor" in National Instrument 45-106 *Prospectus and Registration Exemptions*, and
- the exemption should be available for soliciting any accredited investor.

After considering the comments, we have revised the amendments to NI 41-101 to broaden the class of persons who may be solicited under the testing of the waters exemption to include all accredited investors. We note that:

- certain issuers, particularly venture issuers, may have difficulty attracting institutional investors, and therefore need a broader base of investors in order to benefit from the exemption, and

- existing securities legislation permits accredited investors to purchase securities without a prospectus on the basis that they are sophisticated investors or otherwise do not need the protection of a prospectus.

Period of testing

We have revised the amendments to NI 41-101 to prohibit solicitation under the testing of the waters exemption for a period of 15 days before the filing of the preliminary prospectus for the initial public offering. We believe that this prohibition supports the policy rationale underlying the exemption (i.e., to assess interest in a potential initial public offering before incurring costs relating to the offering).

Approval of materials

We have revised the amendments to NI 41-101 to clarify that any materials used by a dealer to solicit an expression of interest from an investor under the exemption must be approved in writing by the issuer.

Confidentiality

The November 2011 Materials provided that an investment dealer soliciting an expression of interest from an investor under the testing of the waters exemption was required to ask the investor to confirm in writing that the investor would keep any such information confidential. We have revised the amendments to NI 41-101 to require that the investor confirm in writing that it will keep information about the proposed offering confidential until the earlier of:

- the time the information has been generally disclosed in a preliminary long form prospectus or otherwise, or
- the time the issuer has confirmed in writing that it will not be pursuing the potential offering.

Use of information

We have revised the amendments to NI 41-101 to provide greater clarity regarding the use of information obtained pursuant to the testing of the waters exemption. The amendments require that an investment dealer soliciting an expression of interest from an investor under the testing of the waters exemption must ensure that the investor confirms in writing that it will not use information about the proposed offering for any purpose other than assessing the investor's interest in the offering, until the earlier of:

- the time the information has been generally disclosed in a preliminary long form prospectus or otherwise, or
- the time the issuer has confirmed in writing that it will not be pursuing the potential offering.

We have also included companion policy guidance in 41-101CP to remind investment dealers and accredited investors that they should not use information obtained under the testing of the waters exemption in a way that may be considered abusive.

Companion policy guidance

We have added further companion policy guidance to 41-101CP in order to clarify certain matters relating to the testing of the waters exemption for IPO issuers. Specifically, the guidance:

- clarifies that the exemption may be used at the same time by more than one investment dealer in respect of the same issuer, provided that the issuer has authorized each dealer in accordance with the conditions of the exemption,
- reminds issuers, dealers and accredited investors that selective disclosure concerns would arise if accredited investors were provided with material facts that are not disclosed in the subsequent preliminary prospectus for the initial public offering, and
- reminds issuers and dealers that the purpose of the exemption is to see if there is enough interest before initiating the initial public offering process and incurring costs, rather than to pre-sell the deal.

Bought Deals

Enlarging bought deals

The November 2011 Materials provided for the enlargement of bought deals up to a specified percentage. We requested comments on what that percentage should be. After considering the comments received, we have revised the amendments to NI 44-101 to allow bought deals to be enlarged up to 100% of the size of the original deal.

We have not retained the provision in the proposed rules that would prohibit a bought deal from being enlarged if doing so “is 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”. Instead, the amendments to NI 44-101 now specify that a bought deal agreement may not contain an upsizing option.

We believe that these revisions will prevent abuse of the bought deal exemption, but will still enable issuers to benefit from increased demand for the offering.

Enlarging or reducing bought deal syndicates

The November 2011 Materials contained a prohibition against adding a new underwriter to a bought deal syndicate if doing so was “the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement”.

We have revised the amendments to NI 44-101 to:

- remove the prohibition noted above, and
- specify that a bought deal agreement must not be *conditional* on syndication (except for confirmation clauses, discussed below), although the parties can add or remove an underwriter or adjust the number of securities to be purchased by each underwriter on a proportionate basis, provided that certain conditions are met.

Confirmation clauses

We understand that some bought deal agreements include “confirmation clauses”. The purpose of these clauses is to allow the lead underwriter to contact potential syndicate members before confirming the bought deal. The rule amendments now define “confirmation clause” for the purpose of Part 7 of NI 44-101 to mean a provision in a bought deal agreement that provides that the agreement is conditional on the lead underwriter confirming that one or more additional underwriters has agreed to purchase certain of the securities being offered.

We have revised NI 44-101 to provide that confirmation clauses are only acceptable in certain circumstances, and have included companion policy guidance in 41-101CP regarding confirmation clauses. Under the amendments to NI 44-101, confirmation clauses are only acceptable if, among other things:

- The lead underwriter provides a signed bought deal agreement to the issuer and the issuer signs it on the same day.
- On the following day, the lead underwriter provides a notice to the issuer either confirming the bought deal or advising that the bought deal has been terminated. If the bought deal is confirmed, the issuer must file a news release announcing the bought deal.

Timing for receipt of preliminary prospectus

We have maintained the requirement in NI 44-101 that the preliminary prospectus for a bought deal must be filed within four business days after the date a bought deal agreement is entered into. However, the revised amendments to NI 44-101 do not require the issuer to obtain a receipt for the prospectus on the fourth day.

Amending bought deal agreements to provide for different or additional classes of securities

We have revised the amendments to NI 44-101 to allow bought deal agreements to be amended to provide for different classes of securities or additional classes of securities and a different price for the securities, provided that certain conditions are met.

Bought deal agreement replaced by a more extended form of underwriting agreement

We have revised the amendments to NI 44-101 to indicate that an original bought deal agreement can be replaced by a more extended form of underwriting agreement, provided that the more extended form of underwriting agreement complies with the bought deal requirements in NI 44-101.

Withdrawing bought deals or amending bought deals to provide for a lower price per share or a smaller offering

We have become aware of a number of cases where bought deals have been either withdrawn or amended to provide for a lower price per share or a smaller offering. We have revised the amendments to NI 44-101 to prohibit such an amendment to a bought deal agreement until the fourth business day after the bought deal was entered into.

We have also added companion policy guidance to 41-101CP that provides further details on this issue, and discusses our regulatory concerns.

Similar to the rule amendments published with the November 2011 Materials, the revised rule amendments provide that the parties to a bought deal agreement may agree to terminate the agreement if they decide not to proceed with the distribution. The revised changes to 41-101CP also clarify that the bought deal rules do not prevent a party to a bought deal agreement from exercising a termination right set out in the agreement if:

- another party or person performs, or fails to perform, certain actions, or
- certain events occur or fail to occur.

Regulatory outs

We are aware that a practice has developed in which underwriters will require in a bought deal agreement or a more extended form of underwriting agreement that the issuer obtain a receipt for the final prospectus within a short period of time after the first comment letter relating to the preliminary prospectus is issued by staff of the principal regulator. This creates tension when staff identify significant issues that cannot be resolved within the time period specified in the agreement.

We have included companion policy guidance in 41-101CP regarding the use of regulatory outs in bought deal agreements and more extended forms of underwriting agreements, and our concerns around this practice.

Engagement letters

We have included companion policy guidance in 41-101CP indicating that if an issuer enters into an engagement letter with underwriters solely for the purpose of conducting due diligence before a potential prospectus offering, that event will not, in and of itself, indicate that “sufficient specificity” (as discussed in subsection 6.4(4) of 41-101CP) has been achieved, provided the engagement letter does not contain any other information which indicates that it is reasonable to expect that the dealer will propose to the issuer an underwriting of securities.

Due diligence outs

We have included companion policy guidance in 41-101CP regarding the use of due diligence outs in bought deal agreements and more extended forms of underwriting agreements, and our concerns around this practice.

Providing marketing materials to investors

We have revised the amendments to NI 44-101 to broaden the class of persons who may receive bought deal marketing materials before the receipt of a preliminary prospectus to include any investor. The November 2011 Materials indicated that these materials could only be given to permitted institutional investors (as defined in the November 2011 Materials).

We have also revised the amendments to NI 44-101 to provide that an investor who received marketing materials in relation to a bought deal need only to receive a copy of the preliminary prospectus if, in response to the solicitation, the investor expressed an interest in acquiring the securities.

Bought deal road shows

We have revised the amendments to NI 44-101 to include provisions for road shows after the announcement of a bought deal but before the filing of a preliminary prospectus. In this regard, the amendments to NI 44-101 relating to marketing materials for bought deals generally apply to marketing materials used in connection with road shows for bought deals.

Overnight marketed deals

We are aware of the practice of entering into “overnight marketed deals” as an alternative to bought deals. We have included companion policy guidance in 41-101CP which sets out the process that is typically followed in an overnight marketed deal.

Prospectus Notices, Standard Term Sheets and Marketing Materials

Prospectus notices

We have revised the amendments to NI 41-101 to include definitions of “preliminary prospectus notice” and “final prospectus notice”. These definitions describe short notices relating to a prospectus that are currently permitted under securities legislation in certain jurisdictions.

Standard term sheets

We have revised the rule amendments and policy changes to distinguish between “standard term sheets” and “marketing materials”.

With respect to standard term sheets, the rule amendments provide for the following:

- Standard term sheets can only contain limited information in respect of an issuer, securities or an offering, as prescribed by the rule amendments.
- Standard term sheets must contain a prescribed legend (or words to the same effect) with cautionary language.
- Generally, other than contact information for the investment dealer or underwriters, any information in a standard term sheet concerning an issuer, securities or an offering must be disclosed in, or derived from, the relevant prospectus. However, if the offering is a bought deal, the information must be disclosed in, or derived from, the bought deal news release or the issuer’s continuous disclosure record on SEDAR, or the subsequent preliminary prospectus.
- Standard term sheets will not have to be filed on SEDAR or included or incorporated by reference in the relevant prospectus. As a result, they will not be subject to civil liability. However, they will be subject to the existing statutory prohibitions on misleading or untrue statements.

We have defined “standard term sheet” in NI 41-101 to include a written communication intended for potential investors regarding a distribution of securities under a prospectus that only contains prescribed information.

The definition of standard term sheet excludes a preliminary prospectus notice and a final prospectus notice.

Marketing materials

The rule amendments relating to marketing materials are intended to apply to situations where issuers and investment dealers would like to provide investors with information that is more detailed than the limited information that can be contained in a standard term sheet. Marketing materials are generally subject to the same conditions in the proposed rule amendments published with the November 2011 Materials relating to “term sheets”, with certain revisions as discussed below.

We have replaced the proposed definition of “term sheet” in NI 41-101 with a definition of “marketing materials”, which are defined as a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer, securities or an offering. The definition of marketing materials excludes a prospectus or any amendment, a standard term sheet, a preliminary prospectus notice and a final

prospectus notice.

We have also added companion policy guidance to 41-101CP to clarify that marketing materials would not include a cover letter or email that merely encloses a copy of a document such as a prospectus, a standard term sheet or marketing materials.

Comparables

“Comparables” are information that compares an issuer to other issuers. The November 2011 Materials provided that comparables could only be given to permitted institutional investors (as defined in the November 2011 Materials) in the absence of civil liability. We noted that comparables can be “cherry picked” by investment dealers and misunderstood by retail investors. We specifically requested comment on the circumstances in which comparables should be permitted to be given to retail investors.

Based on the comments that we received, we have made the following revisions:

- We have defined comparables to include information that compares an issuer to other issuers.
- Comparables can be provided to any investor (i.e., institutional, accredited or retail) in marketing materials (including marketing materials provided in connection with a road show).
- Comparables will not be subject to civil liability, if certain conditions are met. Specifically, the rule amendments provide that:
 - comparables can be removed from any version of marketing materials that is filed on SEDAR, and
 - the relevant prospectus need only include, or incorporate by reference, the version of the marketing materials with the comparables removed.

While not subject to statutory civil liability in these circumstances, comparables will be subject to statutory prohibitions on misleading or untrue statements. We have also made certain revisions that are intended to mitigate potential investor protection concerns around the use of comparables in the absence of civil liability. These include the following:

- issuers must confidentially deliver on SEDAR a complete template version of the marketing materials that contains the comparables, and
- additional disclosure (including risk disclosure) proximate to the comparables must be provided.

Companion policy guidance has also been added to 41-101CP regarding the use of comparables to provide greater clarity around this practice.

Approval of marketing materials

The revised rule amendments:

- require that before they are used, marketing materials must be approved in writing by the issuer and the lead underwriter, rather than all of the underwriters,
- allow for the approval and use of a template form for marketing materials that would permit the addition of certain non-substantive information, without requiring subsequent approvals, into a limited-use version of the marketing materials, and

- provide that where a template version of marketing materials that has been approved by the issuer and lead underwriter and filed is divided into separate sections, an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those sections.

The term “limited-use version” is defined in NI 41-101 to mean a template version of a document in which the spaces for information have been completed in accordance with certain requirements.

Filing of marketing materials

The revised rule amendments:

- require that marketing materials (with comparables removed) be filed on SEDAR on the same day they are first used, rather than before they are used, and
- indicate that if a template form of marketing materials is filed, an investment dealer may make non-substantive changes to the template in a limited-use version of the marketing materials without filing the revised document. As noted above, we have defined the term “limited-use version” in NI 41-101.

Requirement to send marketing materials

We have not retained the requirement in the November 2011 Materials for revised marketing materials to be sent to investors who received the original marketing materials in certain circumstances. Instead, if a subsequent prospectus document modifies a statement of a material fact that appeared in the original marketing materials:

- a revised blacklined copy of the marketing materials must be filed with securities regulators and made public, and
- the subsequent prospectus document must contain a statement at the beginning of the document to:
 - disclose the particular statement of material fact that has been modified, and
 - indicate that a blacklined copy of the marketing materials reflecting the modification is available for viewing on SEDAR.

Fair, true and plain requirement

We have not retained the “fair, true and plain” requirement for marketing materials that was included in the November 2011 Materials. While marketing materials will not be subject to an express standard, we have included companion policy guidance in 41-101CP indicating that marketing materials are subject to provisions in securities legislation which prohibit misleading or untrue statements.

Additionally, we note that the template version of the marketing materials must be included or incorporated by reference in the relevant prospectus and, accordingly, will form part of the prospectus document that is subject to the full, true and plain standard.

Scope

We have revised the rule amendments to clarify that the rules relating to marketing materials apply to situations where an investor was shown marketing materials but not permitted to retain a copy.

Permitted information

We have revised the rule amendments to clarify that, other than contact information for the investment dealer or underwriters and any comparables, all information in marketing materials used in connection with an offering other than a bought deal must be either:

- disclosed in the relevant prospectus, or
- derived from the relevant prospectus.

Where the offering is a bought deal, the amendments to NI 44-101 provide that, other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials must be disclosed in, or derived from:

- the bought deal news release,
- the issuer's continuous disclosure record on SEDAR, or
- the subsequent preliminary prospectus that is filed on SEDAR.

Road Shows

General provisions for road shows

The November 2011 Materials contained separate requirements for:

- road shows for permitted institutional investors, and
- road shows for retail investors.

We have revised the rule amendments and policy changes to include provisions that apply to all road shows, rather than distinguishing between the requirements applicable to road shows based on who can attend.

Bought deal road shows

The November 2011 Materials contained requirements for road shows during the waiting period and after filing of the final prospectus. The revised amendments to NI 44-101 also include road show provisions for bought deals. Marketing materials provided in connection with a road show for a bought deal are subject to the same conditions as other marketing materials for bought deals.

Materials provided at a road show

The revised rule amendments and policy changes:

- refer to "marketing materials" rather than "written material" provided at a road show. Accordingly, the rule amendments and policy changes relating to marketing materials generally apply to marketing materials used in connection with a road show,
- remove the requirement for investment dealers to restrict copying of materials provided at a road show,
- clarify that the road show provisions will generally only apply to written marketing materials used in connection with a road show, rather than oral statements, and
- include companion policy guidance in 41-101CP regarding oral statements made at a road show.

Requirements for investment dealers

The November 2011 Materials provided that an investment dealer conducting a road show must establish and follow reasonable procedures to:

- verify the identity and keep a written record of any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means, and
- ensure that the investor receives a copy of the relevant prospectus.

The revised rule amendments provide that an investment dealer conducting a road show must establish and follow reasonable procedures to:

- ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information,
- keep a record of any information provided by the investor, and
- provide the investor with a copy of the relevant prospectus.

We believe that this is a more reasonable requirement to impose on investment dealers, who may not be able to “verify” the identity of all road show attendees, particularly when attendance is not in person. Additionally, as it may not always be possible to “ensure” that an investor has actually received a copy of the prospectus, we believe that it is more reasonable to require that the investment dealer “provide” the investor with the prospectus.

Cautionary language

The November 2011 Materials required that a road show commence with the oral reading of a cautionary statement. We have revised the rule amendments to only require that the cautionary statement be read at the beginning of a road show if the investment dealer conducting the road show permits investors, other than accredited investors, to attend the presentation. We have also shortened the prescribed language and indicated that the statement made at the road show can be a statement that is to the same effect as the prescribed language.

Permitted attendees

The November 2011 Materials contained restrictions on who could attend a road show. The revised rule amendments do not have these restrictions.

We have also revised the rule amendments and policy changes to clarify that members of the media can attend road shows in their capacity as members of the media, rather than only as potential investors. We have added companion policy guidance to 41-101CP on certain matters relating to media attendance at road shows. In particular, the guidance states that:

- Although members of the media may attend a road show, they should not be specifically invited by the issuer or an investment dealer.
- Road shows are intended to be presentations for potential investors, not press conferences for members of the media.
- Issuers and investment dealers should not market a prospectus offering in the media.

Road shows for certain U.S. cross-border prospectus offerings

Due to existing Canadian waiting period restrictions, issuers in U.S. cross-border initial public offerings currently apply for exemptive relief in order to conduct internet road shows. In the notice that was published as part of the November 2011 Materials, we indicated that issuers in U.S. cross-border initial public offerings would no longer have to apply for relief when our proposals on road shows were implemented.

We received comments indicating that issuers in U.S. cross-border offerings may not want to file marketing materials provided in connection with a road show on SEDAR due to concerns regarding potential class action lawsuits in the U.S. In order to prevent U.S. underwriters from avoiding Canadian tranches in cross-border prospectus offerings, we have revised the rule amendments to provide an exception for issuers in certain U.S. cross-border prospectus offerings from the requirements to:

- file the marketing materials on SEDAR, and
- include or incorporate the marketing materials in the final prospectus.

This is intended to be a limited exception and is subject to the following conditions:

- The U.S. cross-border prospectus offering must be primarily intended to be sold in the U.S.
- The issuer and underwriters must provide a contractual right of action to any investor who viewed the marketing materials, in the event that the marketing materials contain a misrepresentation. The contractual right of action must be disclosed in the prospectus.
- A copy of the marketing materials must be confidentially delivered to securities regulators on SEDAR.

We have also provided companion policy guidance in 41-101CP clarifying that the exception does not apply to marketing materials relating to the U.S. cross-border offering other than the marketing materials provided in connection with the road show.

Marketing after a Receipt for a Final Prospectus

The November 2011 Materials contained provisions prescribing when investment dealers could provide term sheets (now marketing materials) and conduct road shows after a receipt for a final prospectus and a final base shelf prospectus. Where we have made changes to the conditions for marketing materials and road shows during the waiting period, we have generally made the same changes for marketing materials and road shows after the receipt of a final prospectus, with certain accommodations for offerings pursuant to a draw-down under a final base shelf prospectus or an offering under the PREP procedures.

Shelf prospectuses

All information in standard term sheets (other than contact information for the investment dealer or underwriters) and marketing materials (other than contact information for the investment dealer or underwriters and comparables) for a draw-down under a final base shelf prospectus must:

- currently be disclosed in, or derived from, the final base shelf prospectus, any amendment to the final base shelf prospectus or an applicable shelf prospectus supplement that has been filed, or
- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is filed.

We have moved the rule amendments relating to final base shelf prospectuses, including provisions relating to standard term sheets, marketing materials and road shows in the context of a draw-down under a final base shelf prospectus, from NI 41-101 to NI 44-102. However, companion policy guidance with respect to these provisions will still be contained in 41-101CP.

Base PREP prospectuses

All information in standard term sheets (other than contact information for the investment dealer or underwriters) and marketing materials (other than contact information for the investment dealer or underwriters and comparables) after the receipt for a final base PREP prospectus must:

- currently be disclosed in, or derived from, the final base PREP prospectus, the supplemented PREP prospectus or any amendment that has been filed, or
- later be disclosed in, or derived from, the supplemented PREP prospectus that is filed.

We have included rule amendments relating to final base PREP prospectuses, including provisions relating to standard term sheets, marketing materials and road shows in the context of a final base PREP prospectus in NI 44-103. However, companion policy guidance with respect to these provisions is contained in 41-101CP.

Other

We have also:

- included new definitions in the rules to reflect the above changes (e.g., a definition of “lead underwriter”),
- revised the companion policies to the rules to reflect the above changes, and
- made certain drafting changes to the provisions.

Schedule B

List of Commenters

1. BMO Capital Markets
2. Borden Ladner Gervais LLP
3. Burnet, Duckworth & Palmer LLP
4. Business Law Section of the Ontario Bar Association
5. Caisse de dépôt et placement du Québec
6. Canada Pension Plan Investment Board
7. Cassels Brock & Blackwell LLP
8. CIBC
9. Davies Ward Phillips & Vineberg LLP
10. Fiore Financial Corporation
11. Investment Industry Association of Canada
12. Kenmar Associates
13. Norton Rose Canada LLP
14. Osler, Hoskin & Harcourt LLP
15. RBC Global Asset Management Inc.
16. Siskinds LLP

Schedule C

Summary of Comments and CSA Responses

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
General Comments			
1	General support for the proposals	<p>Nine commenters expressed general support for the proposals, subject to their comments on specific aspects of the proposals.</p> <p>One commenter expressed general support for some of the proposals.</p> <p>Particular comments include the following:</p> <ul style="list-style-type: none"> • The proposed rules are useful insofar as they clarify and codify existing practices. • One commenter was supportive of the CSA’s efforts to provide greater clarity with respect to the permissible pre-marketing and marketing activities in connection with prospectus offerings. For securities law practitioners, advising on these activities has traditionally required a significant amount of judgment, given the nature of existing rules and policies in this area. This has sometimes led to different views among market participants with respect to certain practices. • The existing regulatory framework surrounding the prospectus pre-marketing and marketing regime does not appear to be 	We thank the commenters for their input.

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>sufficiently clear or well understood by investment dealers or prospective investors. The proposed rule amendments and policy changes would be beneficial to the Canadian capital markets as issuers and investment dealers would be provided with further guidance on the appropriate practices and procedures for communicating these matters with prospective investors.</p> <ul style="list-style-type: none"> • The proposed changes will increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings. • Overall, the proposals are a significant improvement over the current regulation of pre-marketing and marketing and are much more consistent with current market practice. <p>While not expressly supporting the proposals, one commenter indicated that it supports any measure that would help stimulate capital raising activities while preserving the efficiency and integrity of the markets.</p>	
2	General concerns with the proposals in relation to investors	<p>Two commenters had investor protection concerns with the proposed rule amendments and policy changes.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • Since disclosure is one of the pillars of 	The rule amendments are intended 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 addressing investor protection concerns.

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>investor protection, any attempt to water down aspects of disclosure was suspect.</p> <ul style="list-style-type: none"> • Even with regulator-approved disclosure, the content, jargon and legalese are of limited use to the average retail investor. • The proposals would ease regulatory restrictions faced by issuers and investment dealers when marketing prospectus offerings. The commenter did not see how changes that increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings are in the best interests of retail investors. • The proposals will add risks for retail investors without much or any corresponding benefits or safeguards. <p>Another commenter cautioned against any changes to the existing regulatory framework that would impose additional and unduly onerous restrictions on institutional or other investors in order to provide more opportunities for investment dealers to engage in pre-marketing activities.</p>	<p>While the rule amendments increase the range of permissible pre-marketing and marketing activities available in connection with prospectus offerings, certain restrictions and conditions placed upon these activities are intended to protect investors. For instance:</p> <ul style="list-style-type: none"> • Only accredited investors may be solicited under the testing of the waters exemption for IPO issuers. • Marketing materials are subject to a number of restrictions and conditions to further investor protection, including the requirements that <ul style="list-style-type: none"> ○ the marketing materials (other than any comparables in these materials) be included or incorporated by reference into the relevant prospectus and therefore subject to civil liability for misrepresentations. ○ the marketing materials be provided with a copy of the relevant prospectus. ○ the marketing materials contain a prescribed legend with cautionary language. <p>We do not believe that the rule amendments will result in additional and unduly onerous restrictions being placed on institutional and other investors.</p>
3	General support for existing rules on pre-marketing and marketing	Although expressing general support for some of the proposed rule amendments and policy changes, one commenter believes that, in general, the existing statutory regime governing pre-marketing communications adequately	While the rule amendments and policy changes reflect the same policy rationales that underlie the current requirements, we believe that there is a lack of clarity around existing practices which has led, in some instances, to an unlevel playing field. One intent of the rule

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		addresses the marketing needs of underwriters, and serves the dual purpose of protecting investors yet allowing for access to, and the efficient functioning of, the Canadian capital markets.	amendments and policy changes is to provide greater certainty around some practices, and to ensure that a level playing field exists throughout the pre-marketing and marketing process.
4	Policy rationale for existing rules	One commenter agrees with the policy rationales for the existing rules and with the CSA's belief that they are still valid.	We thank the commenter for their input.
5	Application to investment funds	One commenter was glad to see that the proposals did not apply to mutual funds. However, the commenter was concerned that the proposals would apply to exchange traded funds (ETFs) and closed end funds. The commenter noted that leveraged and reverse ETF disclosures have caused confusion in the past for retail investors and their advisors.	<p>We have revised the rule amendments and policy changes so that, in addition to mutual funds, they will not apply to investment funds filing a prospectus on Form 41-101F2 or Form 41-101F3.</p> <p>This change was made since CSA staff are considering potential disclosure reforms for investment funds filing a prospectus on Form 41-101F2 or Form 41-101F3 as part of a future stage of the CSA's point of sale project.</p>
6	General concerns with the proposals in relation to compliance	One commenter believes there should be a requirement for dealers to establish, maintain and apply policies and procedures that establish a system of controls and supervision to ensure compliance with securities legislation and the proposed marketing rules. The commenter noted that CSA Staff Notice 31-325 <i>Marketing Practices of Portfolio Managers</i> gives numerous examples of misleading marketing practices that seem to recur year after year, despite repeated cautions and warnings from securities regulators. The commenter believes that these practices are not limited to portfolio managers.	This is a matter of internal compliance for dealers, who are responsible for ensuring that they comply with securities legislation, both prescriptive and principles based. Securities legislation requires dealers to deal fairly, honestly and in good faith with their clients. Securities legislation also prohibits any person or company from making statements that are misleading or untrue or omitting information that is necessary to prevent the statement from being misleading.

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
7	General concerns relating to interaction with U.S. prospectus marketing rules	<p>One commenter had general concerns about how the proposed rule amendments and policy changes would work in a cross-border context. The commenter submitted that:</p> <ul style="list-style-type: none"> • Divergences between Canadian and U.S. rules have the potential to drive transactions and capital raising to the larger U.S. market. • It was not proposing that the CSA merely duplicate the U.S. regime in the Canadian context. There are clear distinctions between the prospectus regimes in Canada and the U.S. • However, the marketing related rules adopted in the U.S. (as part of their securities offering reform in 2005) highlight the abundance of nuances that must be addressed when attempting to specifically regulate marketing initiatives in respect of a prospectus offering. • The U.S. reforms demonstrated that significant consultation of all affected market participants is essential to establish a tailored approach that avoids impractical requirements or other unintended adverse consequences to the efficiency of one's capital markets. • Since there are instances where the proposed rule amendments may conflict with the equivalent U.S. rules, further consultation in respect of the proposed rule amendments is 	<p>We have considered U.S. rules, including recent changes that have been proposed as a result of the <i>Jumpstart Our Business Startups Act</i>. While we appreciate that there are differences between the Canadian and U.S. regimes, we do not believe that the rule amendments will result in significant impediments to cross-border offerings, or a movement of capital-raising transactions from Canada to the U.S.</p> <p>In response to specific comments, we have revised the rule amendments to provide an exception from the road show provisions so that certain issuers in a U.S. cross-border prospectus offering would not be required to:</p> <ul style="list-style-type: none"> • file marketing materials used in connection with a road show on SEDAR, and • include or incorporate by reference the marketing materials in the final prospectus. <p>We note that this is intended to be a limited accommodation, which would be subject to the following conditions:</p> <ul style="list-style-type: none"> • The exception could only be used if the U.S. cross-border prospectus offering was primarily intended to be sold in the U.S. • The issuers and underwriters would be required to provide a contractual right to any investor who viewed marketing materials used in connection with the road show, in the event the materials contain a misrepresentation. • The contractual right noted above would be required to

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>important to ensure that the final rules are workable, both from a Canadian and a cross-border context.</p>	<p>be disclosed in the prospectus.</p> <ul style="list-style-type: none"> • A copy of the marketing materials would be required to be confidentially delivered on SEDAR to Canadian securities regulators. <p>We provided this exception in response to comments that:</p> <ul style="list-style-type: none"> • Many U.S. issuers in U.S. cross-border prospectus offerings will not want to file marketing materials used in connection with an internet road show on SEDAR for fear of lawsuits from U.S. class action law firms. • Unless the CSA provided an exception for these U.S. issuers, U.S. underwriters may avoid Canadian tranches in cross-border offerings. <p>Although we provided the above-noted exception in response to these concerns, we don't believe that a requirement to file marketing materials in connection with road shows on SEDAR will create an undue burden for U.S. cross-border prospectus offerings for the following reasons:</p> <ul style="list-style-type: none"> • The road show materials will only have to be filed on SEDAR in Canada if the underwriters want to provide the materials to Canadians. The issuer and the underwriters would still be able to rely on any U.S. exemption from having to file the materials on EDGAR. • If the issuer and the underwriters conducted appropriate diligence and care, they should not be worried about the road show materials containing a misrepresentation. • If the road show materials for a cross-border prospectus

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
			<p>offering contained a misrepresentation, we understand that the issuer and the underwriters would, in any event, be subject to civil liability for misrepresentations under Section 12(a)(2) of the United States <i>Securities Act of 1933</i> (the 1933 Act) and other provisions.</p> <ul style="list-style-type: none"> Any liability concerns would be mitigated by the requirement that the road show materials contain a legend warning investors that the road show materials do not provide full disclosure of all material facts relating to the securities offered and that investors should read the relevant prospectus before making an investment decision. <p>We have also revised the rule amendments to provide an exception from certain road show procedures for certain U.S. cross-border initial public offerings where the issuer is relying on the exemption from U.S. filing requirements in Rule 433(d)(8)(ii) under the 1933 Act in respect of the road show.</p>
8	Further consultations and publication for comment	<p>Four commenters wanted the CSA to engage in further consultations with market participants before implementing the proposed rule amendments.</p> <p>Furthermore, two commenters believed that a revised version of the proposed rule amendments should be published for additional comment.</p>	<p>Consultation</p> <p>Before the proposed rules were published for comment on November 25, 2011, we conducted informal consultations with market participants in Fall 2008 and Fall 2010.</p> <p>Since the publication of the original rule amendments and policy changes on November 25, 2011, we have engaged in targeted consultations on specific issues relevant to certain market participants.</p>

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		<p>Comments received include the following:</p> <ul style="list-style-type: none"> • Citing investor protection concerns, one commenter urged that the proposals be referred to the OSC’s Investor Advisory Panel for deeper consideration. • While appreciating that the CSA previously solicited feedback on the proposed rule amendments from investment dealers, another commenter does not feel that it would be appropriate to implement the proposed rule amendments without the completion of a thorough, consultative discussion between the CSA and all market participants. • One commenter was concerned that many market participants may not fully appreciate the impact that the proposals will have on their activities. As a result, the commenter believes the CSA should not implement the proposed rules without at least publishing for comment a further revised version of the rules and obtaining comments from a sufficiently representative group of participants in the capital markets (particularly the investment dealers, institutional investors and retail investors who would be most directly affected by these changes). • Similarly, another commenter believes that the CSA should further consult with a 	<p><i>Publication</i></p> <p>Market participants had an opportunity to comment during the comment process. We considered the comments that were received, and have responded to concerns that were raised by revising the rule amendments and policy changes. We do not believe that a second comment period is necessary as there have not been material changes made to the rule amendments and policy changes that were published for comment in November 2011.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>sufficiently representative sample of market participants and securities law practitioners in Canada, the U.S. and other relevant jurisdictions, and based on such consultation publish for comment a revised draft of the rule amendments. The commenter believes that since the proposed rule amendments raise many commercial, administrative and other elements, market participants who are directly involved in the marketing of prospectus offerings need to assess them. The commenter believes the considered perspectives of investment dealers and other direct market participants are critical to ensure the final version of the rule amendments does not unnecessarily impede the efficient operation of the Canadian capital markets.</p>	
National Instrument 41-101 General Prospectus Requirements			
9	Definition – permitted institutional investor	<p><i>Scope of the definition</i> Six commenters believe that the definition of “permitted institutional investor” should be more consistent with the current definition of “accredited investor” in National Instrument 45-106 <i>Prospectus and Registration Exemptions</i>.</p> <p>One of these commenters submitted that:</p> <ul style="list-style-type: none"> • The definition of permitted institutional investor in the proposed rules is narrower than the definition of accredited investor 	<p>We have removed the definition of “permitted institutional investor” from the rule amendments. Marketing materials, including comparables, can now be provided to any investor (i.e., institutional, accredited or retail). Additionally, the rule amendments now permit an investment dealer to solicit expressions of interest from accredited investors under the testing of the waters exemption for IPO issuers, if the conditions of the exemption are met.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>under Canadian securities laws, and notably excludes registered advisers and dealers and high net worth individuals.</p> <ul style="list-style-type: none"> • The narrower definition of permitted institutional investor is not warranted in light of the manner in which the definition is used throughout the proposed rules. • The CSA previously issued a consultation note inviting public comment on the accredited investor definition, among other matters. Accordingly, the commenter would support the use of the accredited investor definition instead of the proposed permitted institutional investor definition throughout the proposed rules until there are further developments in response to the consultation note. In proposing the narrower definition of permitted institutional investor, it appears to the commenter that the CSA has taken a view on some of the matters that it has asked for comments on in the consultation note without the benefit of input on the consultation note. <p><i>Use of the definition – differentiating between retail investors and institutional investors</i> One commenter disagreed with the proposed rules which differentiate between retail investors and permitted institutional investors in respect of the information that may be provided to them</p>	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>concerning a prospectus offering.</p> <p><i>Use of the definition – differentiating between institutional investors and other accredited investors</i></p> <p>To the extent the proposed rule amendments and policy changes provide for a distinction between the types of investors that may, among other things, be solicited under the testing of the waters exemption or receive comparables information in a road show, six commenters submitted that the definition of “permitted institutional investor” is too narrow.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • If the concept of a “permitted institutional investor” is retained, the definition should be expanded to include a broader class of investors. • If the intention is to exclude retail investors, the definition of “permitted institutional investor” should be more consistent with the definition of “accredited investor” in National Instrument 45-106 <i>Prospectus and Registration Exemptions</i>. • Under the proposed rules, permitted institutional investors would be permitted access to term sheets at an earlier stage than retail investors and access to road shows that excluded retail investors. However, “non- 	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>investment fund” funds, sophisticated corporate investors and foreign analogues to Canadian investment funds would also be denied access to earlier term sheets and to certain road shows.</p> <ul style="list-style-type: none"> • Excluding foreign investment funds would be problematic for any transaction with a cross-border component. • There should be no reason to exclude any potential investor that meets the definition of “accredited investor” in Canada or the U.S. To the extent that distinctions are made, this is one that has already been made from a policy perspective (for private placements) and one that would not impose substantial additional compliance costs that would come from applying an additional classification scheme to an investment dealer’s clients. • The definition of permitted institutional investor is quite narrow, and excludes investors that would be expected to be canvassed under the testing of the waters exemption. 	
10	Definition – road show	<p>One commenter noted that the proposed definition of “road show” requires that one or more executive officers of the issuer be in attendance at the road show for it to be a “road show”. The commenter submitted that:</p> <ul style="list-style-type: none"> • This may result in certain road shows not qualifying. 	<p>We have revised the definition of “road show” to mean a presentation to potential investors, regarding a distribution of securities under a prospectus, conducted by one or more investment dealers on behalf of an issuer in which one or more executive officers, <i>or other representatives</i>, of the issuer participate.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<ul style="list-style-type: none"> • For example, some structures involve a new entity being incorporated to acquire an operating business. There may only be a limited number of executive officers at the issuer level, with additional executive officers at the operating business. A road show that involved only the latter would not qualify. • Similarly, a director is not an “executive officer”. A road show that involved only a director of the issuer would not qualify. • The definition should contemplate alternative arrangements such as these, and others that might arise if the person attending the particular road show does not fall within a definition that has been crafted for other uses. • This could be accomplished by adding the phrase “or other representative of the issuer” in the definition. 	
11	Definition – term sheet	<p>One commenter was concerned that the proposed definition of “term sheet” in NI 41-101 is overly broad, in that it only excludes a prospectus, notice, circular advertisement, letter or other communication expressly permitted by securities legislation. The commenter submitted that:</p> <ul style="list-style-type: none"> • This may have unintended consequences in respect of certain email or other communication with investors that 	<p>We have made certain changes to clarify the scope of the rule amendments and policy changes.</p> <p>We have revised the rule amendments and policy changes to distinguish between “standard term sheets” and “marketing materials”. We have also defined “preliminary prospectus notice” and “final prospectus notice” to include the notices, circulars, advertisements, letters or other communications currently permitted by securities legislation.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>references the distribution, but is not of the same character or does not contain the type of information that would be conveyed in communication with the intention of soliciting interest.</p> <ul style="list-style-type: none"> The definition should be refined so that it applies to a written communication regarding a distribution of securities under a prospectus that contains material information about the distribution and legal terms of the offering that is available under the prospectus. 	<p><i>Standard term sheets</i></p> <p>The rule amendments allow standard term sheets to include specified information, as set out in NI 41-101, relating to the basic factual terms of a prospectus offering, provided that such information is contained in the applicable prospectus (or, in the case of a bought deal, the bought deal news release, the issuer’s continuous disclosure record on SEDAR, or the subsequent preliminary prospectus). The definition of standard term sheet in NI 41-101 excludes a preliminary prospectus notice and a final prospectus notice.</p> <p>Standard term sheets will not have to be filed on SEDAR or included or incorporated by reference into the issuer’s prospectus. As a result, they will not be subject to civil liability, but will still be subject to existing statutory prohibitions for misleading or untrue statements.</p> <p><i>Marketing materials</i></p> <p>To better draw a distinction between standard term sheets and more detailed materials, we have replaced “term sheet” with “marketing materials” throughout the rule amendments and policy changes. With some exceptions, marketing materials are generally subject to the same conditions as term sheets were in our November 2011 proposals.</p> <p>We have defined “marketing materials” in NI 41-101 to mean a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer,</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
			<p>securities or an offering.</p> <p>The definition of marketing materials excludes:</p> <ul style="list-style-type: none"> • a prospectus or any amendment, • a standard term sheet, • a preliminary prospectus notice, and • a final prospectus notice. <p>In addition, we have included companion policy guidance in 41-101CP explaining that the definition is not intended to include certain communications from an investment dealer to an investor, such as a cover letter or email that merely encloses a copy of a document such as a prospectus, a standard term sheet or marketing materials, but does not include any material facts about an issuer, securities or an offering.</p> <p>Marketing materials must be filed on SEDAR and included or incorporated by reference into the relevant prospectus. Accordingly, they will be subject to civil liability for misrepresentations, in addition to statutory prohibitions for misleading or untrue statements.</p>
12	Meaning of “provide”	<p>One commenter noted that it was unclear whether the term “provide” in the proposed rules would capture situations where investors were:</p> <ul style="list-style-type: none"> • Shown a term sheet but not permitted to retain a copy. • Shown a PowerPoint presentation during a road show, but not provided with a paper 	<p>For reasons of investor protection, we have revised the rule amendments and policy changes relating to standard term sheets, marketing materials and road shows to clarify that they apply to situations where an investor is shown a copy of such materials but not permitted to retain a copy. For example, see new subsection 13.0(3) of NI 41-101.</p> <p>We agree with the commenter that issuers should not be</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>copy.</p> <ul style="list-style-type: none"> • Shown written materials during a road show but not permitted to retain a copy. <p>The commenter submitted that:</p> <ul style="list-style-type: none"> • Issuers should not be permitted to avoid liability where written materials are misleading through the simple expediency of refusing to provide a hard copy of the materials to investors. • Accordingly, the language in the proposed rules should be broadened to encompass situations where written materials are shown to investors. 	<p>permitted to avoid liability where written materials are misleading by refusing to provide a hard copy of the materials. We note that investors may make investment decisions on the basis of materials that are shown to them.</p>
13	Materials relating to prospectus offering – distinction between investors	<p>One commenter disagrees with the proposed rules which differentiate between retail and institutional investors in respect of the information that may be provided to them concerning a prospectus offering. The commenter submitted that:</p> <ul style="list-style-type: none"> • This distinction is inconsistent with the principle that the prospectus must contain full, true and plain disclosure of all of the material facts relating to the securities offering. • Any investor that is eligible to participate in an offering should have an equal opportunity to receive any disclosure provided. 	<p>We have revised certain proposed rule amendments that distinguished between the material that can be provided to different investors in a prospectus offering.</p> <p><i>Testing of the waters exemption for IPO issuers</i> We have revised the rule amendments to provide that the testing of the waters exemption for IPO issuers can be used to solicit any accredited investor (rather than only permitted institutional investors). We believe that this will allow issuers to solicit a broader base of investors under the exemption. Additionally, existing securities legislation permits accredited investors to purchase securities without a prospectus based on the view that they are sophisticated investors or other investors that do not need the protection of a prospectus.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
			<p>However, due to investor protection concerns, we have not broadened the class of persons who can be solicited under the exemption to include all retail investors.</p> <p>Comparables The original proposals provided that comparables could only be given to permitted institutional investors in the absence of civil liability. We have revised the rule amendments to provide that comparables can be provided to any investor (i.e., institutional, accredited or retail) in marketing materials in the absence of civil liability.</p> <p>To address investor protection concerns, the rules require that comparables be provided with certain disclosure.</p> <p>Road shows We have revised the rule amendments and policy changes to include standard provisions that apply to road shows which may be attended by any investor (i.e., institutional, accredited or retail).</p>
14	Testing of the waters exemption for IPO issuers – general support	<p>Four commenters were particularly supportive of the proposed testing of the waters exemption for IPO issuers.</p> <p>One commenter agreed that the conditions set forth in the exemption appropriately address the issues of ensuring confidentiality and preventing a conditioning of the market.</p>	We thank the commenters for their input.

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
15	Testing of the waters exemption for IPO issuers – definition of permitted institutional investor	<p>One commenter recommended using the “accredited investor” definition in National Instrument 45-106 <i>Prospectus and Registration Exemptions</i> rather than the proposed definition of “permitted institutional investor” to describe those investors that could be canvassed under the testing of the waters exemption. The commenter submitted that:</p> <ul style="list-style-type: none"> • The current accredited investor definition more closely reflects the types of investors that would be interested and appropriately qualified to receive and assess information. • The definition of permitted institutional investor is quite narrow, and excludes investors that would expect to be canvassed in the process of testing the waters such as foreign hedge funds or U.S. accredited investors. The commenter believes that inclusion of these entities should not raise any public policy concerns. • The CSA may wish to consider allowing the “testing of the waters” exemption to apply to sophisticated retail investors who may be most likely to participate in certain types of structured product offerings. The commenter submitted that from an investor protection perspective, it may be appropriate to restrict retail exposure to only accredited investors. 	<p>We have revised the rule amendments to provide that the testing of the waters exemption for IPO issuers can be used to solicit any accredited investor. See response to item 13.</p> <p>However, due to investor protection concerns, we have not broadened the class of persons who can be solicited under the exemption to include all retail investors.</p>

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16	Testing of the waters exemption for IPO issuers – permitted information	<p>Four commenters were in favour of rules and restrictions on what information could be given to investors under the proposed testing of the waters exemption for IPO issuers.</p> <p>One commenter expressed concern about multiple “term sheets” being used to test the waters, resulting in potential abuses through differential disclosure. The commenter submitted that:</p> <ul style="list-style-type: none"> • Some dealers may use a document containing overly promotional content that the issuer has not approved in an attempt to get a more positive response than other dealers competing for the same work. • The rules should provide that any document used to test the waters that identifies or contains sufficient information to identify the issuer be approved in writing by the issuer and that the issuer provide that same document to any dealer that is testing the waters at approximately the same time. <p>Two commenters were of the view that confidential information provided to permitted institutional investors under the proposed testing of the waters exemption for IPO issuers should be limited to the information that would be disclosed in the prospectus.</p>	<p>We have revised the amendments to NI 41-101 to provide that while materials used by a dealer to solicit investors under the testing of the waters exemption for IPO issuers must be approved by the issuer, each dealer will not be required to use the same materials.</p> <p>We have also included companion policy guidance in 41-101CP explaining that the testing of the waters exemption may be used by more than one dealer at the same time, provided the issuer has authorized each dealer in accordance with the conditions of the exemption.</p> <p>We believe that the risk of abuse of the nature specified by the commenter will be mitigated by the requirements that the issuer:</p> <ul style="list-style-type: none"> • authorize each dealer, and • approve all materials that are used under the exemption. <p>Information distributed to investors under the testing of the waters exemption will not be limited to information that would be disclosed in the prospectus. However, we have included companion policy guidance in 41-101CP to remind issuers that:</p> <ul style="list-style-type: none"> • the preliminary prospectus must contain full, true and plain disclosure of all material facts, and

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		<p>One commenter noted that one of the proposed conditions of relying on the exemption is that any written material must bear a legend indicating that the material is not subject to liability for misrepresentations under securities law. The commenter submitted that:</p> <ul style="list-style-type: none"> • In the interests of investor protection, a reference should also be made to the fact that the information is subject to the disclosure contained in the prospectus. • The rationale for such an additional legend requirement is that: (a) investors should make their investment decision based on the prospectus, which is the principal disclosure document; and (b) the information may change due to the length of time that may elapse between the initial contact with a potential IPO investor and the date the IPO prospectus is received. 	<ul style="list-style-type: none"> • selective disclosure concerns would arise if an investor was provided with material facts that are not disclosed in any subsequent prospectus. <p>We have not prescribed any additional legend requirements if materials are given to investors solicited under the exemption. If a dealer or an issuer wishes to include additional disclaimers, they may do so.</p>
17	Testing of the waters exemption for IPO issuers – confidentiality requirement	<p>One commenter made reference to the proposed requirement that before an investment dealer could provide a permitted institutional investor with confidential information about a proposed IPO, the investor must confirm in writing that it will keep the information confidential. The commenter submitted that:</p> <ul style="list-style-type: none"> • In practice, should an investor choose to receive confidential information after being approached by an investment dealer, it may be difficult to ascertain whether inside 	<p>We have revised the amendments to NI 41-101 to require any investor solicited under the testing of the waters exemption for IPO issuers to confirm in writing that it will keep information about the proposed offering confidential and not use it for any purpose other than assessing the investor’s interest in the offering until the earlier of:</p> <ul style="list-style-type: none"> • the information being generally disclosed, or • the issuer confirming in writing that it will not be proceeding with the offering.

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		<p>information has been made available by the investment dealer to the investor.</p> <ul style="list-style-type: none"> • Additional guidance on what the CSA considers material, undisclosed information would be helpful so investors' trading activities are not unduly impacted. • The CSA should specify, or outline the factors in determining, the time period within which an investor would be expected to continue to treat the information as confidential. 	
18	Testing of the waters exemption for IPO issuers – liability for permitted information	One commenter supported keeping any “term sheets” used in testing the waters for IPO issuers out of the prospectus liability regime as the disclosures in such documents would, due to their preliminary nature, not necessarily have been subject to adequate or significant due diligence.	Confidential materials used in connection with the testing of the waters exemption for IPO issuers are not subject to the statutory civil liability regime for prospectuses.
19	Testing of the waters exemption for IPO issuers – record keeping	<p>Two commenters believe that there should not be any additional record keeping involved with the proposed testing of the waters exemption for IPO issuers.</p> <p>In particular, two commenters were concerned that the proposed documentation requirements will add unnecessary costs and/or administrative burdens without corresponding significant benefit.</p> <p>One commenter was concerned that the</p>	<p>We have retained the record keeping requirements in the amendments to NI 41-101. We believe that these requirements are an important safeguard that should be in place if investors are provided with confidential information prior to an initial public offering.</p> <p>We note that the rule amendments do not prescribe the manner in which records must be kept. This provides investment dealers with flexibility to develop mechanisms that fit within their existing record keeping practices.</p>

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		<p>proposed rules would require dealers to develop and maintain separate systems to meet the specific requirements of the proposal. The commenter submitted that:</p> <ul style="list-style-type: none"> • Currently, dealers maintain comprehensive record keeping systems suited to their particular operational and compliance processes and system configuration. • If the regulatory objective is to ensure that no information is disclosed that will not be included in the prospectus, this can be achieved by permitting the dealers to develop processes that are consistent with their existing record keeping systems to achieve this objective, rather than prescribing specific procedures. 	
20	Testing of the waters exemption for IPO issuers – timing	For dealers relying on the testing of the waters exemption for IPO issuers, one commenter was of the view that there should not be any time limitations when marketing to permitted institutional investors prior to the filing of the preliminary prospectus for an IPO.	<p>We have revised the amendments to NI 41-101 to limit the testing of the waters exemption for IPO issuers to solicitations of expressions of interest that take place outside of the 15 day period prior to filing of the preliminary prospectus.</p> <p>The testing of the waters exemption is intended to help investment dealers and issuers assess interest in a potential IPO in advance of the IPO process and, in particular, before incurring costs in preparing a preliminary prospectus. We do not believe that the exemption should be used in order to “pre-sell” the IPO on the eve of filing a preliminary prospectus.</p>

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			We believe that the 15 day restricted period is in line with the policy intent behind the exemption, and also helps to mitigate regulatory concerns around leaks of information before the preliminary prospectus is filed.
21	Testing of the waters exemption for IPO issuers – request for additional guidance	One commenter requested that the CSA provide further guidance regarding the applicability of the testing of the waters exemption to a situation where a subsidiary of a public company is undertaking an IPO, and this transaction is deemed material to the parent company. The commenter also felt that guidance in respect of “wall crossing” would be instructive to the market.	In order to address insider and tippee trading concerns, we have revised the amendments to NI 41-101 to provide that the testing of the waters exemption for IPO issuers may not be used for an issuer contemplating an initial public offering if: <ul style="list-style-type: none"> • any of the issuer’s securities are held by a control person that is a “public issuer” (as defined in NI 41-101), and • the initial public offering would be a material fact or a material change with respect to the control person.
22	Testing of the waters exemption for IPO issuers – drafting comments	One commenter had a drafting comment on the opening language in proposed subsection 13.4(1) of NI 41-101. The commenter suggested removing the phrase “offering of securities of an issuer” and replacing it with “offering by an issuer”. The commenter submitted that: <ul style="list-style-type: none"> • This change may not be absolutely necessary given that the issuer must not be a reporting issuer in any jurisdiction in any event, but may more properly reflect the intent. • In other words, it is an initial public offering by the issuer, not of a specific class or kind of securities of the issuer. 	We have made the suggested change.
23	Term sheets – general	Two commenters expressed general support for the proposed rules that would permit term sheets	We thank the commenters for their input.

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		<p>to be provided at the time of the preliminary prospectus and final prospectus to all investors, both retail and institutional (subject to their comments on specific aspects of the proposals). Comments received include the following:</p> <ul style="list-style-type: none"> • The proposed rules would allow an investor to quickly identify the relevant facts of the offering. • While the prospectus is the cornerstone disclosure document for any offering, communication methods have developed over time and there is more information available electronically to investors than ever before in making an investment decision. • The proposed rule amendments and policy changes are an important step in modernizing the marketing regime for Canadian prospectus offerings and bringing that regime in line with the regimes of other jurisdictions to facilitate multi-jurisdictional offerings. 	
24	Term sheets – distinction between “term sheets” and “written marketing materials”	<p>One commenter submitted that:</p> <ul style="list-style-type: none"> • The majority of public offerings make use of a term sheet (a “standard term sheet”) that simply states the basic factual terms of the transaction such as price, total deal size, over-allotment terms, use of proceeds, jurisdictions of sale, commission, closing date, etc. 	See response to item 11.

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		<ul style="list-style-type: none"> • If upon review of the standard term sheet, a potential investor expresses an interest in participating in the transaction, then, in accordance with applicable securities legislation, a prospectus is delivered to that potential purchaser. • Any new rules should differentiate between a standard term sheet and the type of term sheet that would be permitted under the proposals, both in terminology and in regulation. The former is correctly called a “term sheet”, while the latter should be given another name, such as “written marketing materials”. 	
25	Term sheets – approval and filing on SEDAR	<p>Two commenters had concerns with the proposed requirement that a term sheet be approved in writing by the issuer and underwriters and filed on SEDAR before solicitation activities commence.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • The requirement of written approval could lead to difficulties in timing, which often is crucial for such transactions. • The provision could be modified to allow for a 24-48 hour filing requirement without creating public policy concerns. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • It is unclear what policy rationale is served 	<p><i>Approval of marketing materials</i></p> <p>We have revised the rule amendments to provide that only a template version of marketing materials must be pre-approved in writing by the issuer before use. Furthermore, the rule amendments only require that the template version of the marketing materials be pre-approved in writing by the lead underwriter, rather than all underwriters. For civil liability and investor protection reasons, we believe the template version of the marketing materials should be subject to these approval requirements.</p> <p>In order to minimize potential compliance burdens, the rule amendments provide that:</p> <ul style="list-style-type: none"> • if a template version of the marketing materials is approved and filed, an investment dealer or the lead underwriter may prepare and provide a limited-use

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		<p>by requiring that term sheets be approved and filed in advance of their first use, particularly where the content must be included (or incorporated, as applicable) in the preliminary and final prospectus of an offering.</p> <ul style="list-style-type: none"> • Canadian investors may withdraw from their purchase within the two days following the receipt of the final prospectus. • Any limited benefit served by the requirement for the advance approval and filing of a term sheet is outweighed by the associated costs and administrative burden. • In addition to extra costs and administrative burden associated with the approval and filing requirement, this requirement may also, in certain circumstances, significantly impede the efficient operation of the markets. • For example, it would force the prior formal approval and filing of a term sheet that simply contains a description of the final terms of the securities in an offering. • In a U.S. context, it is vital that this pricing term sheet be available for transmission to accounts immediately after pricing in order to confirm sales as it forms part of the “disclosure package” at the time of sale. A delay to permit the review, approval and filing of such a term sheet can create risk 	<p>version of the marketing materials that contains certain additional or alternative information (as described below), and</p> <ul style="list-style-type: none"> • if the template version of marketing materials is divided into separate sections, an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections. <p><i>Filing of marketing materials</i> We have also revised the rule amendments to require that the template version of the marketing materials be filed on SEDAR on the same day that they are first shown or provided to potential investors (rather than filed before use).</p> <p>We believe that selective disclosure concerns that may arise with this approach (i.e., same day filing rather than filing before use) are mitigated by the fact that the information in the marketing materials will be disclosed in, or derived from, the relevant prospectus.</p> <p><i>Definition of limited-use version</i> We have defined the term “limited-use version” in NI 41-101 to mean a template version of a document in which the spaces for information have been completed in accordance with certain specified provisions.</p> <p><i>Standard term sheets</i> As noted above, the new provisions for standard term</p>

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		<p>that investors who had informally committed to a particular offering may reconsider their decision as a result of that delay.</p> <ul style="list-style-type: none"> To address this risk, the U.S. rules permit the filing of the pricing supplement as late as two days following this transmission. 	<p>sheets are not subject to approval and filing requirements.</p>
26	Term sheets – distribution of term sheets with the prospectus	<p>One commenter had the following comments on the proposed rules that require an investment dealer to provide a copy of the prospectus with a term sheet when the term sheet is provided to a potential investor:</p> <ul style="list-style-type: none"> This requirement may not reflect current investment dealer practice and may be difficult for investment dealers to comply with. Term sheets are typically emailed to investors by members of an investment dealer’s sales force, while prospectus delivery is typically handled by a separate distribution centre of an investment dealer (usually located at separate premises from the sales force, depending on the size of the dealer), or may in some cases be outsourced by the dealer to a service provider. The prevailing dealer practice remains to deliver paper copies of prospectuses in order to fulfil a dealer’s statutory obligation to deliver a prospectus. As a result, term sheets are typically delivered by email by personnel within an investment dealer who 	<p>We have considered the comments, and have retained the requirement that, other than marketing materials provided before the filing of a preliminary prospectus for a bought deal, marketing materials must be provided to investors with a copy of the relevant prospectus. Since the marketing materials will not provide full, true and plain disclosure of all material facts, they should generally be provided with a copy of the relevant prospectus.</p> <p><i>PREP and shelf offerings</i> We have also provided for some accommodations to the general requirement to provide marketing materials where the post-receipt pricing process is used, and in relation to shelf prospectus supplements. In particular, an investment dealer can provide marketing materials before a shelf prospectus supplement has been filed. We believe that these accommodations will address some of the concerns raised by the commenters.</p> <p><i>Electronic delivery</i> We also note that National Policy 11-201 <i>Electronic Delivery of Documents</i> sets out the circumstances in which a prospectus can be delivered by electronic means.</p>

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		<p>are usually different than the group responsible for delivery of prospectuses in paper form.</p> <ul style="list-style-type: none"> • As a result of the foregoing, it would be difficult to comply with the requirement in the proposed rules to provide a copy of the preliminary prospectus, final prospectus or amendment (as applicable) with the term sheet, since these documents are typically delivered separately and in different formats (the prospectus in paper form and the term sheet in electronic form). • Where an offering of securities is to be made pursuant to an issuer's shelf prospectus, the proposed rules appear to require an investment dealer to provide a copy of the base shelf prospectus with the term sheet where the prospectus supplement is not yet available (i.e., after launch of an offering but before the end of the two business day period for delivery). • Under current practice for an offering of securities made pursuant to an issuer's shelf prospectus, the term sheet would be sent on its own after launch of the offering, while both the base shelf prospectus and the shelf prospectus supplement would be sent together to investors within the allowable two business day period. The commenter believes that there is little added benefit to 	<p><i>Compliance</i> We do not believe it is onerous for a member of the sales force at an investment dealer to comply with the requirements and send a copy of the marketing materials and the relevant prospectus to an investor by email or paper delivery.</p> <p>Furthermore, an investment dealer may choose to retain its current procedures for paper delivery of the prospectus notwithstanding that the investor may already have received an electronic copy of the prospectus with an earlier email from a registered representative enclosing marketing materials. We do not think this raises any undue administrative burdens.</p> <p><i>Standard term sheets</i> As noted above, the new provisions for standard term sheets do not require that standard term sheets be provided to investors with a copy of the relevant prospectus.</p>

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		<p>be gained by requiring a base shelf prospectus on its own to be delivered to investors with a term sheet, and this additional delivery requirement will impose an additional compliance burden on investment dealers.</p>	
27	Term sheets – requirement to send a revised term sheet	<p>Two commenters had concerns with the proposed rules requiring that a revised term sheet be sent to investors who received the original term sheet in certain circumstances, namely when the subsequent preliminary short form prospectus, final prospectus, shelf prospectus supplement or amendment (as the case may be) modifies a statement of a material fact that appeared in the original term sheet.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • There should be an exception to these requirements where the modified information is simply to identify final terms of the offering. There will always be such a modification in marketed offerings where a term sheet with preliminary terms is provided and there is no utility in requiring delivery of a revised term sheet and disclosure to identify this type of modification. • More generally, it seems duplicative to require delivery of a revised term sheet to highlight any modification where the final 	<p>We have removed this delivery requirement. Instead, we have revised the rule amendments to provide that if a prospectus or an amendment to a prospectus modifies a statement of material fact that appeared in earlier marketing materials, the issuer must:</p> <ul style="list-style-type: none"> • post a revised, blacklined version of the marketing materials on SEDAR at the time the prospectus (or amendment) is filed, and • disclose, in the prospectus (or amendment), how the statement in the previous marketing materials has been modified by a statement in the prospectus (or amendment), and state that a revised, blacklined copy of the marketing materials has been filed on SEDAR. <p>Since a retail investor may have made an investment decision on the basis of a statement of material fact in the marketing materials, we think any changes to that statement should be highlighted in the above manner.</p>

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		<p>prospectus will highlight the change. If the CSA is concerned with the prominence of the disclosure, this concern should instead be addressed in the prospectus disclosure requirement.</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • The requirement is unnecessary given that the language of the proposed rules contains the standard “modifying or superseding” language that allows the subsequent preliminary prospectus, final prospectus, shelf prospectus supplement or amendment (as the case may be) to modify or supersede the contents of the earlier term sheet. • One of the hallmarks of the Canadian prospectus offering regime is that investors are considered to make their investment decision on the basis of the disclosure in the final prospectus (notwithstanding that there may have been changes in disclosure since the preliminary prospectus). Investors are then given a two day right to withdraw from their purchase of securities after having received the final prospectus. Accordingly, even if certain statements of a material fact in the original term sheet are modified or superseded by the subsequent version of the prospectus document, a purchaser is ultimately making its investment decision on 	

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		<p>the basis of the disclosure in the final prospectus.</p> <ul style="list-style-type: none"> • The requirement to send a revised term sheet highlighting modified statements of a material fact together with the subsequent version of the prospectus document would be difficult to comply with since the responsibility within a dealer for delivery of term sheets and prospectuses may reside in separate groups, or in some cases separate firms if the dealer has outsourced the prospectus delivery function. • There is limited substantive disclosure about the issuer in a term sheet for a prospectus offering, and so it may be less likely that a subsequent version of the prospectus document would modify a statement of a material fact that appeared in the original term sheet. • The one exception is information regarding offering price and offering size, as term sheets for a marketed offering will refer to the pricing and sizing range. In the event that the pricing and sizing range for a marketed offering were to change from that indicated in the original term sheet, investment dealers would typically send a revised term sheet to potential investors with the modified information. However, this revised term sheet is sent independently of 	

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		the final prospectus.	
28	Term sheets – French translation	<p>Given the requirement in the proposed rules to include or incorporate by reference a term sheet in an issuer’s preliminary prospectus or final prospectus (as the case may be), one commenter assumed that a term sheet would need to be translated into French in order to comply with French language requirements in the province of Québec. The commenter believes that this would be a change to current practice.</p>	<p>Under the rule amendments:</p> <ul style="list-style-type: none"> • a template version of the marketing materials must be filed on or before the day that the marketing materials are first provided to a potential investor (guidance on the meaning of “provide” is set out in subsections 6.5(B)(3) and 6.12(4) of 41-101CP), and • if marketing materials are provided, the issuer must include, or incorporate by reference, the template version of the marketing materials in its final prospectus. <p>Under applicable legislation in Québec, a French template version of the marketing materials would have to be prepared and filed at the time the template version is included or incorporated by reference in the final prospectus (if the issuer files the final prospectus in Québec).</p>
29	Term sheet – “fair, true and plain” requirement	<p>Two commenters had concerns on how the proposed rules would impose a new standard of disclosure for term sheets, that of “fair, true and plain” disclosure.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • It understands that liability for the information in a term sheet will arise from its inclusion (or incorporation) in the final prospectus. • The misrepresentation standard applicable to the contents of the prospectus does not take 	<p>We have revised the rule amendments to remove the “fair, true and plain” standard for marketing materials. However, while marketing materials are not subject to an express standard, we have included companion policy guidance in 41-101CP indicating that marketing materials are subject to the provisions in securities legislation that prohibit misleading or untrue statements.</p> <p>The template version of the marketing materials must be filed on SEDAR and incorporated by reference or included in the relevant prospectus. Accordingly, they will also be subject to civil liability.</p>

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		<p>into account the balanced requirement that the proposed rule amendments impose on a term sheet.</p> <ul style="list-style-type: none"> • Accordingly, it appears that enforcement of this requirement of the term sheet will fall on members of the CSA in the prospectus review process. The commenter anticipates that the additional interaction with the members of the CSA (and any attendant revisions to the term sheet thereby required) may impose delay on the prospectus review and approval process. • Further, in the context of a take-down from a shelf prospectus, there is effectively no mechanism by which to enforce a balanced component of the fair, true and plain standard, as prospectus supplements are not subject to regulatory review. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • Given that the proposed rules require the term sheet to be contained or incorporated by reference in the prospectus which is subject to its own standard of disclosure (“full, true and plain”) and given that the prospectus must be delivered and will attract liability for misrepresentations to investors purchasing pursuant to the prospectus, is there a need for a separate standard of disclosure for a term sheet and should the 	<ul style="list-style-type: none"> • We believe that subjecting marketing materials to civil liability enhances investor protection. • We expect issuers and investment dealers to be accountable to investors if they provide investors with marketing materials that contain a misrepresentation. • In a prospectus offering, an investor may make an investment decision based on information in marketing materials. • An investor who receives marketing materials may decide not to participate in the prospectus offering, but may instead proceed to buy securities of the issuer in the secondary market on the basis of information in the marketing materials. Accordingly, these materials should be subject to the secondary market civil liability provisions in securities legislation. <p>Because marketing materials will be included or incorporated by reference in the relevant prospectus, they will become part of the prospectus document which is subject to a full, true and plain standard.</p> <p>However:</p> <ul style="list-style-type: none"> • comparables can be removed from the template version of marketing materials that is filed on SEDAR, and • the relevant prospectus need only include, or incorporate by reference, the template version of the marketing materials with the comparables removed. <p>Accordingly, comparables will not be subject to civil liability. Issuers will, however, be required to confidentially</p>

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		<p>term sheet attract liability as a stand-alone document?</p> <ul style="list-style-type: none"> • The term sheet will be required to be filed on SEDAR and will attract liability to secondary market investors for any misrepresentation. This includes liability for any omission. As the disclosure is not “full” disclosure, it is difficult to see how this standard will be interpreted. • The term sheet and the prospectus should be seen as a single document for the purposes of assessing statutory liabilities. • Unlike other documents incorporated by reference in prospectuses (e.g., financial statements), term sheets do not have their own specific purpose outside the context of an offering. • Amendments to the secondary market regime would be necessary to ensure term sheets are not considered “documents” attracting liability by themselves. • Information contained in term sheets incorporated by reference in a prospectus will be subject to review by regulators. Accordingly, this review should discourage the publication of overly promotional term sheets. 	<p>deliver the complete template version of the marketing materials on SEDAR (the delivered materials will not be made public).</p> <p>The marketing provisions require that any marketing materials contain a prescribed legend noting that:</p> <ul style="list-style-type: none"> • The marketing materials do not provide full disclosure of all material facts relating to the securities offered. • Investors should read the relevant prospectus for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision. <p>This legend will address some of the commenters’ concerns about liability.</p>
30	Term sheets – liability	One commenter strongly endorsed the approach of attaching civil liability to term sheets and written road show materials. The commenter	<p><i>Civil liability</i></p> <p>We agree with the commenter that marketing materials should generally be subject to statutory civil liability. We</p>

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		<p>submitted that:</p> <ul style="list-style-type: none"> • These materials can and do play a critical role in the marketing of securities to the public. • Because such materials do influence investor decisions, civil consequences should attach to misrepresentations that are contained in such materials. • The risk of civil liability will incentivize issuers and underwriters to ensure that the disclosures in such documents are not materially misleading. 	<p>believe that this enhances investor protection. Comparables included in marketing materials will not be subject to civil liability (see response to item 29). However, the rules will require that any comparables in marketing materials be accompanied by cautionary language.</p>
31	Term sheets during the waiting period – drafting comments	<p>One commenter had drafting comments on the language in proposed subsections 13.5(3), (4), (5) and (6) of NI 41-101. The commenter submitted that:</p> <ul style="list-style-type: none"> • These provisions are somewhat confusing given that any term sheet and revised term sheet either have to be specifically incorporated by reference or will be deemed to be incorporated by reference into the prospectus. • For example, in paragraph 13.5(3)(b), it states that one must indicate that the term sheet is not part of the final prospectus to the extent that the term sheet’s contents have been modified or superseded by a statement contained in the final prospectus. • The provision would be clearer if it simply stated that any statement in the term sheet 	<p>This language has been removed from the amendments to NI 41-101. The relevant language now appears in Item 36A of Form 41-101F1 and Item 11.6 of Form 44-101F1. Although we have not adopted the commenter’s suggested drafting changes, we believe the language in these items provides adequate instructions to filers.</p>

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		that is modified or superseded is deemed also to be modified or superseded by the statement in the final prospectus.	
32	Term sheets after the receipt of a final prospectus	<p>One commenter had concerns about aspects of the proposals relating to term sheets after the receipt of a final prospectus. The commenter submitted that:</p> <ul style="list-style-type: none"> • The proposed rule amendments would expressly regulate marketing during the period following the issuance of a receipt for a final prospectus. Current law limits distribution of marketing material during the waiting period by virtue of the prospectus requirement. There is, however, no equivalent limitation in the post-final receipt period. • Accordingly, the CSA should conduct further consultation of market participants to understand the implications of the proposed rule amendments and whether a different marketing regime is appropriate during the post-receipt period than is proposed for the waiting period. • At a minimum, exceptions from the proposed term sheet requirements should be made with respect to term sheets that simply set out the potential or actual terms of an offered security. • It is impractical to require that pricing supplements be approved and filed in 	<p>Our policy concerns regarding the use of marketing materials during the waiting period also apply to the use of marketing materials after a receipt for a final prospectus.</p> <p>As described in item 11, we have revised the rule amendments and policy changes to distinguish between “standard term sheets” and “marketing materials”.</p> <p>Standard term sheets can be distributed after the receipt of a final prospectus without the same requirements as marketing materials.</p> <p>We have also provided for some accommodations to the general requirement to provide materials where the post-receipt pricing process is used, and in relation to shelf prospectus supplements. In particular, an investment dealer can provide marketing materials before a shelf prospectus supplement has been filed. We believe that these accommodations will address some of the concerns raised by the commenters.</p> <p>NI 44-102 has been amended to provide that information (with certain exceptions) in a standard term sheet or marketing materials for a draw-down under a final base shelf prospectus:</p> <ul style="list-style-type: none"> • is disclosed in, or derived from, the final base shelf prospectus, any amendment or an applicable shelf

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		<p>advance of their first use.</p> <ul style="list-style-type: none"> • Accommodation should also be made for marketing a take-down off a shelf prospectus with a term sheet that simply sets out potential terms of the securities. • While filing this term sheet may not be problematic, the proposed rule amendments would require that a preliminary prospectus supplement also be filed in advance as the information in the term sheet must be disclosed in a prospectus filed on SEDAR and this information would only be available in a preliminary prospectus supplement. • This is at odds with current practice for Canadian shelf offerings (where only a final prospectus supplement is typically filed) and would unnecessarily delay solicitations of interest in a potential shelf take-down by a short form issuer, thereby defeating the efficiency of the shelf procedures. 	<p>prospectus supplement that has been filed, or</p> <ul style="list-style-type: none"> • will be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed. <p>NI 44-103 has been amended to provide that information (with certain exceptions) in a standard term sheet or marketing materials after the receipt of a final base PREP prospectus:</p> <ul style="list-style-type: none"> • is disclosed in, or derived from, the final base PREP prospectus, the supplemented PREP prospectus or any amendment that has been filed, or • will be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed.
33	Term sheets – conflicts with market practice and U.S. rules	<p>One commenter was concerned that the proposed term sheet provisions contain potential conflicts with market practice and the U.S. marketing rules. The commenter submitted that:</p> <ul style="list-style-type: none"> • Some of these conflicts will stem from the requirement that all information in a term sheet be disclosed in both the preliminary and final prospectus. • At a minimum, there should be a materiality threshold such that immaterial term sheet 	<p>The revised rule amendments require that, other than contact information for the investment dealer and the underwriters and any comparables, all information in marketing materials must be disclosed in, or derived from, the relevant prospectus.</p> <p>If an investment dealer wants to include information in marketing materials, it should first ensure that the information is included in the relevant prospectus. We do not believe this requirement is onerous.</p>

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		<p>information need not be in the prospectus.</p> <ul style="list-style-type: none"> • Under U.S. rules, a “free writing prospectus” may contain information that is additional to the registration statement in respect of the securities offering; it simply must not conflict with the information in that registration statement or the issuer’s continuous disclosure record. • The CSA should give further consideration to what additional information may typically be included in a free writing prospectus and whether this additional information should be accommodated in the term sheet requirements of the proposed rule amendments. • Due to the breadth of the definition of term sheet, additional exceptions should be added to avoid the burden of filing every written communication regarding a distribution where there is no utility in each such filing being made. • For example, a term sheet will encompass underwriter generated Bloomberg screens and other underwriter communications that contain additional market or other offering specific information (such as comparisons of yield or other terms or metrics of comparable securities). • This additional information would not generally constitute “issuer information” 	<p>We note, however, that a limited-use version of the marketing materials can contain certain deviations from the template version of the marketing materials that is filed on SEDAR (see response to item 25).</p> <p><i>Interaction with U.S. requirements</i></p> <p>We do not believe that this requirement will create a burden for U.S. cross-border prospectus offerings. In order for an issuer or underwriter in a cross-border prospectus offering to comply with the proposed Canadian rules, they need to ensure that any marketing materials given to a Canadian investor do not contain information that is not in the relevant prospectus filed on SEDAR (subject to the exceptions discussed above). We do not believe that this is an onerous requirement.</p> <p>We note that, unlike U.S. prospectuses generally, a free writing prospectus is not subject to liability under Section 11 of the <i>Securities Act of 1933</i> (the 1933 Act). However, because it is used in connection with the offering of securities, we understand that a free writing prospectus is subject to liability under Section 12(a)(2) of the 1933 Act and the general anti-fraud provisions. If, for U.S. liability reasons, an issuer does not want to include certain information in the U.S. prospectus that forms part of the U.S. registration statement, the issuer can include the information in a “Canadian wrap” to the version of the U.S. prospectus filed on SEDAR.</p>

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		<p>and, provided it is not distributed in a broad, unrestricted manner, would not require a filing under applicable U.S. rules.</p> <ul style="list-style-type: none"> • Further, the U.S. rules exempt from the filing requirements any new materials that do not contain substantive changes from or additions to previously filed materials. As a practical matter, similar exceptions should be made in the proposed rule amendments. • Following further consultation with market participants, the CSA may identify other instances where the term sheet requirements inhibit the efficiency of the capital markets or impose significant administrative burden with no corresponding benefit in investor protection. • The CSA may also identify additional circumstances that are not intended to be caught by these requirements for which clarification would be appropriate. 	<p><i>Definition of marketing materials</i> The definition of marketing materials only applies to certain communications. See response to item 11.</p>
34	Road shows – general	Subject to their comments on specific aspects of the road show proposals, one commenter expressed general support for the CSA’s efforts to provide clarity to the current marketing regime through rules that expressly acknowledge road shows are a permissible solicitation of expressions of interest.	We thank the commenter for their input.
35	Road shows – request for additional guidance	Given the breadth of the proposed definition of “road show”, one commenter suggested that the CSA provide guidance regarding how the road	The commenter has made reference to the prospectus requirement (section 53 of the Ontario Act), and an exception to the prospectus requirement (subsection 65(2))

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		<p>show provisions interact with:</p> <ul style="list-style-type: none"> • conduct that forms part of solicitations of expressions of interest permitted under subsection 65(2) of the <i>Securities Act</i> (Ontario) (the Ontario Act) (and the equivalent provisions in other jurisdictions), and • acts in furtherance of trades that form part of the distribution under the extended definition of “trade” in the Ontario Act which may be undertaken in reliance on section 53 of the Ontario Act (and the equivalent provisions in other jurisdictions) following the issuance of a receipt for the final prospectus. <p>In particular, since the road show provisions apply to investment dealers, the commenter felt that clarification regarding the conduct permitted for other participants in the offering, including the issuer, would be helpful.</p>	<p>of the Ontario Act, which allows for certain activities during the waiting period that would otherwise be prohibited by the prospectus requirement).</p> <p>The road show provisions serve as additional exceptions to the prospectus requirement in the Ontario Act and in other securities legislation, and supplement provisions such as subsection 65(2). Parties other than investment dealers continue to be regulated by existing marketing and pre-marketing restrictions.</p>
36	Road shows – adopting model based on U.S. rules	<p>Three commenters expressly advocated a model for regulating road shows similar to the U.S.</p> <p>As noted below, other commenters wanted the CSA to harmonize certain differences in the proposed Canadian rules on road shows with the U.S. model.</p> <p>For example, one commenter noted that</p>	See response to item 7.

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		<p>proposed section 6.13 of 41-101CP refers to the fact that U.S. rules require the filing of internet road show materials with the SEC or that they be made “available without restriction by means of graphic communication”. In order to maintain an approach consistent to that adopted under the U.S. rules, the commenter suggested that issuers be permitted to either file the materials from internet road shows on SEDAR or make them available without restriction through other internet outlets.</p>	
37	Road shows – definition of retail investor	<p>One commenter submitted that since the proposals draw a distinction between road shows for institutional investors and road shows for retail investors, the term “retail investor” should be defined.</p>	<p>We have revised the rule amendments and policy changes to include standard provisions for road shows that apply to all types of investors (i.e., institutional, accredited or retail). Accordingly, we do not believe that there is a need to define the term “retail investor”.</p>
38	Road shows – authorization	<p>One commenter had the following comments on the proposed rules requiring that an issuer provide written authorization to the investment dealer to conduct a road show:</p> <ul style="list-style-type: none"> • The commenter questioned whether this is necessary given that it is typically senior management (often the CEO, CFO and others) who present at a road show. The issuer’s approval is therefore implicit in management’s attendance with the lead underwriter(s) at the road show. • The requirement for written authorization does add an additional compliance obligation for the working group on a 	<p>We have not retained the requirement that an issuer provide written authorization for an investment dealer to conduct a road show. However, a template version of any marketing materials provided in connection with a road show must be approved in writing by the issuer before those marketing materials are provided to investors.</p>

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		prospectus offering.	
39	Road shows – liability	<p>One commenter strongly endorsed the approach of attaching civil liability to term sheets and written road show materials. The commenter submitted that:</p> <ul style="list-style-type: none"> • These materials can and do play a critical role in the marketing of securities to the public. • Because such materials do influence investor decisions, civil consequences should attach to misrepresentations that are contained in such materials. • The risk of civil liability will incentivize issuers and underwriters to ensure that the disclosures in such documents are not materially misleading. <p>Another commenter was concerned that marketing efforts sometimes go beyond what is in a prospectus, but misrepresentations that are outside of the prospectus do not attract prospectus liability under local securities acts. The commenter submitted that:</p> <ul style="list-style-type: none"> • It is very hard for investors to sue market participants who make misrepresentations during a road show unless those misrepresentations are also in the prospectus. • By way of example, in a recent prospectus offering by an issuer of income participating 	<p><i>Civil liability for marketing materials used in connection with a road show</i></p> <p>We agree with the commenter that marketing materials used in connection with a road show should generally be subject to statutory civil liability. To achieve this, the rules provide that the template version of the marketing materials must be included or incorporated by reference in the final prospectus.</p> <p>We believe that this enhances investor protection.</p> <ul style="list-style-type: none"> • We expect issuers and investment dealers to be accountable to investors if they provide investors with marketing materials that contain a misrepresentation. • In a prospectus offering, an investor may make an investment decision based on information in marketing materials used in connection with a road show. • An investor who receives such materials may decide not to participate in the prospectus offering but may instead proceed to buy securities of the issuer in the secondary market on the basis of information in marketing materials. Accordingly, these materials should generally be subject to the secondary market civil liability provisions in securities legislation. <p>However, comparables can be removed from the template version of the marketing materials that is filed on SEDAR, and the relevant prospectus need only include, or incorporate by reference, the template version of the marketing materials with the comparables removed.</p>

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		<p>securities, a PowerPoint presentation used in the road show employed very aggressive and misleading language that did not appear in the prospectus.</p> <ul style="list-style-type: none"> • As a result, the issuer and the underwriters were not liable for misrepresentations in that presentation under the prospectus liability provisions in local securities acts. • Consequently, local securities acts should be amended to impose liability for misrepresentations in any material efforts made in connection with a public offering. 	<p>Accordingly, comparables will not be subject to civil liability. However, the rule amendments contain disclosure requirements and additional safeguards relating to comparables.</p> <p><i>Statutory amendments</i> Amendments to local securities acts of the nature suggested by the commenter are beyond the scope of this project.</p>
40	Road shows – requirement that all information in a road show must also be included in the applicable prospectus	<p>Two commenters had concerns with the proposed requirement that all information in a road show must also be disclosed in the applicable prospectus, with the exception of comparable company information (which may only be disclosed to permitted institutional investors). Comments received include the following:</p> <p><i>Material information</i></p> <ul style="list-style-type: none"> • The proposed rule is very restrictive and requires that “all information” in the road show also be in the preliminary prospectus, rather than focusing only on material information. • The requirement should focus only on material information. 	<p><i>Information disclosed in prospectus</i> The revised rule amendments provide that all information in marketing materials used in connection with a road show (other than contact information for the investment dealer and the underwriters and any comparables) must be disclosed in, or <i>derived from</i>, the prospectus. We believe that this furthers the policy objectives of equal access to information and investor protection through adequate disclosure of the proposed offering.</p> <p>However, the rule amendments contain accommodations for prospectus offerings under the shelf procedures and the post-receipt pricing procedures. See response to item 32.</p> <p>We have also included companion policy guidance in 41-101CP which indicates that marketing materials may include information derived from the prospectus and information that is presented in a manner that differs from</p>

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		<p><i>Verbal communications</i></p> <ul style="list-style-type: none"> • This requirement would appear to apply not only to the written presentation material (e.g., slide decks) but to all verbal communications made during the presentation. • It would not necessarily be helpful to investors, or aid in their protection, to prevent management from being able to answer questions during a road show simply because the answers go beyond what is contained in the preliminary prospectus. • In general, only material information in written road show materials should be required to be disclosed in the applicable prospectus. Otherwise, there would be a chilling effect on road shows – requiring that the answer to every question be thoroughly scripted in advance and that questions go unanswered if there is any concern that the answer is not strictly within the text of the applicable prospectus. In the context of a road show, for which there are significant timing constraints, this would be impractical. <p><i>Nature of information provided</i></p> <ul style="list-style-type: none"> • The proposed rules permit a road show to summarize information from the prospectus or to include graphs or charts based on 	<p>the manner of presentation in the prospectus (see subsection 6.5B(5) of 41-101CP).</p> <p><i>Verbal communications</i></p> <p>In response to the comments about verbal communications, we have not retained the requirement that all information provided at a road show must be in the prospectus. However, any marketing materials provided at the road show must comply with the provisions relating to marketing materials.</p> <p>Other than a requirement to verbally read a statement at the beginning of a road show that investors other than accredited investors are permitted to attend, the rule amendments do not regulate oral statements made at a road show.</p> <p>However, we do have regulatory concerns regarding oral statements made at road shows, and have included companion policy guidance in 41-101CP that describes these concerns (see subsection 6.12(7) of 41-101CP).</p> <p><i>General market information and information about parent companies</i></p> <p>We disagree with the comments that general market information (e.g., interest rates, currency exchange rates, stock exchange indices) and information about the ultimate parent corporation of an issuer or a credit supporter contained in marketing materials should not be required to be in the relevant prospectus.</p>

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		<p>numbers in the prospectus. However, it would be preferable for the CSA to be more general in allowing road show materials to contain information derivable from the prospectus as well as general market information not specific to the issuer.</p> <ul style="list-style-type: none"> • The CSA should also clarify that immaterial differences in the manner of presentation of the information from the prospectus would be permissible in a road show. • In particular, the requirement should be clarified to confirm it is sufficient that information in a road show is derivable from the information in the prospectus and need not be verbatim. <p><i>Guaranteed securities</i></p> <ul style="list-style-type: none"> • There are other technical concerns with the requirement that “all information” in a road show be disclosed in the prospectus. For example, certain Canadian issuers of guaranteed securities (typically debt securities) prepare a short form prospectus and incorporate by reference in the short form prospectus the U.S. public company filings of the credit supporter of the Canadian issuer. In many cases, the credit supporter is not the ultimate parent company of the Canadian issuer, but rather is the finance subsidiary of the ultimate parent 	<p>We believe that if an issuer or an investment dealer wishes to include information of this nature in marketing materials that are used in connection with a road show or otherwise provided to investors, they should disclose the information in the applicable prospectus. We have made certain accommodations for bought deals (see response to item 11) and offerings under the shelf and PREP procedures (see response to item 26).</p>

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		<p>company.</p> <ul style="list-style-type: none"> • Road show materials used for offerings by these types of issuers may contain information about the ultimate parent company (since this is publicly available information) in addition to information about the credit supporter. This is because the financial performance of the parent company is also seen as relevant with respect to the securities of the Canadian issuer being offered. Under the proposed rules, this practice would be prohibited unless the information about the ultimate parent company is included or incorporated by reference in the prospectus of the Canadian issuer. This is not current market practice, and the CSA should consider changing the proposed rules to accommodate the practice of including parent company information in a road show in these circumstances. <p><i>U.S. law and practice</i></p> <ul style="list-style-type: none"> • This requirement represents a source of conflict with the U.S. model for road shows, as there is no such requirement under applicable U.S. rules. • This difference may arise by virtue of the liability regimes in Canada and the U.S. • In contrast with the Canadian prospectus 	<p><i>Interaction with U.S. requirements</i></p> <p>See response to item 7.</p>

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		<p>regime, where disclosure must be part of the prospectus for statutory liability to attach, there are separate liability provisions under U.S. federal securities laws for disclosure outside of the registration statement that do not impose as strict a standard as the liability provision for misrepresentations in a registration statement.</p> <ul style="list-style-type: none"> • Liability for road shows (and, more generally, information in free writing prospectuses) arises under these separate liability provisions under U.S. rules. • In a cross-border offering, the proposed rule amendments will require road show and other disclosures to be part of the Canadian prospectus. As a U.S. version of the prospectus will form part of the U.S. registration statement, the stricter U.S. standard of liability will apply. • While the proposed rule amendments contemplate an exception for “comparables” information, it is unlikely this exception will be broad enough to cover other market information not specific to the issuer that may be included in road shows (and other free writing prospectuses) but excluded from the U.S. registration statement. • It is not appropriate for an issuer to take strict liability for any such non-issuer information, given its nature, under 	

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		<p>applicable liability provisions for Canadian prospectuses or U.S. registration statements. This is information derived and available from other publicly available sources (including, among others, research reports) and is not material information specific to an issuer such that it should require prospectus level liability or disclosure.</p> <ul style="list-style-type: none"> Accordingly, the CSA should reconsider the types of information in road show materials and term sheets that must be included or incorporated, as applicable, in the preliminary and final prospectus for an offering. <p><i>Need for further consultations</i></p> <ul style="list-style-type: none"> The CSA should ensure that comments on this aspect of the proposed rules are received from a sufficiently representative sample of Canadian investment dealers and institutional investors before the CSA moves forward with implementation. 	<p><i>Further consultations</i> See response to item 8.</p>
41	Road shows – fair, true and plain requirement	<p>One commenter noted the proposed requirement that disclosure in a road show must be fair, true and plain. The commenter was concerned about the potential for disclosure with exaggerated claims, undefined assumptions, controversial back-testing practices, cleverly drawn and misleading charts, unsupported “facts”, etc. The commenter asked what would happen if the</p>	<p><i>Fair, true and plain standard</i> We have removed the fair, true and plain standard for disclosure at a road show. However, we have included companion policy guidance in 41-101CP indicating that disclosure at a road show, whether oral or written, is subject to the provisions of securities legislation which prohibit misleading or untrue statements.</p>

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		<p>disclosure was not accurate, true, up-to-date or complete and what kind of enforcement is contemplated or possible. The commenter asked if there would be independent review and approval of marketing materials by individuals at an investment dealer with appropriate authority and proficiency (e.g., chief compliance officer).</p>	<p><i>Review and approval of marketing materials</i></p> <ul style="list-style-type: none"> • We have not prescribed specific requirements regarding independent review and approval of marketing materials by individuals at an investment dealer. • Under the rules, marketing materials would have to be approved by the issuer and the lead underwriter in a prospectus offering. As a practical matter, we expect that marketing materials will normally be prepared by the lead underwriter and its counsel and vetted by the issuer and its counsel. • A member of the retail sales force at an investment dealer could not prepare marketing materials on their own.
42	Road shows – reading of prescribed cautionary statement	<p><i>Commenters favouring less strict requirements</i></p> <p>Two commenters had concerns with the proposed rule that would require an investment dealer to verbally read a prescribed disclaimer at the commencement of every road show.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • There are often multiple meetings with different investors on each road show date, such that the time for management to present in each meeting is limited (typically 20 to 30 minutes, excluding questions). • The reading of the proposed disclaimer will take valuable time out of each meeting. • In light of these timing constraints, an investment dealer should have the option of including the disclaimer in written road 	<p>We have considered the comments and have revised the rule amendments to:</p> <ul style="list-style-type: none"> • shorten the prescribed statement, and • require that the prescribed statement, or a statement to the same effect, be read only when investors other than accredited investors are permitted to attend the road show.

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		<p>show materials provided to attendees, rather than reading the disclaimer at the start of a road show.</p> <ul style="list-style-type: none"> • Alternatively, the CSA should consider whether the disclaimer could be placed in the road show materials and referred to by the investment dealer without a full reading. • The rules should provide that the disclaimer used can be substantially to the effect of the prescribed language, rather than verbatim. Among other things, this would accommodate the use of equivalent language in cross-border offerings. <p><i>Commenters favouring stricter requirements</i> In contrast, one commenter felt the oral reading of the disclaimer was not sufficient. He suggested that any documents distributed be prominently marked with suitable cautionary language and warnings.</p>	<p><i>Cautionary language</i> All marketing materials (including marketing materials provided in connection with a road show) must contain a prescribed legend, or words to the same effect, which indicates (among other things) that:</p> <ul style="list-style-type: none"> • The marketing materials do not provide full disclosure of all material facts relating to the securities being offered. • Investors should read the relevant prospectus for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.
43	Road shows – written materials	Five commenters noted that the proposed rules would prohibit an investment dealer from providing “written material” to an investor attending a road show, other than the	<p><i>Scope of rule amendments and policy changes</i> We have revised the rule amendments and policy changes to:</p> <ul style="list-style-type: none"> • Remove the references to “written materials”

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		<p>preliminary prospectus and any amendment, unless the written material is treated as a term sheet under the proposed rules. This would mean filing the written material on SEDAR and including or incorporating by reference the written material in the prospectus.</p> <p><i>Commenters seeking to restrict filing and other requirements</i></p> <p>Three commenters sought to restrict filing and other requirements in relation to road show materials.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • It is not clear what “written materials” will be subject to the new road show requirements. • While the U.S. rules exclude any real time communications at a live road show (including slides or other visual aids available only as part of that road show) from what they refer to as “written communications”, the CSA’s commentary to the proposed rule amendments suggests the amendments would not provide a similar exclusion. Clarification is required on what constitutes written materials for purposes of these road show requirements. • Further, regardless of how “written materials” are construed, the proposed rule 	<p>throughout the road show provisions and refer instead to “marketing materials”. Marketing materials provided in connection with a road show will be subject to the same requirements as any other marketing materials.</p> <ul style="list-style-type: none"> • Clarify that the road show provisions apply to situations where an investor was shown marketing materials but not permitted to retain, or make a copy of, the materials. See response to item 12. <p>We have also included companion policy guidance in 41-101CP relating to oral statements made at road shows.</p> <p><i>Interaction with U.S. requirements</i></p> <p>See response to item 7.</p>

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		<p>amendments will nonetheless conflict with equivalent U.S. rules because communications made as part of a road show need not be filed under these U.S. rules, regardless of whether they are written or oral communications.</p> <ul style="list-style-type: none"> • In contrast, the proposed rule amendments will require filing all written materials provided in a road show. • While the U.S. rules could require the filing of road show materials for an electronic road show (as this would constitute a “written communication”) for an initial public offering of common or convertible equity, no filing is required where the issuer makes at least one version of a <i>bona fide</i> electronic road show available without restriction. • In these circumstances, the typical approach in the U.S. is to make such a <i>bona fide</i> electronic road show available rather than file the road show materials. • The restricted access provisions of the proposed rule amendments would not permit this option in a cross-border IPO. • To be a <i>bona fide</i> version under the U.S. rules, a road show must include discussion of the same general areas of information as the other road shows for the same offering (to the extent those other road shows are written communications), but need not 	

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		<p>address all of the same subjects or provide the same information as those other road shows.</p> <ul style="list-style-type: none"> • Accordingly, while a <i>bona fide</i> version under the U.S. rules could exclude information that compares the issuer to other issuers (with respect to multiples or other valuation metrics), it could also exclude further information provided at other road shows for the same offering. • In light of the above conflicts, the CSA should reconsider the circumstances in which road show materials must be filed and the types of road show materials that must be filed. In particular, instead of the road show requirements in the proposed rule amendments, the CSA should adopt a model similar to that of the U.S. • However, if the CSA ultimately determines that road show materials must be filed in certain circumstances (such as in the case of an IPO), the filing requirement should at least maintain some consistency with U.S. practice. Among other things, this might be achieved by requiring that only one <i>bona fide</i> version of those road show materials be filed. <p>Similarly, another commenter also believed it is unclear whether a slide deck for a road show</p>	

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		<p>would always need to be filed on SEDAR and included or incorporated in the prospectus. The commenter submitted that:</p> <ul style="list-style-type: none"> • It is not clear whether the filing requirement applies when investors are shown the written material but are not allowed to keep a copy of it. For example, a road show slide deck may be shown on screen during an in-person meeting, or handed out for viewing only during the meeting with all copies collected afterwards, or presented through the internet in a format that does not allow for printing or downloading. • Written road show materials such as a slide deck should be filed on SEDAR and otherwise treated like a term sheet only if they are being provided in a form that can be retained by investors, and not when they are merely being shown to investors. • The practice in the U.S. is for dealers to take back from investors any hard copies of slide decks distributed during a road show presentation. • It is unclear why written materials such as a road show slide deck should be filed on SEDAR and otherwise treated like a term sheet if they are being provided in a form that cannot be retained by investors. • Road show materials are rarely, if ever, filed on EDGAR in the U.S. 	

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		<p>In like manner, another commenter noted that the proposed guidance regarding road shows for cross-border IPO offerings suggests that the obligation to file road show materials may extend to road show presentations that are displayed, but not distributed to the attendees. If this is intended, the commenter suggested that:</p> <ul style="list-style-type: none"> • Further guidance or clarification should be provided. • If no materials are distributed in a form that can be retained by the attendees, it is not clear that there is any rationale for the term sheet provisions to apply. <p><i>Commenters seeking to expand filing and other requirements</i></p> <p>In contrast to the above comments, two commenters sought to expand filing and other requirements in relation to road show materials.</p> <p>In particular, the commenters submitted that “written materials” should include electronic files or slide shows made available to investors on the internet, social media or by other electronic means.</p>	
44	Road shows – French translation of written materials	One commenter assumed that written road show materials would not need to be translated into French in order to comply with French language requirements in the province of Québec (since written road show materials do not constitute a	See response to item 28.

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		prospectus), unless those materials are provided in a form that can be retained by investors, in which case they would be treated as a term sheet under the proposed rules and would need to be included or incorporated by reference in the prospectus.	
45	Road shows – documents to be filed with prospectus	One commenter noted that the proposed changes to the rule provisions dealing with the documents to be filed with a prospectus (sections 9.1 and 9.2 of NI 41-101 and sections 4.1 and 4.2 of NI 44-101) only expressly address the filing of term sheets, but not road shows materials. The commenter believes the provisions should expressly address the filing of road show materials.	We have revised the rule amendments and policy changes to remove the term “road show materials”. Marketing materials provided during a road show will be subject to the same requirements as any other marketing materials, including the filing requirement.
46	Road shows – comparables – civil liability	<p><i>Commenters in favour of civil liability for comparables</i></p> <p>One commenter was in favour of civil liability for comparables included in road show materials.</p> <p>The commenter did not see a clear justification for not attaching civil liability to information in road show materials provided to permitted institutional investors that compares the issuer to other issuers (comparables). The commenter submitted that:</p> <ul style="list-style-type: none"> This distinction unfairly places the burden on such investors to verify the accuracy of the comparables, rather than requiring the 	<p>We have revised the rule amendments to allow for comparables to be provided to any investor.</p> <p>However:</p> <ul style="list-style-type: none"> comparables can be removed from the version of marketing materials used in connection with a road show that is filed on SEDAR, and the relevant prospectus need only include, or incorporate by reference, the version of the marketing materials with the comparables removed. <p>Accordingly, comparables will not be subject to statutory civil liability. Issuers will, however, be required to confidentially deliver the complete version of the marketing materials on SEDAR.</p>

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		<p>issuer to ensure that the disclosure is fair, true and plain, failing which liability will attach.</p> <ul style="list-style-type: none"> • Under the proposed rules, to the extent that comparables were disclosed to retail investors, they would attract civil liability. The commenter did not see a clear basis for making the civil liability provisions available to retail investors in respect of comparables, but not to permitted institutional investors. <p><i>Commenters opposed to civil liability for comparables</i></p> <p>In contrast, three commenters were opposed to civil liability for comparables.</p> <p>In particular, one commenter disagreed with the proposal that road shows for retail investors should not include comparables in the absence of prospectus liability. The commenter submitted that:</p> <ul style="list-style-type: none"> • Comparables are not material information about an issuer that should require prospectus disclosure. • Comparables are based on publicly available information for which liability is not appropriate. • Reliance should be placed on the underwriters and the market to select 	<p>The rule amendments also provide additional disclosure requirements and other safeguards relating to comparables. Additionally, we have included companion policy guidance in 41-101CP indicating that any comparables included in marketing materials provided to an investor will be subject to the provisions in applicable securities legislation which prohibit misleading or untrue statements.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>appropriate methods of selection of comparables.</p> <p>In like manner, another commenter believes that dealers should be able to choose to provide comparables in marketing materials to all potential investors and to redact such comparables from the marketing materials prior to filing on SEDAR. The commenter submitted that:</p> <ul style="list-style-type: none"> • The valuation metrics for other issuers provides context, but are not material facts as regards the securities of the issuer. • This conclusion is supported by the proposed differential treatment of retail investors. <p>Because the information is derived from publicly available sources, another commenter believes that issuers should not be mandated to include in their prospectus any comparables and other publicly available market information included in written road show materials and other term sheets.</p>	
47	Road shows – attendance	Three commenters noted that the proposed rules would only allow investors, registered individuals and representatives of the issuer to attend a road show.	<p><i>Road show attendees</i></p> <p>We have revised the rule amendments to remove the restriction on road show attendees. However, we refer to the guidance in subsection 6.12(6) of 41-101CP.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>Comments received include the following:</p> <ul style="list-style-type: none"> • One commenter acknowledged the CSA’s concern with members of the media attending a road show. • It would be appropriate to expand the list of permitted attendees at a road show to include: <ul style="list-style-type: none"> ○ other members of the working group for a prospectus offering, such as representatives of the underwriters, legal counsel, any road show consulting firms engaged by the issuer, etc., and ○ representatives of the portfolio manager or other registrant representing an institutional investor. 	<p><i>Media attendance at road shows</i></p> <p>The revised rule amendments would allow members of the media to attend road shows in their capacity as members of the media. However, we have included companion policy guidance in 41-101CP which sets out our regulatory concerns (see subsection 6.12(2) of 41-101CP).</p>
48	Road shows – restricted access	<p>One commenter noted the requirement that an investment dealer must establish and follow reasonable procedures to keep a written record of any investor attending a road show in person, by telephone conference call, on the internet or by other electronic means. The commenter questioned the ability to validate identity for road shows held by conference calls or by webinar or similar web technology. The commenter suggested that the rules provide for a minimum retention period for attendance records for road shows.</p>	<p><i>Minimum retention period</i></p> <p>We have not specified a minimum retention period. We expect investment dealers to determine an appropriate retention period for records of the nature referred to by the commenter in accordance with any applicable laws.</p> <p><i>Validation of identity</i></p> <p>The revised rules now provide that the investment dealer must establish and follow reasonable procedures to ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information. For example, see subsection 13.10(3) of NI 41-101.</p>

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49	Road shows – cross-border offerings	<p><i>Comments from commenters worried about litigation</i></p> <p>Three commenters were concerned that the new road show requirements will create a significant impediment for Canada/U.S. cross-border IPOs.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • In respect of road shows, the CSA should adopt a model similar to the U.S., which provides equal access to institutional and retail investors. Under this regime, either (i) road shows are open to everyone or (ii) the road show presentation must be filed on EDGAR as a free writing prospectus. • Under the U.S. rules, if the materials are not filed on EDGAR (which appears to be the common practice), the road show materials must be “made generally available without restriction” through electronic means. • In U.S. practice, access is limited to viewing only, with no capability to print or download the content or access it after the viewing period expires. • These U.S. rules have led to the need for regulatory relief in Canada on cross-border marketed offerings (e.g., IPOs) because the Canadian rules currently do not permit an electronic road show to be open to all investors, and there is a preliminary prospectus delivery obligation prior to the 	<p><i>Interaction with U.S. requirements</i></p> <p>See response to item 7.</p> <p>As indicated in the revised companion policy guidance in 41-101CP, due to the road show provisions and exceptions for certain U.S. cross-border offerings set out in the rule amendments, we do not anticipate a further need for relief of the nature referred to by the commenters and instead expect such issuers to comply with the applicable road show provisions.</p>

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		<p>road show.</p> <ul style="list-style-type: none"> • If, under the proposed CSA rules, road show material is required to be filed on SEDAR in Canada, the result is that the materials would also have to be filed on EDGAR as well for cross-border road shows. This represents a significant change from current U.S. practice, and could create a disincentive for firms to offer cross-border IPOs. • A regime consistent with the U.S. model would adequately protect investors, and avoid the need for regulatory relief on cross-border offerings. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • It is not clear whether the proposed rules would require written road show materials to be filed on SEDAR. The proposed companion policy provisions discussing road shows for cross-border IPOs appear to be premised on the assumption that this means that an electronic road show will constitute “road show materials” that must be filed on SEDAR, even if the content cannot be downloaded or printed. • The proposed companion policy guidance suggests that cross-border IPO issuers will no longer be required to apply for the type of exemptive relief previously granted in Canada for cross-border IPOs (and such 	

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		<p>relief will no longer be granted absent unusual circumstances) because issuers will be able to file on SEDAR the same road show materials that they are permitted to file on EDGAR.</p> <ul style="list-style-type: none"> • As the proposed companion policy points out, in the case of an internet road show for an IPO, the U.S. requirement is that road show materials either be filed on EDGAR or be “made generally available without restriction” through electronic means. The CSA appears to be under the impression that road show materials are typically filed on EDGAR in the U.S., and that the need for the previously granted exemptive relief stemmed from a concern that the public availability of the road show materials on EDGAR would violate Canadian marketing restrictions, as the SEC’s EDGAR website is available worldwide, including to Canadian investors. • In fact, road show materials are rarely, if ever, filed on EDGAR. U.S. underwriters typically insist on making a <i>bona fide</i> version of the road show available to the public without restriction for the express purpose of avoiding the alternative requirement to file the road show on EDGAR. • Although the commenter understands a 	

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		<p>number of commercial services allow investors in the U.S. (and elsewhere, including Canada) to view the road show, access is always limited to viewing only, with no capability for investors (or others) to print or download the content, or access it after the permitted viewing period expires.</p> <p>Two of these commenters submitted that:</p> <ul style="list-style-type: none"> • U.S. underwriters are generally concerned that they would be subject to a significantly higher risk of frivolous and ultimately unmeritorious lawsuits being brought against them and the issuer by the active U.S. plaintiff securities litigation bar if a record of the contents of the road show slides and script is made permanently available on EDGAR. • Any road show materials that are required to be filed on SEDAR in Canada will also be permanently available to the U.S. securities class action bar, and the commenters anticipate that U.S. underwriters would raise the same concerns about that result in the context of a cross-border IPO. Further, because the proposed rules will still require restricting access to electronic road shows in Canada (even if only for the purpose of verifying the identity of the viewers), the U.S. rules will require that a <i>bona fide</i> 	

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		<p>version of the road show must also be filed on EDGAR. The result will be a significant change from current U.S. IPO practice.</p> <ul style="list-style-type: none"> • The commenters were concerned that this change from current practice may create a disincentive for IPOs to be conducted on a cross-border basis. The commenters anticipate that U.S. issuers and underwriters will be reluctant to participate in a cross-border IPO unless road show content which is protected from downloading and printing is exempt from any SEDAR filing requirement, and the CSA continues to provide exemptive relief to allow unrestricted access to such road shows in Canada so that they may continue to be exempt from the SEC's EDGAR filing requirements. <p>One of these commenters was strongly opposed to any measures that would curtail demand for cross-border IPOs and secondary offerings, particularly given the weak environment for Canadian offerings. In order to reflect current U.S. IPO practices, the commenter recommended exempting road show materials from any SEDAR filing requirement and continuing to allow unrestricted access to road show materials in Canada so that they may continue to be exempted from EDGAR filing</p>	

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		requirements in the U.S.	
50	Road shows – distinction between institutional investors and retail investors	<p>One commenter disagrees with the proposed rules which differentiate between retail and institutional investors in respect of the information that may be provided to them concerning a prospectus offering. The commenter submitted that:</p> <ul style="list-style-type: none"> • This distinction is inconsistent with the principle that the prospectus must contain full, true and plain disclosure of all of the material facts relating to the securities offered. • Any investor that is eligible to participate in an offering should have an equal opportunity to receive any disclosure provided. 	We have revised the rule amendments and policy changes to include standard provisions for road shows that apply for all types of investors (i.e., institutional, accredited or retail).
51	Road shows – protections for retail investors	<p>One commenter believes that the “know your client” and suitability obligations should apply in respect of any retail investor invited to a road show. In particular, the commenter believes that an investment dealer should only invite a retail investor to a road show if the potential investment is suitable for that investor.</p> <p>The commenter believes that senior citizens are particularly vulnerable to road shows. The commenter was concerned that senior citizens may feel obligated to honour any indications of interest based on disclosures that may subsequently materially change.</p>	<p>We have considered the comment, and believe that this is outside the scope of this project.</p> <p>However, we note that 41-101CP provides guidance indicating that unless an exemption from the requirement to register as a dealer is available in the circumstances, an investment dealer would have to be registered as an investment dealer in any jurisdiction where it conducts a road show (see subsection 6.12(6) of 41-101CP). An investment dealer would be required to ensure that a proposed trade is suitable for a client before making a recommendation in accordance with the relevant securities legislation and rules of the Investment Industry Regulatory Organization of Canada.</p>

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52	Road shows during the waiting period – drafting comments	<p>One commenter had the following drafting comments on the following proposed provisions of NI 41-101:</p> <p>Paragraphs 13.8(1)(c) and 13.9(1)(c)</p> <ul style="list-style-type: none"> • The information in the road show should be limited to “written” information and should relate not only to the securities but also to the issuer. • Accordingly, delete the phrase “all information in the road show concerning the securities is disclosed in the preliminary prospectus” and replace it with “all written information in the road show concerning the securities or the issuer is disclosed in the preliminary prospectus”. <p>Paragraph 13.8(3)(b)</p> <ul style="list-style-type: none"> • It should be sufficient if the permitted institutional investor has access to a copy of the preliminary prospectus or any amendment, rather than requiring that it actually has received these documents. 	<p>Other than a requirement to verbally read a statement at the beginning of the road show that investors other than accredited investors are permitted to attend, the revised rule amendments do not regulate oral statements made at a road show. See response to item 40.</p> <p>The revised road show provisions require that an investment dealer must establish and follow reasonable procedures to provide the investor with a copy of the relevant prospectus. We do not believe this requirement to be onerous. For a road show held on the internet or other electronic means, recommended procedures are set out in section 2.7 of NP 47-201.</p>
53	Term sheets and road shows – liability of co-managers in an underwriting syndicate	<p>One commenter was concerned about the effect of the proposed rule amendments and policy changes relating to term sheets and road shows on the potential liability of co-managers in an underwriting syndicate. The commenter believes these liability ramifications have the potential to negatively impact underwriting syndicate</p>	<p>Liability of syndicate</p> <p>We have considered the comments and have concluded that all underwriters in a syndicate should be liable for misrepresentations in marketing materials. We believe that this furthers investor protection and is consistent with the statutory regime for civil prospectus liability.</p>

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		<p>participation, and ultimately, an issuer's access to the capital markets.</p> <p>Background By way of background, the commenter noted that:</p> <ul style="list-style-type: none"> • Under the proposed rule amendments, investment dealers will, subject to certain conditions, be permitted to provide a term sheet to a permitted institutional investor after announcing a bought deal, but before filing the preliminary prospectus four business days later. • The proposed rule amendments will contain provisions governing (i) road shows carried out during the waiting period following the filing of the preliminary prospectus, and (ii) the related road show materials. • Term sheets and road show materials would be subject to prospectus liability (statutory liability for misrepresentations). <p>The commenter made the following submissions:</p> <p>Syndication process</p> <ul style="list-style-type: none"> • The new provisions will increase the administrative burden on the issuer and underwriters in connection with any corporate finance transaction, and more 	<p>We recognize that in an underwriting syndicate, the lead underwriter will be primarily responsible for working with the issuer in preparing documents relating to the offering, and that other underwriters may join the syndicate after initial marketing materials have already been prepared and distributed. However, we do not believe that the rule amendments impose an unfair burden on syndicate members. In particular, we note that:</p> <ul style="list-style-type: none"> • No underwriter will be liable under the statutory provisions for civil prospectus liability until the time of the final prospectus. • If a prospectus (or amendment) modifies a statement of material fact that appeared in earlier marketing materials, blacklined copies of the materials must be filed on SEDAR at the same time as the prospectus (or amendment). <p>Accordingly, before a final prospectus is filed, members of the underwriting syndicate will have the opportunity to request that the lead underwriter and issuer modify any statements in earlier marketing materials that they have concerns with.</p>

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		<p>importantly, do not take into consideration some of the practical issues that underwriters face on a day-to-day basis in their equity underwriting business.</p> <ul style="list-style-type: none"> • The provisions are inconsistent with the realities of the syndication process for any public offering in the Canadian market, in that they fail to take into account the fact that co-managers in an underwriting syndicate have no control or input over the form, substance or dissemination of ancillary documentation. • There are some instances where an investment dealer is the lead bookrunner with respect to a bought deal or marketed offering. In those instances, the lead bookrunner works hand-in-hand with the issuer and has full control over the form, content and dissemination of all disclosure documents from their inception. • Specifically, the lead bookrunner will provide input on the bought deal news release, the preliminary prospectus, and the final prospectus in order to ensure compliance with applicable securities laws. • The situation is very different in the case of offerings where an investment dealer is not a bookrunner (i.e., where the dealer is a “co-manager” in the syndicate). • An underwriter who is a co-manager will 	

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		<p>commonly receive an invitation to participate in an offering considerably later than when the bookrunners were first involved – in some cases, as late as shortly before the filing of the preliminary prospectus.</p> <p><i>Bought deals</i></p> <ul style="list-style-type: none"> • In the bought deal context, the bookrunner may have had several days to familiarize itself with the issuer, its intentions, and the details of the offering, while co-managers are required to bring themselves up to speed under extremely tight timing constraints. • In these situations, the only disclosure document that co-managers are provided with is the preliminary prospectus, and it is a perpetual challenge for the co-managers to review and sign off on even this document before it is disseminated. • More significantly, given the late stage at which co-managers are asked to join a bought deal syndicate, they generally have no input or authorship over the drafting of the issuer’s press release announcing the offering. • For this reason, the commenter is partial to the customary form that such news releases take – i.e., very abbreviated and general disclosure regarding the nature of the 	

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		<p>offering, terms of the securities and use of proceeds.</p> <p><i>Term sheets</i></p> <ul style="list-style-type: none"> • If the term sheet provisions are adopted, then, in transactions where a dealer is a co-manager, the co-manager will not have (or be granted) the opportunity to review or comment on term sheets before they are distributed. • As a result, co-managers will not have an adequate opportunity to determine whether the disclosure in the term sheet is, in fact, fair, true and plain, as required pursuant to the proposed rule amendments. • Ascribing prospectus-level liability to the co-managers for a term sheet that only the bookrunners have drafted and/or reviewed and distributed unfairly penalizes the co-managers in any offering. • The realities of the syndication and distribution process dictate that the co-managers will not have had an opportunity to vet such a term sheet prior to its dissemination. <p><i>Definition of term sheet</i></p> <ul style="list-style-type: none"> • This issue will be exacerbated by the broad definition of “term sheet” in the proposed rule amendments, which includes any 	<p><i>Definition of marketing materials</i> See response to item 11.</p> <p>We refer to the revised definition of “marketing materials”,</p>

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		<p>“written communication regarding a distribution of securities under a prospectus that contains information on the issuer or the securities” other than “a prospectus, or a notice, circular, advertisement, letter or other communication referred to in section 13.1 that is expressly permitted by securities legislation”.</p> <ul style="list-style-type: none"> • Arguably, this could include any email or ancillary communication from the lead bookrunners, none of which the co-managing underwriters will have an opportunity to review, but with respect to which each underwriter will have prospectus-level liability. • The explicit adoption of the term sheet provisions may tempt bookrunners to provide a more in-depth description of the terms of the offering than one would currently find in a generic bought deal news release. • A detailed description of any securities offering belongs in the prospectus, where it can be properly described and (if necessary) qualified. Explicitly allowing dealers to provide an initial “snapshot” of the offering in term sheet format increases the propensity for errors or omissions in such a description, especially for complex offerings where either the terms of the securities or the use of 	<p>which now refers to “a written communication intended for potential investors”. This would not capture routine emails between underwriters.</p>

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		<p>proceeds are novel or non-conventional.</p> <ul style="list-style-type: none"> • This disproportionately penalizes the co-managers, who did not draft the term sheet or comment on it before it was issued, yet bear prospectus-level liability along with the syndicate as a whole. <p><i>Road shows</i></p> <ul style="list-style-type: none"> • The issues regarding co-manager liability are even more pronounced with respect to the road show provisions contained in the proposed rule amendments. • In those offerings where a dealer is a co-manager, the co-manager has no input over road show materials, and in many cases, is not even provided with these materials prior to their use in the road show itself. • In actuality, as a co-manager, it would not be customary for a dealer to participate in the bookrunners' road show process. • Based on customary marketing and syndication practices, co-managers will not have (or be granted) the opportunity to determine whether all information contained in the road show is (i) contained in the preliminary prospectus or (ii) fair, true and plain. • Ascribing prospectus-level liability to road show materials penalizes the co-managers of any public offering disproportionately and 	

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		<p>unjustifiably.</p> <ul style="list-style-type: none"> • This concern is exacerbated by the use of the generic term “written materials” in proposed sections 13.8 and 13.9 of NI 41-101, which could arguably include email or other ancillary communications, none of which the co-managing underwriters will have any input on (or even be aware of). <p><i>Fully marketed offerings</i></p> <ul style="list-style-type: none"> • Identical arguments to those set forth above hold true with respect to any term sheet that a bookrunner may choose to distribute following the filing of the preliminary prospectus in a fully marketed offering (e.g., an IPO). <p><i>Effect on Canadian capital markets</i></p> <ul style="list-style-type: none"> • The syndication mechanics described above reflect the processes that have traditionally been in place for any Canadian capital markets offering. • If the proposed rule amendments were to be adopted, it’s unlikely that these processes would change in any material respect to address the concerns set forth above. • In the U.S., the much larger number of investment dealers gives issuers flexibility in determining which dealers participate in their offering syndicate. In the Canadian 	

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		<p>context, the selection is far more limited.</p> <ul style="list-style-type: none"> • There are fewer investment dealers in Canada, and to complete any mid to large sized offering in the Canadian capital markets, an issuer often requires the majority of dealers in the country to participate in the syndicate. • For the same reasons, investment dealers do not always have the same commercial flexibility to “take a pass” on the limited number of larger offerings that are undertaken in the Canadian market simply because they are not comfortable with the disclosure practices adopted by the lead bookrunners on that transaction. • Nevertheless, if the term sheet and road show provisions are adopted, underwriters may be dissuaded from participating in a syndicate as co-managers if they are forced to take on prospectus-level liability on ancillary documents with respect to which they customarily have no input or involvement. • The risk of incurring this additional liability may affect an underwriter’s willingness to join certain underwriting syndicates, which, in the Canadian context, could ultimately impact the issuer’s unbridled access to capital markets financing. 	

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		<p><i>Bifurcated liability</i></p> <ul style="list-style-type: none"> • In the event that the CSA chooses to move forward with the proposed rule amendments, the CSA should consider amending the road show and term sheet provisions so that prospectus-level liability for misrepresentations in these materials is bifurcated – i.e., only those investment dealers that were bookrunners for the transaction in question, and therefore directly involved from the outset of the offering in the drafting, review, and dissemination of term sheets and road show materials, should be subject to statutory liability for a misrepresentation in such documents. • Such a construct would accurately reflect the syndication realities of the offering process, and involvement (or lack thereof) of underwriters in reviewing ancillary documentation based on their syndicate position. 	
<p>Form 41-101F1 Information Required in a Prospectus Form 41-101F2 Information Required in an Investment Fund Prospectus</p>			
54	Term sheets incorporated by reference	One commenter noted that the proposed amendments to Form 41-101F1 and Form 41-101F2 expressly address the inclusion in, or incorporation by reference into, the prospectus of term sheets, but not road show materials. The commenter believes the prospectus form should	We have revised the road show provisions to refer only to marketing materials, rather than to distinguish between marketing materials and other materials provided at a road show. Marketing materials provided in connection with a road show are subject to the same requirements as any other marketing materials. Accordingly, the amendments to

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		expressly address road show materials.	<p>Form 41-101F1 address the inclusion in, or incorporation by reference into, the prospectus of marketing materials used in connection with a road show.</p> <p>As noted in the response to item 5, we have decided that the pre-marketing and marketing reforms in NI 41-101 will not apply to investment funds filing a prospectus in the form of Form 41-101F2. As a result, we have not made the same revisions to Form 41-101F2 that we have made to Form 41-101F1.</p>
Companion Policy 41-101CP General Prospectus Requirements			
55	CP guidance – subsection 6.2(9) – interaction with prospectus exemptions	<p>One commenter referred to IIROC Rule 29.13 on pre-marketing and the notice that IIROC issued on May 1, 2007 regarding compliance with that rule (the IIROC Pre-Marketing Notice). The commenter submitted that:</p> <ul style="list-style-type: none"> • An issue that has arisen in the past and for which there does not appear to be sufficient clarity is the application of the pre-marketing rules in a situation where there is an attempt to effect a financing by way of private placement that is abandoned and a public offering is proceeded with. • Section 3 of the IIROC Pre-Marketing Notice contemplates the situation where a <i>bona fide</i> intention to affect an exempt distribution is abandoned in favour of a prospectus offering. • In particular, section 3 of the IIROC Pre-Marketing Notice states that it is not until it 	<p>We have reviewed IIROC Rule 29.13 on pre-marketing and the notice issued by IIROC on May 1, 2007 regarding compliance with that Rule. We do not believe that there is a need for additional guidance, as the guidance currently provided in subsection 6.2(10) of 41-101CP states that “[f]rom the time when it is reasonable for a dealer to expect that a <i>bona fide</i> exempt distribution will be abandoned in favour of a prospectus offering, the general rules relating to advertising or marketing activities that constitute an act in furtherance of a distribution will apply.”</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>is reasonable to expect that a <i>bona fide</i> exempt distribution will be abandoned, that any subsequent pre-marketing activities will be subject to IIROC Rule 29.13 on pre-marketing activities.</p> <ul style="list-style-type: none"> Given the uncertainty that arises in this context, the CSA should consider taking this opportunity to clarify the issue by adopting the principles enunciated in the IIROC Pre-Marketing Notice. 	
56	CP guidance – sufficient specificity	<p><i>Opposition to revised guidance</i> One commenter was of the view that the changes to subsection 6.4(4) of 41-101CP regarding “sufficient specificity” should not be made. The commenter believes that the existing guidance in the Companion Policy on when a distribution of securities commences is clear to investment dealers.</p> <p><i>When “sufficient specificity” occurs</i> Three commenters referred to the existing guidance in subsection 6.4(4) of 41-101CP. That provision states:</p> <p><i>“We consider that a distribution of securities commences at the time when:</i></p> <ul style="list-style-type: none"> <i>a dealer has had discussions with an issuer or a selling securityholder, or with another dealer that has had discussions with an issuer or a selling securityholder about the</i> 	<p>We have not revised the changes to 41-101CP in response to these comments. We believe that there is a lack of clarity among some market participants regarding when sufficient specificity occurs and the proposed guidance is intended to assist marketing participants in this regard.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p><i>distribution, and</i></p> <ul style="list-style-type: none"> • <i>those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or the selling securityholder an underwriting of the securities.”</i> <p>One commenter agreed that guidance on “sufficient specificity” is useful in developing a more consistent and predictable practice. However, the commenter believed the language in the above provision presents some practical difficulties. The commenter submitted that:</p> <ul style="list-style-type: none"> • In order to establish a mutual intent to conduct an offering, a dealer may have to make several proposals before it is reasonable to conclude that an issuer will undertake an underwriting. • Until there is a mutual <i>bona fide</i> intention on the part of both the issuer and dealer to conduct a public distribution, it would be premature to declare that the distribution has commenced. • The trigger point may occur earlier than the date of the engagement letter or bought deal agreement. However, the guidance should reflect the reality that there are two parties involved in making the determination to conduct a public offering. As such, the 	<p>We are of the view that a mutual intent between an issuer and a dealer is not necessary in order for “sufficient specificity” to occur. Accordingly, we have not revised the existing guidance in subsection 6.4(4) of 41-101CP as requested by certain commenters.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>trigger for a distribution should hinge on whether it is reasonable that a dealer will undertake a distribution based on discussions with the issuer.</p> <p>One commenter was of the view that the existing and proposed guidance on “sufficient specificity’ is not adequately flexible. The commenter noted that the proposed guidance specifically provides that CSA staff do not agree that a distribution does not commence until a later time (e.g., when an engagement letter is delivered to an issuer). The commenter submitted that:</p> <ul style="list-style-type: none"> • IIROC guidance for compliance with IIROC Rule 29.13 states that “At the latest, [a distribution] will have commenced at the time the offer to underwrite is made to the issuer”. • There should be mutuality of discussions (i.e., an intention of both the dealer and the issuer to proceed). The commenter noted that the proposed guidance gives two examples. While the first example does anticipate issuer approval, the second example refers to a situation where no indication of price range or other terms would have been given by the underwriter to the issuer and therefore there is no intention of the issuer to necessarily proceed. 	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<ul style="list-style-type: none"> • The guidance should be revised to reflect these concerns. <p>Similarly, although generally opposed to revising this guidance, another commenter indicated that, if a change is made, it would support language that provides that “there must be a <i>bona fide</i> intention on the part of both the dealer and the issuer to engage in the public distribution of securities”. The commenter’s issue with the language is that a distribution may commence if the intention is only with the dealer.</p> <p><i>Specific examples</i> One commenter was concerned about the consequences of the statement in the proposed guidance, which discusses situations where an issuer rejects a proposed engagement letter or proposal for an underwriting from a dealer. The proposed guidance states:</p> <p><i>“Similarly we do not agree with the interpretations that if an issuer rejects a proposed engagement letter or proposal for an underwriting from a dealer, the “distribution” has ended and the dealer could immediately resume communications with potential investors concerning their interest in purchasing securities of the issuer. In these situations, we</i></p>	

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		<p><i>expect the dealer not to resume communications with potential investors until after a “cooling off” period.”</i> (emphasis added)</p> <p>The commenter submitted that:</p> <ul style="list-style-type: none"> • The use of the word “of” as highlighted in the above provision is problematic in that it may be interpreted to apply to securities traded in the secondary market, rather than those to be distributed pursuant to a prospectus distribution. • This would result in significant negative consequences for the issuer as it could curtail secondary market trading by a dealer or group of dealers. • The word “of” in this provision should be changed to “from” to provide clarity of the intention. 	<p>We have revised the guidance as recommended by the commenter.</p>
57	CP guidance – non-deal road shows	<p>One commenter had comments on the guidance on non-deal road shows in the last paragraph of proposed subsection 6.4(b) of 41-101CP. The commenter submitted that:</p> <ul style="list-style-type: none"> • The phrase “if such a non-deal road show was undertaken in anticipation of a prospectus offering” may in some cases cause interpretation issues (i.e., exactly what “in anticipation of a prospectus offering” means). • It may be helpful to provide a safe harbour which would provide that a road show 	<p>We have considered the comment. However, we don’t propose to proceed, at this time, with a legislative safe harbour for non-deal road shows.</p>

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		<p>would be a “non-deal road show” if a specified period has elapsed since the road show prior to commencement of the prospectus offering.</p>	
58	CP guidance – testing of the waters exemption – IPO issuers	<p>One commenter noted that the guidance in proposed subsection 6.4A(5) of 41-101CP contained a sample email that an investment dealer could use when soliciting expressions of interest in accordance with the proposed testing of the waters exemption. The commenter suggested that the last bullet of the sample email be modified to read as follows: “<i>you agree to keep the information confidential until it is otherwise in the public domain</i>”.</p>	<p>While we have not made the specific change recommended by the commenter, we have revised the amendments to NI 41-101 to require that any investor solicited under the testing of the waters exemption for IPO issuers confirm in writing that it will keep information about the proposed offering confidential until:</p> <ul style="list-style-type: none"> • the information is generally disclosed, or • the issuer confirms that it will not be proceeding with the offering.
59	CP guidance – term sheets – fair, true and plain requirement	<p>With respect to the proposed rule that any term sheet be “fair, true and plain”, two commenters noted the proposed companion policy guidance that a term sheet would be “fair true and plain” if:</p> <ul style="list-style-type: none"> • it is honest, impartial, balanced and not misleading, • it does not give undue prominence to a particular fact or statement in the prospectus (or, in the case of a term sheet under subsection 7.5(1) of NI 44-101, a document referred to in paragraph 7.5(1)(d) of NI 44-101), and • it does not contain promotional language. 	<p><i>Fair, true and plain standard</i> See response to item 29, which applies to all marketing materials (including marketing materials provided in connection with a road show).</p> <p><i>Guidance on marketing materials</i> We have also revised the guidance in 41-101CP to address some of the concerns expressed by the commenters. For instance:</p> <ul style="list-style-type: none"> • We have removed the statement that marketing materials should not give undue prominence to a particular fact or statement. • We have removed the guidance relating to promotional language. • Instead, we have included guidance in 41-101CP indicating that as marketing materials are subject to

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		<p>One commenter submitted that:</p> <ul style="list-style-type: none"> • This guidance is impractical as currently drafted. • By their nature, marketing materials are for marketing. They are not, as is recognized, full disclosure, but rather would be limited to key selling features, the issuer’s purported positive attributes and financial highlights. • In creating this summary, it would be open to question whether the facts in the summary are given undue prominence, if for no other reason than simply because it is a summary only. • Similarly, this guidance assumes that prominence itself can be assessed. Does it relate to its location in the term sheet? Does it relate to the manner in which selected information is summarized in the term sheet? Does it relate to which line items are included in a financial summary in the term sheet? Too much uncertainty results from this guidance. • Further, as each potential investor receives a prospectus from which the information comes, it is uncertain what “undue” prominence means in the context of the complete package of documents being given to the investor (or why it should matter). • The “prohibition” on promotional language is potentially problematic as well. A 	<p>statutory prohibitions against misleading or untrue statements, issuers and investment dealers should have a reasonable, factual basis for any statement that is included in marketing materials.</p> <p>Road shows Other than a requirement to verbally read a statement at the beginning of the road show, the revised rule amendments do not regulate oral statements made at a road show. See response to item 40.</p>

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		<p>prospectus for a marketed offering will often contain promotional language – in addition to a liability document, the prospectus is a selling document, as are other marketing materials, used to encourage and facilitate the sale of the securities being offered.</p> <ul style="list-style-type: none"> • Promotional language should not contain untruths or misrepresentations, but should not otherwise be prohibited. • To suggest that promotional language that is in a prospectus could not be used in written marketing materials is difficult to understand. The commenter suggested that this cannot be the intention. • Written marketing materials do not need this additional guidance given that statutory liability for misrepresentations attaches to these documents. Investment dealers are familiar with the concept of misrepresentation. The overall prospectus liability regime should meet any investor protection concerns. • The guidance should simply remind issuers of this fact, including the second branch of the definition of “misrepresentation” in applicable securities legislation regarding omissions of material facts necessary to make a statement not misleading in the context in which the statements are made. 	

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		<p>Another commenter was particularly concerned with the proposed guidance that a term sheet would be “fair, true and plain” if it does not contain promotional language. The commenter submitted that:</p> <ul style="list-style-type: none"> • Under the proposed rule amendments, this same standard would apply to road show materials. • While potentially an issue for all term sheets, this is clearly problematic for road show materials which, by their very nature, are to promote interest in the securities being offered. This is true of all marketing materials, including the prospectus. • The CSA should remove this prohibition on promotional language. • More generally, the proposed paragraph 13.8(1)(b) of NI 41-101 and equivalent paragraphs of the rule amendments would apply the fair, true and plain standard to all “disclosure in the road show”, rather than limiting its application to written materials. It is unclear how this could be applied in practice. Accordingly, these paragraphs should be removed. 	
60	CP guidance – news release before filing a preliminary prospectus	One commenter noted the guidance in proposed subsection 6.9(3) of 41-101CP which attempts to clarify what may be in a news release or material change report filed before the filing of a preliminary prospectus or the announcement	We agree that there may be circumstances where additional material facts or material changes must be disclosed in connection with a bought deal. The guidance is not intended to limit the ability of the issuer to disclose material facts or material changes of the nature referred to

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		<p>of a bought deal and limits the information to identifying the securities proposed to be issued without a summary of commercial features of the issue. The commenter submitted that:</p> <ul style="list-style-type: none"> • In certain instances, the bought deal itself may trigger a requirement to disclose certain other facts that may in and of themselves be material facts or material changes. • For example, a prospectus offering of a resource issuer may result in a change to a capital expenditure budget for the coming year which may be material and would need to also be disclosed in the news release and material change report. • Another example is if a significant acquisition is announced together with a financing, both of which may constitute material information and require disclosure and possible material change reporting. • It may be more appropriate for this guidance to clarify that the news release and material change report only include the information required to be included to comply with applicable law including disclosure of all material facts and of the material change. 	<p>by the commenter.</p> <p>The guidance refers to news releases <i>before</i> the announcement of a bought deal under Part 7 of NI 44-101.</p>
National Instrument 44-101 Short Form Prospectus Distributions			
61	Bought deal – definition – bought deal agreement	<p>One commenter supports the introduction of a definition of bought deal agreement which includes it not having a “market out” clause. The commenter believes this reflects the current</p>	<p>We thank the commenters for their input.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>market understanding of what constitutes a bought deal.</p> <p>Another commenter did not object to the CSA's proposal that a "bought deal agreement" not contain a market-out clause. The commenter believes that the overwhelming market practice in Canada for a bought deal would be for both the bid letter and the underwriting agreement to exclude a market-out clause.</p>	
62	Bought deal exemption – general	<p>One commenter supported the introduction of an expanded bought deal exemption.</p> <p>Three commenters were generally supportive of the proposed rule amendments on the circumstances in which a bought deal can be expanded (subject to their comments on specific aspects of the proposals).</p>	We thank the commenters for their input.
63	Bought deal exemption – insider trading concerns	<p>As regards insider trading and tipping concerns with the bought deal exemption, one commenter submitted that:</p> <ul style="list-style-type: none"> • Insider trading and tipping do not often result from testing the waters for a bought deal, given the nature of the institutions who are contacted by dealers. • If insider trading does occur, it is best dealt with by enforcement action rather than restricting the ability of issuers to successfully raise capital. • Insider trading concerns can also be 	As noted in the November 2011 Materials, the pre-marketing restrictions reinforce the requirement that insiders and tippees should not trade on the basis of information about a potential offering that has not been generally disclosed. When the CSA considered reforms that permit greater pre-marketing before the announcement of a bought deal under Part 7 of NI 44-101 or the filing of a preliminary prospectus, the CSA needed to also consider whether those reforms would increase the likelihood of insider and tippee trading.

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		effectively addressed by confidentiality undertakings.	
64	Amendment to bought deal agreement – limits on amount of the upsizing	<p><i>Opposition to a cap</i> Six commenters did not think an increase in size of a bought deal should be limited.</p> <p>While not expressly opposing a cap, another commenter noted that the current absence of a specific limit affords issuers and dealers with a flexibility that can allow for issuers to raise additional funds if an offering is received with unexpected demand.</p> <p>One commenter did not believe that a cap on upsizing a bought deal is necessary in light of the other proposed requirements for an upsizing, which should adequately guard against any upsizing that is a misuse of the bought deal exemption.</p> <p>Another commenter did not see any reason to limit the amount of enlargement of a bought deal to a specified percentage. The commenter submitted that:</p> <ul style="list-style-type: none"> • In its experience, issuers and underwriters have not colluded to enter into an initial bought deal letter agreement in respect of a small offering intending to increase its size with the purpose of avoiding the pre-marketing rules. 	<p>We have considered the comments, and have revised the amendments to NI 44-101 to provide that bought deals may be enlarged to an amount up to 100% of the original deal size. However, a bought deal agreement must not contain an upsizing option (other than an over-allotment option).</p> <p>We believe that imposing a limit on bought deal enlargements will prevent potential abuse, but that a 100% limit will still allow issuers to benefit from increased demand.</p>

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		<ul style="list-style-type: none"> • The general language proposed that the enlargement cannot be the culmination of a formal or informal plan to offer a larger amount devised before the execution of the original agreement should provide sufficient protection if any is necessary. <p>Instead of imposing a cap, another commenter suggested that dealers be reprimanded if they initiate an unreasonable size offering to avail themselves of the bought deal exemption.</p> <p>Another commenter acknowledged that the CSA, through its proposed cap and additional conditions on upsizing, is attempting to address the potential for misuse of the bought deal exemptions (e.g., underwriters committing to purchase \$5 million of securities under a bid letter when the intended offering size is \$100 million in an attempt to limit underwriting risk). The commenter submitted that:</p> <ul style="list-style-type: none"> • Such misuse of the bought deal exemption is extremely rare. • It is unlikely that experienced senior management of an issuer would accept a purchase commitment from an underwriter on a bought deal that is materially below management's intended offering size and price. • The commenter has not observed 	

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		<p>underwriters engaging in such a practice, which the commenter attributes in part to the competitive environment for underwriting securities offerings in Canada.</p> <ul style="list-style-type: none"> • As a result, a cap on upsizing a bought deal is not necessary, since the potential for misuse of the bought deal exemption is very limited in practice. • An issuer seeking financing should be allowed to determine whether the size of the underwriting commitment and pricing being offered are acceptable to it. <p>Similarly, another commenter believes it is not necessary to specify a percentage by which a bought deal can be enlarged following its initial announcement. The commenter submitted that:</p> <ul style="list-style-type: none"> • Any attempts to limit the ability of an issuer to enlarge the size of a bought deal based on legitimate market demand would hamper the efficiency of Canadian capital markets and the attractiveness of the bought deal regime. • There are no strong policy reasons to justify imposing such restrictions on issuers. While the CSA indicated that the rationale for such a limit is to avoid the possibility of a dealer entering into a commitment with an issuer for a small number of securities in order to avoid the general restrictions on pre-marketing and then increasing it at a later 	

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		<p>time, the commenter thinks that this risk is overestimated.</p> <ul style="list-style-type: none"> • Dealer reputation, the issuer not wanting to agree to incur expenses for a small offering and market forces will not result in this behaviour occurring with any regularity. • The market ultimately will determine what the demand for certain securities will be, and there is no policy reason to restrict it to a specified percentage if market demand exists. <p>In setting a percentage cap on the enlargement of a bought deal, one commenter suggested that the CSA should consider the related provisions in the U.S. to ensure consistency.</p>	
65	Amendment to bought deal agreement – other conditions for upsizing a bought deal	<p><i>Opposition to other conditions for upsizing a bought deal</i></p> <p>Six commenters had concerns regarding the provision in the proposed rules that would prohibit a bought deal from being upsized if doing so is “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”.</p> <p>One commenter encouraged the CSA to ensure that the restrictions regarding enlarging bought deals are clear to avoid creating uncertainty. In</p>	<p>We have considered the comments and have not retained this provision. Instead, we have revised the definition of “bought deal agreement” in NI 44-101 to provide that a bought deal agreement must not contain an upsizing option (other than an over-allotment option). We believe that this will prevent potential abuse of the bought deal exemption.</p> <p>The revised rule amendments will not prevent issuers and underwriters from benefitting from unexpected demand for a bought deal, provided that any upsizing is done in accordance with the rule amendments (i.e., that the offering not be enlarged by an amount that is greater than 100% of the size of the original offering).</p>

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		<p>particular, as regards the condition that the upsizing can't be "the culmination of a formal or informal plan", the commenter felt that this involved a subjective element which will create uncertainty.</p> <p>Another commenter also believes the language is vague and the condition will cause unnecessary uncertainty in the marketplace as to when a transaction can be enlarged. The commenter submitted that:</p> <ul style="list-style-type: none"> • It is highly probable that many dealers and issuers would hope that a bought deal would be well received and that discussions of a possible enlargement based on market demand could occur at the time of the initial agreement. • The determination of the original size of a bought deal is always an estimate of what the market will in fact bear, and the condition seems circular and unnecessary. <p>Another commenter noted that discussions between an issuer and an underwriter will necessarily involve market demand and the possibility of upsizing in the event that the demand is greater than expected at the given price. The commenter submitted that:</p> <ul style="list-style-type: none"> • It is unclear whether these discussions would constitute a "formal or informal 	

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		<p>plan”.</p> <ul style="list-style-type: none"> • If an upsizing limit is implemented, there is no need for this provision. <p>Similarly, another commenter stated that:</p> <ul style="list-style-type: none"> • It is common for issuers and investment dealers to discuss the potential for increasing the size of the transaction prior to entering into a bought deal agreement. • Given the uncertainty regarding market reaction, this is not necessarily inconsistent with the underwriter making a firm commitment for the original offering size. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • It understood the CSA’s concern that an investment dealer not circumvent the pre-marketing restrictions (and consequently the policy behind the bought deal exemption) by entering into the original agreement for a small number of securities in order to solicit investors without a preliminary prospectus, and then, after having obtained expressions of interest, entering into an amended agreement for a much larger amount. • Nevertheless, the commenter was concerned about the broad language currently used in the proposed rule amendments. • In particular, what constitutes “a formal or informal plan devised before the execution 	

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		<p>of the original agreement” in practice will be difficult to ascertain and/or prove – both for underwriters when they gauge the issuer’s intentions, and for securities regulators.</p> <ul style="list-style-type: none"> • Initial discussions between an issuer and the underwriters in the planning and formulation stages of any public offering are inherently dynamic – issues such as the potential range and size of the offering are fluid and subject to change. • Given the uncertainty and ambiguity present in ascertaining when a “formal or informal plan” actually existed, this condition may actually introduce more uncertainty into the enforcement of this provision, and thus adversely impact an underwriter’s decision to rely on it. • The CSA should consider revising the language of this condition. <p>Another commenter was of the view that the conditions for upsizing a bought deal could be difficult to comply with and may preclude upsizing in many situations. In particular, the commenter submitted that:</p> <ul style="list-style-type: none"> • The condition that the upsizing can’t be “the culmination of a formal or informal plan” is presumably aimed at making sure that the upsized offering is the result of excess demand or over-subscription, rather than a 	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>means of circumventing the spirit of the bought deal rules by permitting solicitations of expressions of interest in securities for which there is no pre-existing purchase commitment by an underwriter.</p> <ul style="list-style-type: none"> • The wording of this condition, however, is very broad, and it is not clear how market participants will be able to satisfy themselves that the condition is met in any specific situation. • When considering a bought deal, an issuer will typically have in mind an approximate offering size and offering price (expressed as a discount to the current market price) for its securities. As part of the pricing discussions with the issuer, underwriters may provide the issuer with a range of suggested alternatives for offering size and price. • Depending on market conditions, an underwriter may on occasion recommend that the issuer launch a bought deal at a smaller offering size, with the possibility of upsizing, in order to increase the likelihood of a successful offering (one that will be “all sold”, and ideally with excess demand so as to create market conditions that support the offering price), rather than take the risk that the market will not be able to absorb a larger offering at the same price per security. 	

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		<ul style="list-style-type: none"> • Such action is not motivated by the underwriters' desire to limit underwriting risk, but rather by a desire to facilitate a successful offering for the issuer. • An issuer may be negatively impacted if its offering were to remain unsold, notwithstanding that the issuer receives the full amount of the net offering proceeds as a result of the underwriters' firm commitment to purchase the issuer's securities at the full offering price. (Among other reasons, an unsold offering may put downward pressure on the market price of the issuer's securities, adversely affect market perception of the issuer and negatively impact the ability of the issuer to raise capital in the future.) • Discussions of possible upsizing in the event of excess demand are a normal feature of the pricing process on certain bought deals. Such discussions facilitate certainty of financing for an issuer, rather than detract from it. However, the wording of the proposed condition on upsizing is very broad, and may be viewed as applying to the discussions that issuers and underwriters have regarding the interplay of offering price and offering size prior to launch. It is not at all clear when such discussions would amount to a "formal or informal plan" under the proposed rules and therefore prohibit an 	

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		<p>upsized offering.</p> <ul style="list-style-type: none"> The proposed condition may introduce needless uncertainty regarding the ability to upsize a bought deal, and should not be necessary, particularly if the CSA moves forward with its proposal to cap the amount by which a bought deal can be upsized. <p>Consequently, the commenter encouraged the CSA to remove this condition from the proposed rules.</p> <p><i>Support for other conditions for upsizing a bought deal</i></p> <p>Given that upsizing a bought deal is a material change, one commenter agreed with the proposed condition that the enlargement of the offering cannot be the culmination of a formal or informal plan to offer a larger amount devised before the execution of the original agreement.</p> <p>In addition, the commenter suggested that upon upsizing a bought deal, the rules should require that the order book be reconfirmed in an unambiguous fashion.</p>	
66	Amendment to bought deal agreement – to add underwriters – general support	<p><i>General support</i></p> <p>One commenter was generally supportive of the proposed amendments to Part 7 of NI 44-101 that allow additional underwriters to join the</p>	We thank the commenter for their input.

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>bought deal syndicate (subject to their comments on specific aspects of the proposals). The commenter believes that the amendments are appropriate in order to provide the issuer and the bought deal underwriting syndicate with marketing and distribution flexibility in responding to investor demand.</p>	
67	<p>Amendment to bought deal agreement – to add underwriters – conditions</p>	<p><i>Opposition to certain conditions</i> Eight commenters had concerns with the proposed rule provision that would prohibit adding a new underwriter to the bought deal syndicate if, among other things, this was “the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement”.</p> <p>One commenter encouraged the CSA to ensure that the restrictions regarding enlarging bought deal syndicates are clear to avoid creating uncertainty. In particular, as regards the condition that the addition of an underwriter can’t be “the culmination of a formal or informal plan”, the commenter felt that this involved a subjective element which will create uncertainty.</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • Syndication of a bought deal often occurs after signing the bid letter, and is generally contemplated at the time of signing. 	<p>We have considered the comments and have not retained this provision. Instead, we have revised the amendments to NI 44-101 to provide that an original bought deal agreement must not be conditional on syndication (although it can give the underwriter the ability to syndicate). Otherwise, the original agreement is not a true firm commitment to purchase securities under the bought deal exemption.</p> <p>If an agreement is conditional on syndication, the policy rationale of the bought deal exemption (i.e., to facilitate issuers seeking certainty of financing) has not been met. The policy rationale of certainty of financing will still be met if the parties later amend the agreement to add additional underwriters.</p> <p>However, we have added provisions to NI 44-101 and guidance in 41-101CP relating to the practice of including “confirmation clauses” in bought deal agreements. The rule amendments indicate that confirmation clauses are only permitted in certain circumstances. Specifically, the bought deal agreement must be confirmed on a next day basis.</p>

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		<ul style="list-style-type: none"> • In addition to being in conflict with market practice, it is unclear what benefit is provided by the prohibition as additions to the syndicate do not diminish the commitment to purchase all of the securities that are the subject of the bought deal agreement. • Accordingly, proposed subsection 7.4(3) of NI 44-101 should be removed. <p>Another commenter noted that in a bought deal, the underwriter assumes, at the time of entering the agreement, the risk from the issuer that an issuance of securities will not sell. The commenter submitted that:</p> <ul style="list-style-type: none"> • The fact that a dealer chooses to manage this risk by entering into a syndication agreement with other dealers does not affect either the issuer or investors and therefore should not be a concern to securities regulators. • In the interests of efficiency, one or two dealers (the lead underwriters) will enter into the bought deal agreement with the issuer and will in fact contemplate a subsequent syndication. • Any attempt to place restrictions on the ability to syndicate may hamper the efficiency of the capital markets and have a negative effect on the bought deal regime. 	

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		<p>Another commenter also noted that there are often circumstances where issuers want the ability and flexibility to permit additional dealers to join the syndicate. The commenter submitted that:</p> <ul style="list-style-type: none"> • For very large transactions, it is Canadian practice to sign and launch with a smaller syndicate and invite other participants in after the initial launch, as it is not practicable to invite and receive confirmations for a large number of participants in a timely and coordinated manner. • The expansion of the syndicate in this manner does not have any negative consequences from an investor protection or market integrity perspective. • As a result, this restriction should be removed. <p>In like manner, another commenter noted that there are many instances when a lead syndicate member (i.e., a book runner) would like the flexibility to allow additional dealers (i.e., co-managers) to join the syndicate, and would like to afford them sufficient time to seek approval. The commenter believes that the inclusion of these co-managers does not have any negative consequences on the offering or the marketplace as a whole.</p>	

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		<p>Similarly, another commenter believes that the practice of adding additional underwriters to the bought deal syndicate after the transaction has been launched is relatively common due to timing constraints. The commenter noted that it is not clear why this is problematic from a policy perspective, even if it was contemplated prior to the execution of the original agreement.</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • It was concerned about the broad language currently used in the proposed rule amendments. • In particular, what constitutes “a formal or informal plan devised before the execution of the original agreement” in practice will be difficult to ascertain and/or prove – both for underwriters and for securities regulators. • Initial discussions between an issuer and the underwriters in the planning and formulation stages of any public offering are inherently dynamic – issues such as the potential investment dealers that may be interested in participating in the offering, are fluid and subject to change. • Given the uncertainty and ambiguity present in ascertaining when a “formal or informal plan” actually existed, this condition may actually introduce more uncertainty into the enforcement of this provision, and thus 	

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		<p>adversely impact an underwriter's decision to rely on it.</p> <ul style="list-style-type: none"> • The CSA should consider revising the language of this condition. <p>Another commenter believes that the proposed restriction may be incompatible with current market practice on bought deal syndication.</p> <p>The commenter noted that:</p> <ul style="list-style-type: none"> • Most bought deal bid letters are executed by the lead underwriters on behalf of the full syndicate, in the interests of speed in bringing the offering to market, with the full expectation that other underwriters will subsequently execute the full underwriting agreement. • Given that syndication of a bought deal (i.e., the process of the lead underwriters inviting other underwriters to join the underwriting syndicate) often does not occur until shortly prior to launch (sometimes minutes before launch), it is in most cases impractical to have the bid letter signed by all of the underwriters since there is insufficient time to do so. Yet, in the situation where a bought deal is to be syndicated, there is clearly an intention prior to the time that a bid letter is signed to add additional underwriters and to specify the number of securities to be 	

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		<p>purchased by the additional underwriters.</p> <ul style="list-style-type: none"> • This intention is usually evidenced by the listing in the bid letter of all of the underwriters, together with their purchase commitments on a several basis. However, only the lead underwriter(s) will sign the bid letter. The proposed condition in paragraph 7.4(3)(a) of NI 44-101 would appear to prohibit this practice, since the intention to add other underwriters would constitute a “formal or informal plan” to do so devised before the execution of the original agreement. • It is also unclear whether the proposed condition in paragraph 7.4(3)(c) of NI 44-101 that the amended agreement (which adds other underwriters) be otherwise on the same terms as the original agreement would preclude the current practice of having the other syndicate members sign the full underwriting agreement, rather than an amended bid letter. This is because the full underwriting agreement will necessarily contain other terms in addition to what was contained in the original bid letter. • The commenter did not understand the regulatory concerns with the current practice, since the underwriters’ commitment to purchase all of the offered securities from the issuer, once a bid letter is 	

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		<p>signed, is unchanged by the addition of underwriters to the syndicate.</p> <p>Consequently, the commenter suggested that the CSA delete proposed subsection 7.4(3) of NI 44-101 in its entirety.</p>	
68	Amendment to bought deal agreement – to add clauses	<p>Five commenters were concerned that the proposed restrictions on amending bought deal agreements may be incompatible with the current market practice of parties entering into an underwriting agreement to supersede or supplement a bought deal bid letter.</p> <p>In particular, commenters noted that:</p> <ul style="list-style-type: none"> • A bought deal is launched on signing of a “bought deal letter”, which is typically a short document that contains the underwriter’s commitment to purchase, obliges the issuer to file the prospectus within the prescribed timeframe and details the termination provisions. • This document is superceded by a standard underwriting agreement, which is more detailed. <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • The proposed rule amendments do permit the addition of representations, warranties, indemnities and conditions. • However, it is not clear if this is an attempt 	<p>In response to the comments, we have revised the amendments to NI 44-101 relating to modifications to bought deal agreements. In particular, we have added a provision to NI 44-101 which expressly allows for a bought deal agreement to be replaced by a more extended form of underwriting agreement, provided that the underwriting agreement complies with the terms and conditions that apply to a bought deal agreement.</p>

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		<p>to change current practice or to accommodate the current practice.</p> <ul style="list-style-type: none"> • The definition of “amend” includes “amend and restate” so this is likely not a change. This should, nonetheless, be clarified. • In addition, it should be permissible to permit additional covenants in an amendment to a bought deal letter. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • The proposed rules appear to prohibit all terms and conditions of the underwriting from being amended or modified. • It is not clear whether the proposed rules will disallow the current practice of issuers and underwriters entering into a relatively short engagement letter or bought deal letter, and then subsequently negotiating a mutually satisfactory underwriting agreement. • The regulatory intent of this provision is unclear, as the commenter does not believe that the current practice raises any investor protection issues. <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • It was unclear as to the meaning of the proposed rule. In particular, the proposed rule appears to permit the amendment of the original bought deal agreement to add 	

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		<p>additional representations, warranties, indemnities and conditions if the amended agreement is “otherwise on the same terms as the original agreement”.</p> <ul style="list-style-type: none"> • However, this wording appeared to be circular. • Perhaps proposed paragraph 7.4(4)(a) of NI 44-101 could be clarified to provide that the amended agreement be on the same terms as to number of shares and price as the original agreement. <p>Two other commenters expressed similar concerns. Their comments included the following:</p> <ul style="list-style-type: none"> • The proposed rules would not allow a bought deal agreement to be amended in order to add additional representations, warranties, indemnities and conditions, unless the amended agreement is otherwise on the same terms as the original agreement and other restrictions are complied with. • It is not clear what is intended by this requirement in light of the fact that the term “bought deal agreement” may apply to both the bid letter and the full underwriting agreement (the full underwriting agreement, by superseding or supplementing the bid letter, may be considered to constitute an amendment to it). 	

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		<ul style="list-style-type: none"> • The CSA should clarify that the current practice of superseding or supplementing a bought deal bid letter with a full underwriting agreement (which will necessarily contain additional representations, warranties, indemnities and conditions beyond what is in the bid letter) would continue to be acceptable. • One of the reasons why the practice of using a bid letter to satisfy the “enforceable agreement” requirement in current subsections 7.1(a) and 7.2(a) of NI 44-101 is that there is often not enough time to negotiate a full underwriting agreement prior to the launch of a bought deal. • In contrast, bid letter terms and conditions have become relatively standardized in Canada, with the result that a form of bid letter may be agreed upon in a relatively short period of time. The four business day period following the launch of a bought deal and ending at the time of filing the preliminary prospectus provides additional time during which the full underwriting agreement may be negotiated, settled and executed by the issuer and all of the underwriters. • The commenters would strongly discourage any changes that would result in underwriters and issuers having to settle on 	

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		<p>and execute a full underwriting agreement prior to the launch of a bought deal in order to satisfy the proposed condition relating to the addition of representations, warranties, indemnities and conditions to the bought deal agreement.</p> <ul style="list-style-type: none"> Consequently, proposed subsection 7.4(4) of NI 44-101 should be removed in its entirety. 	
69	Amendment to bought deal agreement – to terminate deal	<p>Four commenters expressed concerns with the provisions in the proposed rule amendments on when a bought deal agreement could be terminated.</p> <p>General One commenter was concerned that the proposed rule amendments appear to prohibit termination of a bought deal agreement unless all parties (the underwriters and the issuer) decide not to proceed with a prospectus offering.</p> <p>Termination under an “out” provision While supporting the introduction of a definition of bought deal agreement which includes it not having a “market-out” clause, one commenter believes the CSA should clarify that other clauses which may allow termination of a transaction are not prohibited, especially in light of proposed subsection 7.4(5) of NI 44-101.</p>	<p>We have made certain revisions in response to these comments.</p> <p>Definition of bought deal agreement The revised definition of “bought deal agreement” in subsection 7.1(1) of NI 44-101 provides that a bought deal agreement may not have a market-out clause, an upsizing option (other than an over-allotment option) or be conditional on syndication (other than a confirmation clause that complies with section 7.5 of NI 44-101).</p> <p>More extended form of underwriting agreement As noted in the response to item 67, we have added a provision to NI 44-101 which expressly allows for a bought deal agreement to be replaced by a more extended form of underwriting agreement that includes, without limitation, termination rights, provided that the underwriting agreement complies with the terms and conditions that apply to a bought deal agreement.</p> <p>Termination of bought deal agreement Subsection 7.3(7) of NI 44-101 provides that the parties to</p>

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		<p>In like manner, two other commenters submitted that:</p> <ul style="list-style-type: none"> • While bought deal “bid letters” do not generally contain “market-out” provisions, it is market practice for a bid letter to contain other conventional termination “outs”, such as a “disaster out”, a “material adverse effect out” or a “due diligence out”. • Consistent with market practice, underwriters need to have the ability to continue to negotiate and rely on customary termination outs with any issuer. • Under the proposed rule amendments, it is unclear whether these termination rights could be contained in the bought deal bid letter. • One of these commenters suggested that proposed subsection 7.4(5) of NI 44-101 be removed. <p>Another commenter believes the proposed restrictions on terminating bought deal agreements may be incompatible with current market practice. The commenter noted that:</p> <ul style="list-style-type: none"> • One of the long-existing policy rationales for allowing bought deals in Canada is to provide certainty of financing for an issuer. The commenter therefore acknowledges the purpose behind the provisions in the proposed rules which seek to restrict when a 	<p>a bought deal agreement may agree to terminate the agreement if the parties decide not to proceed with the prospectus offering. We have provided companion policy guidance that this provision does not prevent a party from exercising a termination right under a provision in a bought deal agreement, or a more extended form of underwriting agreement, that permits the party to terminate the agreement if another party performs, or fails to perform, certain actions, or certain events fail to occur.</p> <p><i>Bought deal agreement – provisions and practices</i> We have revised 41-101CP to provide guidance on the use of termination “outs” in bought deal agreements and certain practices.</p> <p>We have included companion policy guidance in 41-101CP to clarify that where an issuer enters into an engagement letter with underwriters solely for the purpose of conducting due diligence before a potential prospectus offering, that event will not, in and of itself, indicate that “sufficient specificity” has been achieved, provided that the engagement letter does not contain any other information which indicates that “it is reasonable to expect that the dealer will propose to the issuer an underwriting of securities”.</p> <p><i>Due diligence outs</i> We understand that some bought deal agreements, and more extended forms of underwriting agreements for bought deals, include due diligence “outs”. We have</p>

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		<p>bought deal agreement can be amended or terminated. However, the commenter believes that the CSA should clarify whether the new term “bought deal agreement” refers only to the bid letter or also to the underwriting agreement itself.</p> <ul style="list-style-type: none"> • The prevailing market practice in Canada for a bought deal is to use a bid letter to satisfy the requirement in current subsections 7.1(a) and 7.2(a) of NI 44-101 that the issuer has entered into an “enforceable agreement” with the underwriters to purchase the securities that are the subject of the bought deal. The bid letter is typically entered into by the lead underwriters on behalf of the full underwriting syndicate, and is then superseded or supplemented by a full underwriting agreement that is executed by all of the underwriters immediately prior to the time of filing the preliminary prospectus for the bought deal. • The proposed rules appear to prohibit a “bought deal agreement” from being terminated unless all parties (including the issuer) decide not to proceed with the prospectus offering. The commenter was unclear how this provision would apply. • This provision could be read to mean that there can be no “outs” in the bought deal agreement at all, although the commenter 	<p>included companion policy guidance in 41-101CP to indicate that:</p> <ul style="list-style-type: none"> • If permitted by the issuer, an underwriter may want to conduct sufficient due diligence in advance of proposing a bought deal to the issuer. • Where underwriters are not willing or able to conduct sufficient due diligence in advance of proposing a bought deal to an issuer, they may want to consider proposing a fully marketed offering instead. • Where an issuer is required to file technical reports under NI 43-101, the underwriter may want to confirm, as part of its due diligence before proposing the bought deal, that the issuer’s technical reports are compliant with NI 43-101. • Due diligence outs in bought deal agreements, or more extended forms of underwriting agreements for bought deals, should not be used in a way that would defeat the policy rationale of the bought deal exemption. <p><i>Confirmation clauses</i> We have added provisions to NI 44-101 and guidance to 41-101CP relating to the practice of including “confirmation clauses” in bought deal agreements. The amendments provide that confirmation clauses are only acceptable in certain circumstances. Specifically, the lead underwriter must confirm the agreement on a next day basis.</p> <p><i>Timing restrictions in bought deal agreements</i> We understand that underwriters often specify, in a bought</p>

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		<p>presumed this refers only to the bid letter itself rather than to the full underwriting agreement that typically supersedes or supplements the bid letter. (The underwriting agreement for a bought deal would customarily include “regulatory proceedings out”, “disaster out”, “material change out” and “compliance with conditions out” clauses. For a REIT or income trust issuer, a “tax change out” clause may also be included.)</p> <ul style="list-style-type: none"> • Many bought deal bid letters do not themselves contain the customary termination provisions contained in a bought deal underwriting agreement. However, the purchase commitment in the bid letter is usually conditional upon the execution by the issuer and the underwriters of a mutually satisfactory form of underwriting agreement, which would then contain those customary termination provisions. • In addition, it would be typical for a bought deal bid letter to have some form of “due diligence out” clause in the event that undisclosed, materially adverse information about the issuer is revealed during the underwriters’ due diligence investigation prior to the time at which the full underwriting agreement is signed (this provision is not typically included in the full 	<p>deal agreement or a more extended form of underwriting agreement relating to a bought deal, that the issuer must file and obtain a receipt for the final prospectus within a short period of time of the first comment letter or the receipt for the preliminary prospectus being issued.</p> <p>We have included companion policy guidance in 41-101CP to indicate that issuers and underwriters should not expect that all comments can be resolved within a particular period of time.</p> <p><i>Reductions in deal size</i> We have become aware of several recent instances where bought deals have been amended to provide for a lower price per share or a smaller offering.</p> <p>We have revised the amendments to NI 44-101 to prohibit any amendment to the bought deal agreement that would reduce the price or size of the deal, unless the amendment is made on or after the date which is at least four business days after the date the original agreement was entered into.</p> <p>We have also included companion policy guidance that:</p> <ul style="list-style-type: none"> • Sets out our regulatory concerns on how the bought deal exemption was intended to facilitate issuers seeking certainty of financing. • Indicates that if a bought deal is amended to provide for a lower price per share or a smaller offering, especially within a short time after the original agreement has been signed, the policy rationale has not been met.

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		<p>underwriting agreement).</p> <ul style="list-style-type: none"> • If a mutually satisfactory form of underwriting agreement cannot be agreed upon, or if the underwriters' due diligence investigation were to reveal undisclosed, materially adverse information about the issuer, the underwriters would be entitled to withdraw or terminate their underwriting commitment under the bid letter. • Given the wording of proposed subsection 7.4(5) of NI 44-101, it is not clear whether these and other customary conditions in the bid letter would be prohibited or unenforceable, since the failure to satisfy these conditions could result in the termination of a bought deal agreement without the consent of the issuer. • Not including these conditions in a bought deal bid letter would be a significant departure from current market practice. Accordingly, the commenter suggested that the CSA clarify that both the bid letter and the underwriting agreement for a bought deal may contain the customary termination provisions and conditions for a bought deal, which under the proposed rules would exclude a "market-out clause". <p>Consequently, the commenter encouraged the CSA to remove proposed subsection 7.4(5) of</p>	<ul style="list-style-type: none"> • Indicates that if an underwriter does not want to assume the risk of a bought deal, the underwriter may want to consider proposing a fully marketed offering, rather than a bought deal.

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		<p>NI 44-101 and instead re-phrase the proposed rules to clarify that neither the bid letter nor the underwriting agreement for a bought deal may contain a “market out clause”.</p> <p><i>Termination if certain conditions are not met</i></p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • The underwriters’ bought deal participation is always subject to various conditions that are set forth in the bid letter, including (i) that the issuer and the underwriters execute a mutually acceptable form of underwriting agreement, (ii) that the issuer file and obtain receipt for a preliminary prospectus within four business days, and (iii) in some cases, certain stock exchange listing and/or rating agency conditions. • Consistent with market practice, underwriters need to have the ability to continue to negotiate and rely on these customary conditions with any issuer. • Under the proposed rule amendments, it is unclear whether these conditions could be contained in the bought deal bid letter. <p>Another commenter also noted that it is typical for the underwriters’ purchase commitment in the bid letter to be subject to other conditions, such as:</p> <ul style="list-style-type: none"> • The issuer being eligible to file a short form 	

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		<p>prospectus, the issuer filing the preliminary and final short form prospectuses by certain dates, the issuer complying with securities laws and the securities offered being conditionally listed on a particular stock exchange.</p> <ul style="list-style-type: none"> <li data-bbox="621 529 1245 1365">• The bid letter being “subject to syndication”, meaning that the underwriters’ purchase commitment will be withdrawn if the lead underwriters are not able to syndicate the offering among other underwriters. In the event of a failure to syndicate, the bought deal will not be launched (e.g., there is no public announcement of the bought deal). The commenter noted that the lead underwriters may achieve the same result by delaying the execution of the bid letter until after the full syndicate confirms its participation in the bought deal (in other words, the lead underwriter will not commit to purchase securities without the other underwriters confirming their participation as syndicate members). However, the commenter believes that investment dealers prefer to explicitly state in a bid letter when a bought deal is subject to syndication, in part to highlight for the issuer the fact that its offering will not proceed if the offering cannot be syndicated. 	

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70	Bought deal term sheets – general support	One commenter generally supported the proposed rule amendments and policy changes regarding the use of bought deal term sheets, subject to certain comments.	We thank the commenter for their input.
71	Bought deal term sheets – distinction between “term sheets” and “written marketing materials”	<p>One commenter believes that the use of the phrase “term sheet” in the proposed rule amendments and policy changes is potentially problematic as it appears to encompass a wider definition than is typically associated with the phrase. The commenter submitted that:</p> <ul style="list-style-type: none"> • Nearly every public offering makes use of a term sheet (a standard term sheet) that simply states the basic factual terms of the proposed transaction such as price, total deal size, over-allotment terms, use of proceeds, jurisdictions of sale, commission, closing date, etc. • The information contained in the standard term sheet currently used in public offerings would generally be the information that is contained in the launch date news release for a bought deal reformatted into a factual table. • The use of written marketing materials prior to the preliminary prospectus receipt would be uncommon in today’s marketplace. The current experience is that written marketing materials other than the standard term sheet (as discussed above) are rarely used by investment dealers in soliciting expressions 	We have revised the rule amendments and policy changes to distinguish between “standard term sheets” and “marketing materials”. Both can be provided to any investor. See response to item 11.

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		<p>of interest in connection with a bought deal transaction.</p> <ul style="list-style-type: none"> • Further, due to the limited amount of time between the execution of a bought deal engagement letter and the filing of a preliminary prospectus, any materials are likely to be limited in scope. • In view of this potential limited scope and the desire to not treat groups of potential investors differentially, any new rule should permit written marketing materials to be provided to any potential investor, not only permitted institutional investors. • Limiting the permitted audience of the written marketing materials would legislate unequal access to information based on only apparent sophistication. • However, despite the preceding sentiments, the opportunity to use such enhanced marketing materials between the execution of a bought deal engagement letter and the filing of a preliminary prospectus is attractive and would be used in appropriate circumstances. <p>In light of the attempt to conform the marketing rules to market practice as much as is practicable while seeking to pursue the policy goals of the pre-marketing rules, the commenter suggested that standard term sheets be expressly</p>	

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		<p>recognized as a document used by investment dealers, and expressly permitted to be used at any time after a public offering has been announced. Further, any standard term sheet should not be required to be included, or incorporated by reference, in the relevant prospectus.</p>	
72	Bought deal term sheet – content	<p>Four commenters questioned the proposed rule that all information concerning the securities in a bought deal term sheet must be included in the bought deal news release, unless that information has been disclosed by the issuer in a previously filed document.</p> <p>Two commenters believe the proposed rules on the content of bought deal term sheets would require more disclosure in the launch news release for a bought deal compared to current practice. The commenters noted that:</p> <ul style="list-style-type: none"> • Some of the information in a typical bought deal term sheet that would need to be included in the launch news release under the proposed rules would include the stock exchanges where the issuer’s securities are listed, the termination provisions for the underwriting commitment, the eligibility for investment of the securities for RRSPs, TFSAs and other registered plans and the underwriting fee. • Current market practice is to not include this 	<p><i>Bought deal marketing materials – content</i></p> <p>We have revised the amendments to NI 44-101 to allow bought deal marketing materials to include information that is not in the bought deal news release or the issuer’s continuous disclosure record, provided that the information will be disclosed in, or derived from, the subsequently filed preliminary prospectus. We believe that the requirement to include this information in the preliminary prospectus will mitigate potential investor protection concerns.</p> <p>We have included companion policy guidance in 41-101CP that reminds issuers of:</p> <ul style="list-style-type: none"> • Selective disclosure and insider and tippee trading concerns when including information in bought deal marketing materials that is not in the bought deal news release or the issuer’s continuous disclosure record. • Other possible reporting requirements relating to the information (i.e., material change reporting requirements, news release disclosure where the information could affect the market price of the issuer’s securities). <p>The amendments to NI 44-101 require that all information</p>

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		<p>information, and therefore the adoption of these provisions will result in a change in the usual form of launch news release for a bought deal.</p> <p>One commenter did not object to this aspect of the proposed rules, although it was unclear to the commenter whether there is much added benefit to including all of the information that is in a bought deal term sheet in the launch news release.</p> <p>In contrast, two commenters objected to this aspect of the proposed rules. They noted that investors participating in a bought deal offering will receive the information through the term sheet or in the prospectus.</p> <p>Two commenters believe the proposed requirement which states that “all information concerning securities in the term sheet must be in the bought deal news release or the issuer’s continuous disclosure record” should be restricted to material information.</p> <p>One commenter submitted that certain information contained in the news release (e.g., the security identifier) would not be material to investors.</p>	<p>in marketing materials must be in the bought deal news release, the issuer’s continuous disclosure record or the subsequent preliminary prospectus. There is no requirement for all information in the bought deal news release to be in the marketing materials.</p>

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73	Bought deal term sheets – approval and filing on SEDAR	<p>Two commenters had concerns with the proposed rule that a bought deal term sheet would need to be filed on SEDAR before use. One commenter had concerns with the proposed rule that a bought deal term sheet would need to be approved in writing by the issuer and underwriters before use.</p> <p>One commenter submitted that:</p> <ul style="list-style-type: none"> • Under current bought deal rules, the launch news release must be issued and filed on SEDAR prior to the commencement of solicitation activities. • For timing reasons, this is typically handled by the lead underwriter on behalf of the issuer. • Investment dealers will want to ensure that compliance with the proposed rules will not result in a delay in their ability to send term sheets to investors immediately following launch in accordance with current market practice. • The CSA should consider whether approval in writing of the term sheet by all of the underwriters should be necessary, given that market practice is for the lead underwriters to negotiate and finalize the form of term sheet with the issuer. Obtaining the written approval of all of the underwriters on the term sheet (even by way of return email) 	See response to item 25.

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		<p>could result in unnecessary delays in the context of a bought deal.</p> <ul style="list-style-type: none"> • As a practical matter, the new requirement to file the term sheet on SEDAR before the term sheet is sent will result in the lead underwriter also filing the term sheet at the same time as the news release in order to be in a position to be able to distribute the term sheet immediately upon launch. <p>Another commenter was of the view that there are no benefits in filing a bought deal term sheet on SEDAR prior to launching a public offering. The commenter submitted that:</p> <ul style="list-style-type: none"> • The requirement is impractical given the timing involved in launching a bought deal offering, which involves many parties and documentation. • Any additional filing requirement prior to launching a bought deal offering would delay the process and does not benefit investors. 	
74	Bought deal term sheet – incorporation of term sheet in prospectus	Given that all the information in the term sheet must be included in the prospectus, one commenter did not see any benefits to including the actual term sheet in the prospectus since this information would be redundant.	The rule amendments require marketing materials to be included or incorporated by reference in the prospectus so that they will be subject to statutory civil liability for misrepresentations.
75	Bought deal term sheet – subsequent delivery of preliminary prospectus	Three commenters felt that potential investors who receive a bought deal term sheet do not need to also receive the subsequent preliminary	We have revised the amendments to NI 44-101 to require that a copy of the subsequent preliminary prospectus be sent to any investor that received the bought deal marketing

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>prospectus if those investors do not participate in the offering. The commenters felt this requirement imposes an unnecessary compliance burden for dealers without any clear investor protection benefit.</p> <p>One commenter believes no purpose is served by providing further information about an offering to an investor that has already decided not to participate in the offering.</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • In many cases, the mere receipt of a term sheet does not indicate an expression of interest to purchase the securities. • In any case, prospectus and secondary liability for distributions ensures that purchasers are protected. 	<p>materials and expressed an interest in acquiring the securities.</p> <p>We recognize that an investor that receives bought deal marketing materials may decide not to participate in the prospectus offering, but instead buy securities of the issuer in the secondary market on the basis of information in the marketing materials. However, we believe that our approach still provides for investor protection through the following:</p> <ul style="list-style-type: none"> • The marketing materials will contain a legend stating that the marketing materials do not provide full disclosure of all material facts relating to the securities offered and that investors should read the subsequent preliminary prospectus before making an investment decision. • The marketing materials must be filed on SEDAR on the day they are first provided to a potential investor. As a result, they are a “document” under the secondary market liability provisions in securities legislation. <p>We note that the revised requirement corresponds to the current delivery requirements in paragraphs 7.1(d) and 7.2(d) of NI 44-101.</p>
76	Bought deal – road shows before the filing of a preliminary prospectus	<p>One commenter noted that the proposed rules do not address road shows conducted in connection with a bought deal after the announcement of the bought deal but before the issuance of a receipt for a preliminary short form prospectus. The commenter submitted that:</p>	<p>We have revised the amendments to NI 44-101 to allow dealers to conduct road shows for investors after the announcement of a bought deal but before the filing of the preliminary prospectus.</p> <p>We believe that investor protection concerns that may arise</p>

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		<ul style="list-style-type: none"> • The rules should regulate the conduct of road shows in this phase of the bought deal when expressions of interest are being solicited, including the requirement that any written road show materials be filed and included in, or incorporated by reference into, the prospectus, thereby attracting civil liability. • Otherwise, marketing efforts during this phase of a bought deal would not be on the same footing as marketing efforts during other phases of a prospectus offering. 	<p>when retail investors receive marketing materials used in connection with a road show before a preliminary prospectus is filed are mitigated by requiring that all information in the marketing materials be disclosed in, or derived from, the bought deal news release, the issuer's continuous disclosure record on SEDAR or the subsequent preliminary prospectus.</p> <p>We have included companion policy guidance in 41-101CP that reminds issuers of:</p> <ul style="list-style-type: none"> • Selective disclosure and insider and tippee trading concerns that may arise when information included in bought deal marketing materials is not in the bought deal news release or the issuer's continuous disclosure record. • Other possible reporting requirements relating to the information (i.e., material change reporting requirements, news release disclosure where the information could affect the stock price).
Form 44-101F1 Short Form Prospectus			
77	Term sheets incorporated by reference	One commenter noted that the proposed amendments to Form 44-101F1 expressly address the inclusion in, or incorporation by reference into, the prospectus of term sheets, but not road show materials. The commenter believes the prospectus form should expressly address road show materials.	<p>We have revised the rule amendments to remove the definition of "road show materials". Marketing materials used in connection with a road show will be subject to the same requirements as any other marketing materials.</p> <p>Accordingly, the amendments to Form 44-101F1 address the inclusion in, or incorporation by reference into, the prospectus of marketing materials used in connection with a road show.</p>

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National Instrument 44-102 Shelf Distributions Companion Policy 44-102CP Shelf Distributions			
78	Shelf prospectus rules	<p>One commenter noted that a number of rules specific to shelf offerings have been included within the proposed amendments to NI 41-101. The commenter believes that it would be more appropriate for these provisions to be included within NI 44-102.</p>	<p>We have moved the rule amendments relating to marketing after the receipt of a final base shelf prospectus to NI 44-102.</p> <p>However, we have included language in 44-102CP which indicates that:</p> <ul style="list-style-type: none"> • While NI 44-102 has provisions on marketing after the receipt of a final base shelf prospectus, NI 41-101 has general provisions that apply to marketing during the waiting period. • Issuers and investment dealers should refer to the guidance on marketing activities in Part 6 of 41-101CP.
79	Marketing before the filing of a shelf prospectus supplement	<p>One commenter noted the proposed guidance in section 1.3 of 44-102CP that states that if an issuer does not issue a news release about a potential drawdown under a shelf prospectus, dealers should consider measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by “tippees”. The commenter submitted that although this appears to recognize the existing practice of confidentially marketed shelf take-downs, further guidance in respect to what measures are envisioned to ensure compliance with this provision would be helpful.</p> <p>Another commenter believes it would be very</p>	<p><i>Compliance measures</i> We note that this is a matter of internal compliance to be addressed by investment dealers. We don’t propose to issue additional guidance at this time.</p> <p><i>Marketing after receipt for base shelf prospectus</i> We believe this matter is addressed in revised section 1.3 of 44-102CP.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		helpful if the CSA could explicitly confirm in 44-102CP the current industry understanding that the prohibition against pre-marketing under applicable securities laws does not apply in the event that the issuer has filed and received a receipt for a base shelf prospectus.	
Specific Questions			
<i>Testing of the waters exemption for IPO issuers</i>			
80	Would the proposed testing of the waters exemption for IPO issuers be of value to those issuers and their investment dealers? Would it allow them to obtain useful feedback from permitted institutional investors? Why or why not?	<p>Positive comments</p> <p>Five commenters believe the proposed exemption would be of value.</p> <p>One commenter believes that the proposed exemption would be very useful to both issuers and investment dealers because institutional investors are key market participants in public offerings and this would permit issuers contemplating IPOs to obtain important information regarding potential IPOs.</p> <p>Four commenters believe that:</p> <ul style="list-style-type: none"> • Given the considerable time, costs and expenses associated with IPOs, the proposed exemption would enable parties involved with the IPO to assess whether there would be sufficient interest for the IPO and the basis of such interest. • To the extent that market interest may be tested prior to incurring some of those expenditures, it would be beneficial to 	We have considered the comments, and have retained the amendments to NI 41-101 that provide for a testing of the waters exemption for IPO issuers.

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		<p>issuers and capital markets.</p> <p>One commenter noted that initial public offerings are not typically launched in the absence of general feedback as to market appetite and a thorough assessment as to the potential success of the initial public offering. The commenter submitted that:</p> <ul style="list-style-type: none"> • Investment dealers regularly gather general feedback from the marketplace through informal discussions with sophisticated accounts as to interest in certain types of issuers, without needing to provide issuer specific information. • Typically these conversations involve identifying the industry, potential size of the transaction, geographical territory and commodity (for mining transactions) and market capitalization of the issuer. • Additionally, many private issuers actively raise funds in the private markets and have sophisticated or institutional shareholders who are able to assess the market and provide direct feedback about a going public transaction. • While information is being obtained, the proposed exemption would be of value in those instances where there is some question as to whether the market would sufficiently understand the business of the potential 	

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		<p>issuer or where the potential issuer is too dissimilar from other public companies in the Canadian market to obtain useful feedback without providing company specifics.</p> <ul style="list-style-type: none"> This would be more likely in those instances where the potential issuer is a foreign company with a business or assets that are not familiar to the Canadian marketplace. This would be the case whether the issuer was small or large. <p><i>Negative comments</i> One commenter believes the proposed exemption would not allow IPO issuers to obtain feedback from permitted institutional investors since institutional investors prefer not to be “locked up” in any matter.</p>	<p>We do not believe that the rule amendments will result in investors solicited under the exemption becoming “locked up”. We have revised the amendments to NI 41-101 so that the requirement for an investor solicited under the exemption to keep information confidential and not use it for any purpose other than assessing interest in the offering, extends only until:</p> <ul style="list-style-type: none"> the information is generally disclosed, or the issuer confirms that it will not be proceeding with the offering.
81	<p>Do you think the proposed testing of the waters exemption for IPO issuers will be used? If so, who do you think would use the exemption most? Small issuers or large issuers? Or, would it be used equally by both?</p>	<p><i>Positive comments</i> Three commenters thought the proposed exemption would be used.</p> <p>One commenter expects that the proposed exemption will be used frequently by both small and large issuers on an equal basis. Another commenter submitted that:</p>	<p>We have considered the comments, and have retained the amendments to NI 41-101 that provide for a testing of the waters exemption for IPO issuers.</p>

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		<ul style="list-style-type: none"> • One of the most significant deterrents preventing small and medium-sized issuers from accessing the Canadian capital markets is the substantial cost associated with filing a preliminary prospectus. • As such, this exemption would be of particular value to junior and mid-tier issuers in Canada's diverse natural resources industry, as well as in other sectors, since it provides them with an opportunity to determine institutional interest in a potential public offering without incurring the significant expenses associated with filing a preliminary prospectus. <p>Another commenter believes that:</p> <ul style="list-style-type: none"> • The exemption will be relied upon mainly by larger private issuers that: <ul style="list-style-type: none"> ○ have more information regarding their business and products in the public domain, ○ already have an institutional shareholder base, or ○ are able to attract the interest of an investment dealer. • These issuers will likely have more investment interest in their securities such that underwriters may wish, as part of their activities to determine the viability of an IPO, to undertake such discussions. 	

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		<ul style="list-style-type: none"> • As the solicitation must be made through an investment dealer, the exemption may not be utilized by smaller issuers that have not generated the same level of interest from registered dealers. • In addition, smaller issuers that do not have a public record may have difficulty relying upon the exemption to obtain any degree of comfort as to whether a subsequent IPO would generate interest in the market and be successful. <p><i>Negative comments</i></p> <p>One commenter was of the view that the exemption would not likely be used by IPO issuers and their investment dealers, since investment dealers generally do not purchase securities from IPO issuers and are therefore not at market risk prior to selling to investors.</p>	
<i>Bought deal exemption</i>			
82	<p>Our proposals provide for the enlargement of bought deals up to a specified percentage. Should the specified percentage be:</p> <ul style="list-style-type: none"> • 15% of the original size of the offering (which corresponds to the existing 15% limit on over-allotment options), 	<p><i>Commenters suggesting a cap of 100% of the original size (or higher)</i></p> <p>Five commenters indicated that any cap should be at the high end of the range (e.g., 100% or higher).</p> <p>In particular,</p> <ul style="list-style-type: none"> • Although they were opposed to a cap on upsizing bought deals, if a limit were to be imposed, two commenters suggested that it 	<p>We have considered the comments, and have revised the amendments to NI 44-101 to provide that bought deals may be enlarged to an amount up to 100% of the original deal size.</p> <p>We believe that imposing a limit on bought deal enlargements will prevent potential abuse, but that a 100% threshold will still allow issuers to benefit from increased demand.</p>

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
	<ul style="list-style-type: none"> • 25% of the original size of the offering, or • 50% of the original size of the offering? <p>Or, do you think another limit is appropriate in order to provide flexibility, yet prevent abuse of the bought deal exemption?</p>	<p>be at least 100% of the original size of the offering and two commenters suggested that it be at the high end of the proposed range.</p> <ul style="list-style-type: none"> • While not expressly opposing a cap, another commenter suggested that it be at 100% of the original size of the offering. <p>In this regard,</p> <ul style="list-style-type: none"> • One commenter believes that if a limit is imposed, a higher percentage should apply since it would allow market demand to be met. • Another commenter thinks the ability to upsize to 100% would be particularly beneficial to smaller issuers. • Furthermore, even with a 100% upsizing, one commenter felt the bought deal should still be able to have the traditional 15% greenshoe. <p><i>Commenter suggesting a cap of 50% of the original size</i></p> <p>Two commenters suggested a cap of 50% of the original size of the offering.</p> <p>One commenter submitted that a 50% cap would provide the issuer with maximum flexibility to increase the offering size where investor demand warrants it without “resetting” the four business day period between signing the bid</p>	

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		<p>letter and filing the preliminary prospectus, while at the same time preventing abuses of the bought deal exemption.</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • A 50% cap would provide the right balance between flexibility, which is often needed in order to accommodate excess demand or large orders that are difficult to “cut-back” (e.g., a smaller order may not impact a portfolio sufficiently), and continuing to provide discipline to underwriters in sizing bought deal transactions. • A cap of less than 50% could provide structural discrimination against smaller issuers completing smaller transactions by unnecessarily limiting the absolute dollars that may be raised and eliminating certain institutional accounts who would participate only if allocated a relatively large order. <p><i>Commenters in favour of a cap of 15% of the original size</i></p> <p>Two commenters were in favour of a cap of 15% of the original size of the offering.</p> <p>One commenter felt it is highly likely that investment dealers will take full advantage of any rule that permits bought deals to be upsized. As a result, the commenter believes that any</p>	

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		<p>such enlargement should be capped at 15% of the original size of the offering (which corresponds to the existing 15% limit on over-allotment options).</p> <p>Another commenter submitted that:</p> <ul style="list-style-type: none"> • An issuer must have a clearly defined plan regarding the use of proceeds of an offering. • Increasing the number of securities above certain thresholds under a bought deal may raise questions as to the motivation and vision behind the decision to carry out the offering. • Therefore, any upsizing should not exceed 15% of the original size of the offering. 	
<i>Term sheet provision for bought deals</i>			
83	<p>The term sheet provision for bought deals provides that a bought deal term sheet could only be given to permitted institutional investors before the receipt of a preliminary short form prospectus. Should the rules also allow a bought deal term sheet to be given to retail investors before the receipt of a preliminary short form prospectus? Why or why not?</p>	<p><i>Commenters in favour of providing bought deal term sheets to retail investors</i></p> <p>Nine commenters were in favour of allowing bought deal term sheets to be given to retail investors.</p> <p>Specific comments include the following:</p> <ul style="list-style-type: none"> • If a policy goal is to allow as many investors as possible to participate in a bought deal offering, all investors should have access to the term sheet. • While it is unlikely individual investors will form part of a “testing of the waters” group in a bought deal, it is not necessary to 	<p>We have revised the amendments to NI 44-101 to allow bought deal marketing materials to be given to any investor.</p> <p>We believe that investor protection concerns that may arise when retail investors receive marketing materials before a preliminary prospectus is filed are mitigated by requiring that:</p> <ul style="list-style-type: none"> • all information in the marketing materials be included in the bought deal news release, the issuer’s continuous disclosure record on SEDAR or the subsequent preliminary prospectus, • a template version of the marketing materials be included or incorporated by reference in the final

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		<p>restrict delivery of the term sheet for a bought deal only to permitted institutional investors. This may allow, in limited circumstances, a more level playing field with respect to the allocation of securities which may occur prior to the filing of the preliminary prospectus.</p> <ul style="list-style-type: none"> • Although the proposed rules would allow retail investors to receive a term sheet after a preliminary prospectus receipt is issued, this will be of little practical benefit unless a portion of the offering is reserved for retail investors, as bought deals are generally fully allocated well before the preliminary short form prospectus is filed (typically by the morning after launch). • There should not be a distinction between retail investors and institutional investors, particularly since it is proposed that all information contained in the bought deal term sheet must be included in the news release announcing the bought deal or the issuer's continuous disclosure record. • There is no information in a typical bought deal term sheet that is appropriate only for institutional investors. In any event, a term sheet would be required to be included or incorporated by reference in the preliminary prospectus and the final prospectus under the proposed rules. 	<p>prospectus, and</p> <ul style="list-style-type: none"> • a template version of the marketing materials be filed on SEDAR.

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		<ul style="list-style-type: none"> • As the proposals contemplate the term sheet being incorporated into the prospectus, statutory liability will arise for its contents. • The protections in respect of prospectus and secondary liability ensure that there are no investor protection issues in this regard. • Retail investors should benefit from the same information as institutional investors in making their investment decisions. • A term sheet may benefit investors and the proposed term sheet provisions provide for investor protection. Therefore, it would be in keeping with the policy rationales to allow a bought deal term sheet to be given to retail investors before the receipt of a preliminary short form prospectus. • Due to the limited scope of materials provided between the execution of an engagement letter and filing of a preliminary prospectus and the desire to not treat groups of potential investors differentially, the rule amendments should permit marketing materials to be provided to any potential investor. Limiting the permitted audience of such materials would legislate unequal access to information based only on apparent sophistication. <p>One commenter was unclear as to the rationale for not permitting a bought deal term sheet to be</p>	

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		<p>given to retail investors before the receipt for the preliminary prospectus. The commenter submitted that:</p> <ul style="list-style-type: none"> • Although the majority of pre-marketing that is conducted before the preliminary prospectus is most often with institutional investors, the commenter was not certain of the concern of having to provide a copy of the preliminary prospectus with the term sheet, as long as the preliminary prospectus is provided once it is available. • If an investment dealer is able to solicit expressions of interest from retail investors before filing a preliminary prospectus, is it better that they do so without any documentation? Or, is it better to at least permit them to give a document (i.e., the term sheet) that provides “fair, true and plain” disclosure to be followed up with a copy of the preliminary prospectus? The commenter believes the latter is preferable. 	
Comparables			
84	Our proposals would permit a road show for institutional investors to contain comparables even if the comparables were not contained in the prospectus and therefore not subject to prospectus liability. It has been suggested	<p>Commenters in favour of restrictions</p> <p>Two commenters were in favour of restrictions that would only permit comparables to be given to institutional investors.</p> <p>One of these commenters agreed that comparables can be “cherry picked” and misunderstood by retail investors.</p>	<p>We have revised the rule amendments to provide that comparables can be provided to any investor (i.e., institutional, accredited or retail).</p> <p>Comparables can be removed from the template version of marketing materials that is filed on SEDAR and included or incorporated by reference in the relevant prospectus. As a result, those comparables would not be subject to statutory</p>

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	<p>that institutional investors are better able to understand the nature of comparables and the risks related to comparables (e.g., “cherry picking”) than ordinary retail investors and individuals who are accredited investors. Do you agree? Why or why not?</p>	<p>Another commenter was of the view that comparable multiples should not be made available to retail investors. The commenter felt that the current practices and requirements are sufficient with respect to road shows and the inclusion of comparable multiples and that comparable multiples should continue to be part of road show presentations and available to institutional investors and retail brokers.</p> <p><i>Commenters opposed to restrictions</i> Six commenters were opposed to restrictions that would only permit comparables to be given to institutional investors.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • Any concerns regarding comparison of the issuer to other reporting issuers should be dealt with directly, rather than requiring that the comparison be disclosed selectively only to certain investors. • Investors should have the same access to information. • Given the complexity around comparables and the uncertainty of their value to institutional investors who are able to evaluate the offering and any comparables on their own, one commenter questioned the benefit of the provisions permitting comparables. However, if comparables are 	<p>civil liability. However, the rule amendments require additional disclosure and other safeguards relating to comparables. Additionally, as noted in 41-101CP, any comparables included in marketing materials would be subject to statutory provisions in securities legislation which prohibit misleading or untrue statements.</p>

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		<p>provided to institutional investors, the commenter believes (in keeping with the policy rationales) that they should also be provided to retail investors.</p> <ul style="list-style-type: none"> • While road shows for individual investors are rare in Canada, there was no reason to restrict the availability of comparables to retail investors. • Comparables are currently provided to retail sales force registrants through green sheets. • While one commenter appreciated the concern of the CSA that comparables may be “cherry picked”, the commenter saw no reason why these disclosures should be singled out as many other offering-related disclosures are also subject to this risk. <p>Another commenter agreed that if comparables are to be provided, no class of potential investors should be denied access to the comparables. The commenter submitted that:</p> <ul style="list-style-type: none"> • The CSA should not legislate unequal access to information based on apparent sophistication. • Traditional valuation comparables provide a reference point for the price that may be ascribed to the transaction. • Although comparables are helpful in assisting potential purchasers to understand relative pricing of an offering, the definitive 	

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		<p>pricing of any transaction is ultimately set by the forces of supply and demand and the independent assessment of institutional investors.</p> <ul style="list-style-type: none"> • Retail investors, who do not influence price, should be permitted to see this information to also understand reference points and metrics that underlie the pricing process. <p><i>Other comments</i> While not expressly stating a view on whether comparables should be restricted to institutional investors, one commenter indicated that while a comparative analysis may be useful in many sectors, an in-depth knowledge of comparables is essential for explaining certain discrepancies.</p> <p>Another commenter did not specifically address the questions as to the use and regulation of comparables in road show presentations. However, the commenter submitted that differentiating between institutional road shows and “retail” road shows in the proposed rule amendments and policy changes is not relevant in the Canadian context, because practically speaking, Canadian underwriters do not carry out road shows for retail investors.</p>	
85	Do you agree with our proposal that before attending a road show that may contain	Four commenters were opposed to the proposed requirement.	We have not proceeded with the proposal to require investment dealers to obtain confirmation in writing from institutional investors that they will keep comparables

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
	<p>comparables, the investment dealer conducting the road show must obtain confirmation in writing from the institutional investor that they will keep the comparables confidential? Why or why not?</p>	<p>Comments received include the following:</p> <ul style="list-style-type: none"> • Because the information is derived from publicly available sources, there is no reason to require that road show attendees agree in writing to keep this information confidential. This would be a significant administrative burden with limited or no benefit. Further, it may be impractical to obtain such agreements from certain investors. • Obtaining confidentiality commitments from institutional investors with respect to comparables in a road show is an unnecessary compliance burden on investment dealers conducting road shows, for which there is not a significant corresponding benefit from a public policy perspective. • One commenter was unaware of any reason why institutional investors would share the details of comparables obtained during a road show. • The requirement is unnecessary since the Canadian capital markets are an efficient and competitive marketplace where there is issuer information available. Accordingly, institutional investors are generally already familiar with this information. • Another commenter thought the proposed confirmation was “overkill”. The commenter suggested that lists of comparables are no 	<p>confidential.</p>

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		different than various research papers that are published.	
86	<p>If comparables are included in a prospectus or a road show, should the prospectus rules prescribe a method for choosing comparables in order to reduce the risk of “cherry picking”? Should the rules contain measures that would foster the preparation of comparables which are fair and balanced or comparables which could assist an investor in determining if an offering was properly priced? What methods would achieve these goals? For example, should the CSA prescribe a template mandating the metrics used in compiling comparables or mandating how to pick a representative sample? If so, do you have suggestions for these templates?</p>	<p><i>Commenters in favour of detailed rules</i> Two commenters favoured detailed rules on comparables.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • If comparables are provided, detailed rules are required to ensure they are fair and balanced. • Where comparative information is provided, it must be given a framework by imposing certain criteria. In particular, it should be supported by verified or verifiable elements. <p><i>Commenters opposed to detailed rules</i> Six commenters were opposed to specific rules prescribing a method for choosing comparables in order to reduce the risk of “cherry picking”.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • One commenter acknowledged the CSA’s concerns regarding the possibility of “cherry picking” comparable companies for discussion in the road shows. However, the commenter believed this is best addressed by the use of cautionary language in the disclosure concerning comparables, or by restricting the use of comparables altogether. • Another commenter believes that it would 	<p>We have not prescribed a method for choosing comparables. However, comparables must be accompanied by certain disclosure, which relates in part to the rationale for selecting the issuers and attributes included in the comparables.</p> <p>Marketing materials that contain comparables must also:</p> <ul style="list-style-type: none"> • disclose any risks relating to the comparables, and • state that if the comparables contain a misrepresentation, investors will not have a remedy under civil liability provisions in securities legislation. <p>Comparables will be subject to the provisions in securities legislation which prohibit misleading or untrue statements.</p>

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		<p>be impractical to attempt to prescribe rules relating to the selection and preparation of comparables for road show purposes. The commenter suggested that the CSA consider how the use of comparables is regulated in other jurisdictions before proposing any rules in this regard.</p> <ul style="list-style-type: none"> • Another commenter submitted that what are appropriate comparables will vary in each case; applying a “one size fits all” approach to the companies or metrics that may be used for comparison cannot work. Accordingly, the commenter does not believe that any method should be prescribed for choosing or presenting comparables, nor does the commenter believe that other safeguards are necessary beyond those generally governing disclosure in connection with an offering. • Another commenter suggested that the rules should only require that the prospectus and other documents disclose the criteria that the investment dealer used to include any list of comparables. The commenter suggested that being too prescriptive will only reduce the usefulness of this tool. <p>Another commenter believes that the concern that investment dealers may “cherry pick” from publicly available information concerning other</p>	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>reporting issuers in connection with a term sheet or road show, should be adequately addressed by the proposed fair, true and plain requirements. Furthermore, the commenter submitted that:</p> <ul style="list-style-type: none"> • The obligations of the registrants involved in the transaction should address concerns that retail investors may not understand the assumptions and limitations inherent in the use of comparables. • Restricting the use of comparables is also inconsistent with their common use by analysts and media in the secondary market. <p>Another commenter appreciated the concern that comparables can be “cherry picked” and that they may not be readily understood by the average retail investor. However, the commenter submitted that:</p> <ul style="list-style-type: none"> • This criticism could be made with respect to many disclosures in a typical prospectus (such as highly technical or financial and accounting matters). • While it is appropriate to mandate cautionary language, comparables vary from issuer to issuer and no simple rules could apply to their selection and presentation. • Regulation of the manner in which comparables may be selected or presented may lead to rules that cannot be applied for 	

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<p>particular issuers or that result in disclosures that do not serve the purpose for which they were originally intended.</p> <p><i>Other comments</i> While not commenting specifically on whether or not detailed rules of the nature discussed above should be included in the rule amendments, one commenter noted that comparables would only be useful if the relevant metrics are adequately explained and footnoted.</p>	
87	<p>If comparables are included in a prospectus or a road show, should the prospectus rules require additional disclosure to alert retail investors about the nature of comparables and how they can be “cherry picked” and misunderstood? What cautionary language and risk factors should be included? What other safeguards could we implement in order to reduce these risks?</p>	<p>Four commenters were in favour of requiring issuers and dealers to provide cautionary language if comparables were provided to investors.</p> <p>Comments received include the following:</p> <ul style="list-style-type: none"> • If comparables are provided, cautionary language and risk factors should be included in the materials to alert investors of the risks related to comparables. • The rules should require that the prospectus and other documents disclose the criteria that the investment dealer used to include any list of comparables. • Dealers should be required to state that any list of comparables is not complete and may not be representative. • It is appropriate to mandate cautionary language. 	<p>Comparables in marketing materials are not required to be included or incorporated by reference into the relevant prospectus, or filed on SEDAR. Accordingly, they will not be subject to statutory civil liability provisions in securities legislation.</p> <p>However, comparables must be accompanied by proximate disclosure that:</p> <ul style="list-style-type: none"> • explains what comparables are, • explains the basis on which the other issuers were included in the comparables and why they are considered to be an appropriate basis for comparison with the issuer, • explains the basis on which the compared attributes were included, • states that the information about the other issuers was obtained from public sources and has not been verified by the issuer or the underwriters, • discloses any risks relating to the comparables,

No.	Subject (references are to current or proposed sections, items and paragraphs)	Summarized Comment	CSA Response
		<ul style="list-style-type: none"> If comparables are used, the possibility of “cherry picking” comparable companies is best addressed by the use of cautionary language in the disclosure concerning comparables. 	<p>including risks in making an investment decision based on the comparables, and</p> <ul style="list-style-type: none"> states that if the comparables contain a misrepresentation, the investor does not have a remedy under securities legislation. <p>Comparables will be subject to the provisions in securities legislation which prohibit misleading or untrue statements.</p>
General comments not specifically related to the proposed rule amendments and policy changes			
88	Accredited investor	<p>One commenter has concerns that some issuers and dealers sell prospectus-exempt securities in reliance on the accredited investor exemption in National Instrument 45-106 <i>Prospectus and Registration Exemptions</i> to individuals who do not meet the definition of “accredited investor” in that rule.</p>	<p>We refer to the guidance in section 1.9 of 45-106CP. We have included similar guidance in subsection 6.4A(9) of 41-101CP, which states that an investment dealer seeking to rely on the testing of the waters exemption for IPO issuers should:</p> <ul style="list-style-type: none"> conduct reasonable diligence to determine that an investor is an accredited investor before soliciting that investor, and retain all documentation they receive in this regard.

Schedule D

Amendments to National Instrument 41-101 *General Prospectus Requirements* and Changes to Companion Policy

Schedule D-1

THE MANITOBA SECURITIES COMMISSION
MSC Rule No. 2013-20
(Section 149.1, *The Securities Act*)

AMENDMENT INSTRUMENT FOR NATIONAL INSTRUMENT 41-101 *GENERAL PROSPECTUS REQUIREMENTS*

1. *National Instrument 41-101 General Prospectus Requirements* is amended by this Instrument.
2. Section 1.1 is amended by adding the following definitions in alphabetical order:

"**accredited investor**" has the same meaning as in section 1.1 of NI 45-106;

"**final prospectus notice**" means,

(a) in British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario and Saskatchewan, a written communication relating to a final prospectus if that communication is permitted by a provision in securities legislation listed opposite the jurisdiction in Appendix E, or

(b) in every other jurisdiction of Canada, a written communication relating to a final prospectus that only

(i) identifies the security proposed to be issued,

(ii) states the price of the security, and

(iii) states the name and address of a person or company from whom purchases of the security may be made and from whom a final prospectus may be obtained;

"**investment dealer**" has the same meaning as in section 1.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

"**lead underwriter**" means, in respect of a syndicate of underwriters,

(a) the underwriter designated under the underwriting agreement to act as the manager of the syndicate, or

(b) if more than one underwriter is designated under the underwriting agreement to act as a manager of the syndicate, the underwriter designated under the agreement to have primary decision-making authority;

"limited-use version" means a template version in which the spaces for information have been completed in accordance with any of the following:

- (a) subsection 13.7(2) or 13.8(2);
- (b) subsection 7.6(2) of NI 44-101;
- (c) subsection 9A.3(2) of NI 44-102;
- (d) subsection 4A.3(3) of NI 44-103;

"marketing materials" means a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer, securities or an offering but does not include the following:

- (a) a prospectus or any amendment;
- (b) a standard term sheet;
- (c) a preliminary prospectus notice;
- (d) a final prospectus notice;

"preliminary prospectus notice" means,

- (a) in a jurisdiction other than Québec, a communication relating to a preliminary prospectus if that communication is permitted by a provision in securities legislation listed opposite the jurisdiction in Appendix D, or
- (b) in Québec, a written communication relating to a preliminary prospectus that only
 - (i) identifies the security proposed to be issued,
 - (ii) states the price of the security, if determined, and
 - (iii) states the name and address of a person or company from whom purchases of the security may be made and from whom a preliminary prospectus may be obtained;

"road show" means a presentation to potential investors, regarding a distribution of securities under a prospectus, conducted by one or more investment dealers on behalf of an issuer in which one or more executive officers, or other representatives, of the issuer participate;

"**standard term sheet**" means a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains no information other than that referred to in subsections 13.5(2) and (3), subsections 13.6(2) and (3), subsections 7.5(2) and (3) of NI 44-101, subsections 9A.2(2) and (3) of NI 44-102 or subsections 4A.2(2) and (3) of NI 44-103, relating to an issuer, securities or an offering, but does not include the following:

- (a) a preliminary prospectus notice;
- (b) a final prospectus notice;

"**template version**" means a version of a document with spaces for information to be added in accordance with any of the following:

- (a) subsection 13.7(2) or 13.8(2);
- (b) subsection 7.6(2) of NI 44-101;
- (c) subsection 9A.3(2) of NI 44-102;
- (d) subsection 4A.3(3) of NI 44-103;

3. Subsection 9.1(1) is amended

(a) by deleting "and" after subparagraph (a)(v),

(b) by adding the following after subparagraph (a)(vi):

(vii) **Marketing Materials** – a copy of any template version of the marketing materials required to be filed under paragraph 13.7(1)(e); and,

(c) in subparagraph (b)(iii), by replacing "Handbook." with "Handbook; and", and

(d) by adding the following after subparagraph (b)(iii):

(iv) **Marketing Materials** – a copy of any template version of the marketing materials required to be delivered under paragraph 13.7(4)(c) or 13.12(2)(c)..

4. Section 9.2 is amended

(a) by deleting "and" after subparagraph (a)(xii.1),

(b) by adding the following after subparagraph (a)(xiii):

(xiv) **Marketing Materials** – a copy of any template version of the marketing materials required to be filed under paragraph 13.7(1)(e), 13.7(7)(a), 13.8(1)(e) or 13.8(7)(b) that has not previously been filed; and,

(c) by deleting "and" after subparagraph (b)(i),

(d) in subparagraph (b)(ii), by replacing "listing of the exchange." with "listing of the exchange; and", and

(e) by adding the following after subparagraph (b)(ii):

(iii) **Marketing Materials** – a copy of any template version of the marketing materials required to be delivered under paragraph 13.7(4)(c), 13.8(4)(c) or 13.12(2)(c) that has not previously been delivered..

5. The title of Part 13 is amended by adding "of Issuers other than Investment Funds" after "Offerings".

6. Part 13 is amended by adding the following section before section 13.1:

Application

13.0(1) This Part applies to issuers other than investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.

13.0(2) In this Part,

"**comparables**" means information that compares an issuer to other issuers;

"**convertible security**" has the same meaning as in section 1.1 of National Instrument 45-102 *Resale of Securities*;

"**exchangeable security**" has the same meaning as in section 1.1 of National Instrument 45-102 *Resale of Securities*;

"**underlying security**" has the same meaning as in section 1.1 of National Instrument 45-102 *Resale of Securities*;

"**U.S. cross-border initial public offering**" means an initial public offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC;

"**U.S. cross-border offering**" means an offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC, and includes a U.S. cross-border initial public offering;

"**U.S. prospectus**" means a prospectus that has been prepared in accordance with the disclosure and other requirements of U.S. federal securities law for an offering of securities registered under the 1933 Act.

13.0(3) In this Part, for greater certainty, a reference to "provides" includes showing a document to a person without allowing the person to retain or make a copy of the document..

7. *Section 13.1 is amended*

(a) *in subsection 13.1(1), by replacing "A notice, circular, advertisement, letter or other communication" with "A preliminary prospectus notice or other communication",*

(b) *by replacing subsection 13.1(2) with the following:*

13.1(2) If the preliminary prospectus notice or other communication is in writing, include the wording required under subsection (1) in bold type that is at least as large as that used generally in the body of the text., *and*

(c) *by adding the following after subsection 13.1(2):*

13.1(3) Subsection 13.1(1) does not apply to standard term sheets and marketing materials.

8. *Section 13.2 is amended*

(a) *in subsection 13.2(1), by replacing "A notice, circular, advertisement, letter or other communication" with "A final prospectus notice or other communication",*

(b) *by replacing subsection 13.2(2) with the following:*

13.2(2) If the final prospectus notice or other communication is in writing, include the wording required under subsection (1) in bold type that is at least as large as that used generally in the body of the text., *and*

(c) *by adding the following after subsection (2):*

13.2(3) Subsection (1) does not apply to standard term sheets and marketing materials.

9. *Section 13.3 is repealed.*

10. *Part 13 is amended by adding the following after section 13.3:*

Testing of the waters exemption – IPO issuers

13.4(1) In this section, "public issuer" means an issuer that

(a) is a reporting issuer in a jurisdiction of Canada;

(b) is an SEC issuer;

(c) has a class of securities that has been assigned a ticker symbol by the Financial Industry Regulatory Authority in the United States of America for use on any of the over-the-counter markets in the United States of America;

(d) has a class of securities that have been traded on an over-the-counter market with respect to which trade data is publicly reported; or

(e) has any of its securities listed, quoted or traded on a marketplace outside of Canada or any other facility outside of Canada for bringing together buyers and sellers of securities and with respect to which trade data is publicly reported.

13.4(2) Subject to subsections (3) to (7), the prospectus requirement does not apply to a solicitation of an expression of interest in order to ascertain if there would be sufficient interest in an initial public offering of securities by an issuer pursuant to a long form prospectus if

(a) the issuer has a reasonable expectation of filing a preliminary long form prospectus in respect of an initial public offering in at least one jurisdiction of Canada;

(b) the issuer is not a public issuer before the date of the preliminary long form prospectus;

(c) an investment dealer makes the solicitation on behalf of the issuer;

(d) the issuer provided written authorization to the investment dealer to act on its behalf before the investment dealer made the solicitation;

(e) the solicitation is made to an accredited investor; and

(f) subject to subsection (3), the issuer and the investment dealer keep all information about the proposed offering confidential until the earlier of

(i) the information being generally disclosed in a preliminary long form prospectus or otherwise, or

(ii) the issuer confirming in writing that it will not be pursuing the potential offering.

13.4(3) An investment dealer must not solicit an expression of interest from an accredited investor pursuant to subsection (2) unless

(a) all written material provided to the accredited investor

(i) is approved in writing by the issuer before it is provided,

(ii) is marked confidential, and

(iii) contains a legend stating that the material does not provide full disclosure of all material facts relating to the issuer, the securities or the offering and is not subject to liability for misrepresentations under applicable securities legislation; and

(b) before providing the investor with any information about the issuer, the securities or the offering, the investment dealer obtains confirmation in writing from the investor that the investor will keep information about the proposed offering confidential, and will not use the information for any purpose other than assessing the investor's interest in the offering, until the earlier of

(i) the information being generally disclosed in a preliminary long form prospectus or otherwise, or

(ii) the issuer confirming in writing that it will not be pursuing the potential offering.

13.4(4) If any investment dealer solicits an expression of interest pursuant to subsection (2), the issuer must not file a preliminary long form prospectus in respect of an initial public offering until the date which is at least 15 days after the date on which any investment dealer last solicited an expression of interest from an accredited investor pursuant to that subsection.

13.4(5) An issuer relying on the exemption in subsection (2) must keep

(a) a written record of any investment dealer that it authorized to act on its behalf in making solicitations in reliance on the exemption; and

(b) a copy of any written authorizations referred to in paragraph (2)(d).

13.4(6) If an investment dealer solicits an expression of interest pursuant to subsection (2), the investment dealer must keep

(a) a written record of any accredited investor that it solicited in reliance on the exemption;

(b) a copy of any written material and written approval referred to in subparagraph (3)(a)(i); and

(c) any written confirmations referred to in paragraph (3)(b).

13.4(7) Subsection (2) does not apply if

(a) any of the issuer's securities are held by a control person that is a public issuer; and

(b) the initial public offering of the issuer would be a material fact or material change with respect to the control person.

Standard term sheets during the waiting period

13.5(1) An investment dealer that provides a standard term sheet to a potential investor during the waiting period is exempt from the prospectus requirement with respect to providing the standard term sheet if

(a) the standard term sheet complies with subsections (2) and (3);

(b) other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering is disclosed in, or derived from, the preliminary prospectus or any amendment; and

(c) a receipt for the preliminary prospectus has been issued in the local jurisdiction.

13.5(2) A standard term sheet provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A preliminary prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada].

The preliminary prospectus is still subject to completion. Copies of the preliminary prospectus may be obtained from [*insert contact information for the investment dealer or underwriters*]. There will not be any sale or any acceptance of an offer to buy the securities until a receipt for the final prospectus has been issued.

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

13.5(3) A standard term sheet provided under subsection (1) may contain only the information referred to in subsection (2) and the following information in respect of the issuer, the securities or the offering:

(a) the name of the issuer;

(b) the jurisdiction or foreign jurisdiction in which the issuer's head office is located;

(c) the statute under which the issuer is incorporated, continued or organized or, if the issuer is an unincorporated entity, the laws of the jurisdiction or foreign jurisdiction under which it is established and exists;

(d) a brief description of the business of the issuer;

(e) a brief description of the securities;

(f) the price or price range of the securities;

(g) the total number or dollar amount of the securities, or range of the total number or dollar amount of the securities;

(h) the terms of any over-allotment option;

(i) the names of the underwriters;

- (j) whether the offering is on a firm commitment or best efforts basis;
- (k) the amount of the underwriting commission, fee or discount;
- (l) the proposed or expected closing date of the offering;
- (m) a brief description of the use of proceeds;
- (n) the exchange on which the securities are proposed to be listed, provided that the standard term sheet complies with the requirements of securities legislation for listing representations;
- (o) in the case of debt securities, the maturity date of the debt securities and a brief description of any interest payable on the debt securities;
- (p) in the case of preferred shares, a brief description of any dividends payable on the securities;
- (q) in the case of convertible securities, a brief description of the underlying securities into which the convertible securities are convertible;
- (r) in the case of exchangeable securities, a brief description of the underlying securities into which the exchangeable securities are exchangeable;
- (s) in the case of restricted securities, a brief description of the restriction;
- (t) in the case of securities for which a credit supporter has provided a guarantee or alternative credit support, a brief description of the credit supporter and the guarantee or alternative credit support provided;
- (u) whether the securities are redeemable or retractable;
- (v) a statement that the securities are eligible, or are expected to be eligible, for investment in registered retirement savings plans, tax-free savings accounts or other registered plans, if the issuer has received, or reasonably expects to receive, a legal opinion that the securities are so eligible;
- (w) contact information for the investment dealer or underwriters.

13.5(4) For the purposes of subsection (3), "brief description" means a description consisting of no more than three lines of text in type that is at least as large as that used generally in the body of the standard term sheet.

Standard term sheets after a receipt for a final prospectus

13.6(1) An investment dealer must not provide a standard term sheet to a potential investor after a receipt for a final prospectus or any amendment is issued unless

- (a) the standard term sheet complies with subsections (2) and (3);

(b) other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering is disclosed in, or derived from, the final prospectus or any amendment; and

(c) a receipt for the final prospectus has been issued in the local jurisdiction.

13.6(2) A standard term sheet provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A final prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada].

Copies of the final prospectus may be obtained from [*insert contact information for the investment dealer or underwriters*].

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final prospectus, and any amendment, for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

13.6(3) A standard term sheet provided under subsection (1) may contain only the information referred to in subsection (2) and the information referred to in subsection 13.5(3).

Marketing materials during the waiting period

13.7(1) An investment dealer that provides marketing materials to a potential investor during the waiting period is exempt from the prospectus requirement with respect to providing the marketing materials if

(a) the marketing materials comply with subsections (2) to (8);

(b) other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering is disclosed in, or derived from, the preliminary prospectus or any amendment;

(c) other than prescribed language, the marketing materials contain the same cautionary language in bold type as contained on the cover page, and in the summary, of the preliminary prospectus;

(d) a template version of the marketing materials is approved in writing by the issuer and the lead underwriter before the marketing materials are provided;

(e) a template version of the marketing materials is filed on or before the day that the marketing materials are first provided;

(f) a receipt for the preliminary prospectus has been issued in the local jurisdiction; and

(g) the investment dealer provides a copy of the preliminary prospectus and any amendment with the marketing materials.

13.7(2) If a template version of the marketing materials is approved in writing by the issuer and lead underwriter under paragraph (1)(d) and filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that

- (a) has a date that is different than the template version;
- (b) contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors;
- (c) contains contact information for the investment dealer or underwriters; or
- (d) has text in a format, including the type's font, colour or size, that is different than the template version.

13.7(3) If a template version of the marketing materials is divided into separate sections for separate subjects and is approved in writing by the issuer and lead underwriter under paragraph (1)(d), and that template version is filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

13.7(4) The issuer may remove any comparables, and any disclosure relating to those comparables, from the template version of the marketing materials before filing it under paragraph (1)(e) or (7)(a) if

- (a) the comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials;
- (b) the template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed in accordance with this subsection, provided that the note appears immediately after where the removed comparables and related disclosure would have been;
- (c) if the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority; and
- (d) the complete template version of the marketing materials contains disclosure proximate to the comparables which
 - (i) explains what comparables are;
 - (ii) explains the basis on which the other issuers were included in the comparables and why the other issuers are considered to be an appropriate basis for comparison with the issuer;

(iii) explains the basis on which the compared attributes were included;

(iv) states that the information about the other issuers was obtained from public sources and has not been verified by the issuer or the underwriters;

(v) discloses any risks relating to the comparables, including risks in making an investment decision based on the comparables; and

(vi) states that if the comparables contain a misrepresentation, the investor does not have a remedy under securities legislation.

13.7(5) Marketing materials provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A preliminary prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada]. A copy of the preliminary prospectus, and any amendment, is required to be delivered with this document.

The preliminary prospectus is still subject to completion. There will not be any sale or any acceptance of an offer to buy the securities until a receipt for the final prospectus has been issued.

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

13.7(6) If marketing materials are provided during the waiting period under subsection (1), the issuer must include the template version of the marketing materials filed under paragraph 1(e) in its final prospectus, or incorporate by reference the template version of the marketing materials filed under paragraph 1(e) into its final prospectus, in the manner described in subsection 36A.1(1) of Form 41-101F1 or subsection 11.6(1) of Form 44-101F1, as applicable.

13.7(7) If the final prospectus or any amendment modifies a statement of a material fact that appeared in marketing materials provided during the waiting period under subsection (1), the issuer must

(a) prepare and file, at the time the issuer files the final prospectus or any amendment, a revised template version of the marketing materials that is blacklined to show the modified statement, and

(b) include in the final prospectus, or any amendment, the disclosure required by subsection 36A.1(3) of Form 41-101F1 or subsection 11.6(3) of Form 44-101F1, as applicable.

13.7(8) A revised template version of the marketing materials filed under subsection (7) must comply with section 13.8.

13.7(9) If marketing materials are provided during the waiting period under subsection (1) but the issuer does not comply with subsection (6), the marketing materials are deemed for purposes of securities legislation to be incorporated into the issuer's final prospectus as of the date of the final prospectus to the extent not otherwise expressly modified or superseded by a statement contained in the final prospectus.

Marketing materials after a receipt for a final prospectus

13.8(1) An investment dealer must not provide marketing materials to a potential investor after a receipt for a final prospectus or any amendment is issued unless

- (a) the marketing materials comply with subsections (2) to (8);
- (b) other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering is disclosed in, or derived from, the final prospectus and any amendment;
- (c) other than prescribed language, the marketing materials contain the same cautionary language in bold type as contained on the cover page, and in the summary, of the final prospectus;
- (d) a template version of the marketing materials is approved in writing by the issuer and the lead underwriter before the marketing materials are provided;
- (e) a template version of the marketing materials is filed on or before the day that the marketing materials are first provided;
- (f) a receipt for the final prospectus has been issued in the local jurisdiction; and
- (g) the investment dealer provides a copy of the final prospectus, and any amendment, with the marketing materials.

13.8(2) If a template version of the marketing materials is approved in writing by the issuer and lead underwriter under paragraph (1)(d) and filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that

- (a) has a date that is different than the template version;
- (b) contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors;
- (c) contains contact information for the investment dealer or underwriters; or
- (d) has text in a format, including the type's font, colour or size, that is different than the template version.

13.8(3) If a template version of the marketing materials is divided into separate sections for separate subjects and is approved in writing by the issuer and lead underwriter under paragraph (1)(d), and that template version is filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

13.8(4) The issuer may remove any comparables, and any disclosure relating to those comparables, from the template version of the marketing materials before filing it under paragraph (1)(e) or (7)(b) if

(a) the comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials;

(b) the template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed in accordance with this subsection, provided that the note appears immediately after where the removed comparables and related disclosure would have been;

(c) if the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority; and

(d) the complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d).

13.8(5) Marketing materials provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A final prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada]. A copy of the final prospectus, and any amendment, is required to be delivered with this document.

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final prospectus, and any amendment, for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

13.8(6) An investment dealer must not provide marketing materials under subsection (1) unless the issuer

(a) has included the template version of the marketing materials filed under paragraph 1(e) in its final prospectus, and any amendment, or incorporated by reference the template version of the marketing materials filed under paragraph 1(e) into its final prospectus, and any amendment, in the manner described in subsection 36A.1(1) of Form 41-101F1 or subsection 11.6(1) of Form 44-101F1, as applicable, or

(b) has included in its final prospectus, and any amendment, the statement described in subsection 36A.1(4) of Form 41-101F1 or subsection 11.6(4) of Form 44-101F1, as applicable.

13.8(7) If an amendment to a final prospectus modifies a statement of material fact that appeared in marketing materials provided under subsection (1), the issuer must

(a) indicate in the amendment to the final prospectus that the marketing materials are not part of the final prospectus, as amended, to the extent that the contents of the marketing materials have been modified or superseded by a statement contained in the amendment;

(b) prepare and file, at the time the issuer files the amendment to the final prospectus, a revised template version of the marketing materials that is blacklined to show the modified statement; and

(c) include in the amendment to the final prospectus the disclosure required by subsection 36A.1(3) of Form 41-101F1 or subsection 11.6(3) of Form 44-101F1, as applicable.

13.8(8) Any revised template version of the marketing materials filed under subsection (7) must comply with this section.

13.8(9) If marketing materials are provided under subsection (1) but the issuer did not comply with subsection (6), the marketing materials are deemed for purposes of securities legislation to be incorporated into the issuer's final prospectus as of the date of the final prospectus to the extent not otherwise expressly modified or superseded by a statement contained in the final prospectus.

Road shows during the waiting period

13.9(1) An investment dealer that conducts a road show for potential investors during the waiting period is exempt from the prospectus requirement with respect to that road show if

(a) the road show complies with subsections (2) to (4); and

(b) a receipt for the preliminary prospectus has been issued in the local jurisdiction.

13.9(2) Subject to section 13.12, an investment dealer must not provide marketing materials to an investor attending a road show conducted under subsection (1) unless the marketing materials are provided in accordance with section 13.7.

13.9(3) If an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to

(a) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;

(b) keep a record of any information provided by the investor; and

(c) provide the investor with a copy of the preliminary prospectus and any amendment.

13.9(4) If an investment dealer permits an investor, other than an accredited investor, to attend a road show, the investment dealer must commence the road show with the oral reading of the following statement or a statement to the same effect:

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

Road shows after a receipt for a final prospectus

13.10(1) An investment dealer must not conduct a road show for potential investors after a receipt for a final prospectus or any amendment is issued unless

- (a) the road show complies with subsections (2) to (4); and
- (b) a receipt for the final prospectus has been issued in the local jurisdiction.

13.10(2) Subject to section 13.12, an investment dealer must not provide marketing materials to an investor attending a road show conducted under subsection (1) unless the marketing materials are provided in accordance with section 13.8.

13.10(3) If an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to

- (a) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;
- (b) keep a record of any information provided by the investor; and
- (c) provide the investor with a copy of the final prospectus and any amendment.

13.10(4) If an investment dealer permits an investor, other than an accredited investor, to attend a road show, the investment dealer must commence the road show with the oral reading of the following statement or a statement to the same effect:

This presentation does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final prospectus and any amendment for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

Exception from procedures for road shows for certain U.S. cross-border initial public offerings

13.11(1) Subject to subsection (2), the following provisions do not apply to an investment dealer that conducts a road show in connection with a U.S. cross-border initial public offering:

- (a) paragraphs 13.9(3)(a) and (b);

(b) paragraphs 13.10(3)(a) and (b).

13.11(2) Subsection (1) does not apply unless

(a) the issuer is relying on the exemption from United States filing requirements in Rule 433(d)(8)(ii) under the 1933 Act in respect of the road show; and

(b) the investment dealer establishes and follows reasonable procedures to

(i) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to voluntarily provide their name and contact information; and

(ii) keep a record of any information voluntarily provided by the investor.

Exception from filing and incorporation requirements for road shows for certain U.S. cross-border offerings

13.12(1) Subject to subsections (2) to (4), if an investment dealer provides marketing materials to a potential investor in connection with a road show for a U.S. cross-border offering, the following provisions do not apply to the template version of the marketing materials relating to the road show:

(a) paragraphs 13.7(1)(e) and 13.8(1)(e);

(b) subsections 13.7(6) to (9);

(c) subsections 13.8(6) to (9);

(d) paragraphs 36A.1(1)(b) and (c), paragraph 36A.1(3)(b), subsection 36A.1(4) and section 37.6 of Form 41-101F1;

(e) paragraphs 11.6(1)(b) and (c), paragraph 11.6(3)(b) and subsection 11.6(4) of Form 44-101F1.

13.12(2) Subsection (1) does not apply unless

(a) the underwriters have a reasonable expectation that the securities offered under the U.S. cross-border offering will be sold primarily in the United States of America;

(b) the issuer and the underwriters who sign the prospectus filed in the local jurisdiction provide a contractual right containing the language set out in subsection 36A.1(5) of Form 41-101F1, or words to the same effect, except that the language may specify that the contractual right does not apply to any comparables provided in accordance with subsection (3); and

(c) if the prospectus is filed in the local jurisdiction, the template version of the marketing materials relating to the road show is delivered to the securities regulatory authority.

13.12(3) If the template version of the marketing materials relating to the road show contains comparables, the template version of the marketing materials must contain the disclosure referred to in paragraph 13.7(4)(d).

13.12(4) For greater certainty, subsection (1) does not apply to marketing materials other than the marketing materials provided in connection with the road show.

PART 13A – ADVERTISING AND MARKETING IN CONNECTION WITH PROSPECTUS OFFERINGS OF INVESTMENT FUNDS

Application

13A.1 This Part applies to investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.

Legend for communications during the waiting period

13A.2(1) A preliminary prospectus notice or other communication used in connection with a prospectus offering during the waiting period must contain the following legend, or words to the same effect:

A preliminary prospectus containing important information relating to these securities has been filed with securities commissions or similar authorities in certain jurisdictions of Canada. The preliminary prospectus is still subject to completion or amendment. Copies of the preliminary prospectus may be obtained from *[insert name and contact information for dealer or other relevant person or company]*. There will not be any sale or acceptance of an offer to buy the securities until a receipt for the final prospectus has been issued.

13A.2(2) If the preliminary prospectus notice or other communication is in writing, include the wording required under subsection (1) in bold type that is at least as large as that used generally in the body of the text.

Legend for communications following receipt for the final prospectus

13A.3(1) A final prospectus notice or other communication used in connection with a prospectus offering following the issuance of a receipt for the final prospectus must contain the following legend, or words to the same effect:

This offering is made only by prospectus. The prospectus contains important detailed information about the securities being offered. Copies of the prospectus may be obtained from *[insert name and contact information for dealer or other relevant person or company]*. Investors should read the prospectus before making an investment decision.

13A.3(2) If the final prospectus notice or other communication is in writing, include the wording required under subsection (1) in bold type that is at least as large as that used generally in the body of the text.

Advertising during the waiting period

13A.4 If the issuer is an investment fund, an advertisement used in connection with a prospectus offering during the waiting period may state only the following information:

- (a) whether the security represents a share in an incorporated entity or an interest in an unincorporated entity;
- (b) the name of the issuer;
- (c) the price of the security;
- (d) the fundamental investment objectives of the investment fund;
- (e) the name of the manager of the investment fund;
- (f) the name of the portfolio manager of the investment fund;
- (g) the name and address of a person or company from whom a preliminary prospectus may be obtained and purchases of securities may be made;
- (h) how many securities will be made available;
- (i) whether the security is or will be a qualified investment for a registered retirement savings plan, registered retirement income fund, registered education savings plan or tax free savings account or qualifies, or will qualify, the holder for special tax treatment..

11. The general instructions of Form 41-101F1 Information Required in a Prospectus are amended by adding the following instruction after instruction (15):

(16) Marketing materials prepared in accordance with subsections 13.7(1) or 13.8(1) of the Instrument are the only documents that can be incorporated by reference into a long form prospectus..

12. Paragraph 20.2(a) of Form 41-101F1 is amended 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]".

13. Form 41-101F1 is amended by adding the following after Item 36:

ITEM 36A: Marketing Materials

Marketing materials

36A.1(1) If marketing materials were provided under subsection 13.7(1) or 13.8(1) of the Instrument, the issuer must

- (a) include a section, under the heading "Marketing Materials", proximate to the beginning of the prospectus that contains the disclosure required by this Item,

(b) subject to subsection (2), include the template version of the marketing materials filed under the Instrument in the final prospectus, or incorporate by reference the template version of the marketing materials filed under the Instrument into the final prospectus, and

(c) indicate that the template version of the marketing materials is not part of the final prospectus to the extent that the contents of the template version of the marketing materials have been modified or superseded by a statement contained in the final prospectus.

36A.1(2) An issuer may comply with paragraph (1)(b) by including the template version of the marketing materials filed under the Instrument in the section of the prospectus under the heading "Marketing Materials" or in an appendix to the prospectus that is referred to in that section.

36A.1(3) If the prospectus or any amendment modifies a statement of material fact that appeared in marketing materials provided earlier,

(a) provide details of how the statement in the marketing materials has been modified, and

(b) disclose that, pursuant to subsection 13.7(7) or 13.8(7) of the Instrument,

(i) the issuer has prepared a revised template version of the marketing materials which has been blacklined to show the modified statement, and

(ii) the revised template version of the marketing materials can be viewed under the issuer's profile on www.sedar.com.

36A.1(4) State that any template version of the marketing materials filed under the Instrument after the date of the final prospectus and before the termination of the distribution is deemed to be incorporated into the final prospectus.

36A.1(5) If the issuer relies on the exception in subsection 13.12(1) of the Instrument, include the following statement, or words to the same effect:

"Before the filing of the final prospectus, the issuer and underwriters held road shows on *[insert dates and brief description of road shows for U.S. cross-border offering eligible for the exception in subsection 13.12(1) of the Instrument or other prospectus rule]* to which potential investors in *[insert the jurisdictions of Canada where the prospectus was filed]* were able to attend. The issuer and the underwriters provided marketing materials to those potential investors in connection with those road shows.

In doing so, the issuer and the underwriters relied on a provision in applicable securities legislation that allows issuers in certain U.S. cross-border offerings to not have to file marketing materials relating to those road shows on SEDAR or include or incorporate those marketing materials in the final prospectus. The issuer and the underwriters can only do that if they give a contractual right to investors in the event the marketing materials contain a misrepresentation.

Pursuant to that provision, the issuer and the underwriters signing the certificate contained in this prospectus have agreed that in the event the marketing materials relating to those road shows contain a misrepresentation (as defined in securities legislation in *[insert the jurisdictions of Canada where the prospectus was filed]*), a purchaser resident in *[insert the jurisdictions of Canada where the prospectus was filed]* who was provided with those marketing materials in connection with the road shows and who purchases the securities offered by this prospectus during the period of distribution shall have, without regard to whether the purchaser relied on the misrepresentation, rights against the issuer and each underwriter with respect to the misrepresentation which are equivalent to the rights under the securities legislation of the jurisdiction in Canada where the purchaser is resident, subject to the defences, limitations and other terms of that legislation, as if the misrepresentation was contained in this prospectus.

However, this contractual right does not apply to the extent that the contents of the marketing materials relating to the road shows have been modified or superseded by a statement in this prospectus. In particular, *[insert a description of how any statement in the marketing materials has been modified or superseded by a statement in the prospectus]."*

GUIDANCE

Marketing materials do not, as a matter of law, amend a preliminary prospectus, a final prospectus or any amendment..

14. Item 37 of Form 41-101F1 is amended by adding the following after section 37.5:

Marketing materials

37.6 If an issuer filed a template version of marketing materials under paragraph 13.7(1)(e) of the Instrument or intends to file a template version of marketing materials under paragraph 13.8(1)(e) of the Instrument, change "prospectus" to "prospectus (which includes the marketing materials included or incorporated by reference)" where it first appears in the statements in sections 37.2 and 37.3..

15. The following is added after Appendix C:

**APPENDIX D TO NATIONAL INSTRUMENT 41-101
GENERAL PROSPECTUS REQUIREMENTS**

PRELIMINARY PROSPECTUS NOTICE PROVISIONS

Jurisdiction	Securities Legislation Reference
Alberta	Paragraph 123(a) of the <i>Securities Act</i> (Alberta)
British Columbia	Paragraph 78(2)(a) of the <i>Securities Act</i> (British Columbia)
Manitoba	Paragraph 38(b) of the <i>Securities Act</i> (Manitoba)
New Brunswick	Paragraph 82(2)(a) of the <i>Securities Act</i> (New Brunswick)

Newfoundland and Labrador	Paragraph 66(2)(a) of the <i>Securities Act</i> (Newfoundland and Labrador)
Northwest Territories	Paragraph 97(a) of the <i>Securities Act</i> (Northwest Territories)
Nova Scotia	Paragraph 70(2)(a) of the <i>Securities Act</i> (Nova Scotia)
Nunavut	Paragraph 97(a) of the <i>Securities Act</i> (Nunavut)
Ontario	Paragraph 65(2)(a) of the <i>Securities Act</i> (Ontario)
Prince Edward Island	Paragraph 97(a) of the <i>Securities Act</i> (Prince Edward Island)
Saskatchewan	Paragraph 73(2)(a) of <i>The Securities Act, 1988</i> (Saskatchewan)
Yukon	Paragraph 97(a) of the <i>Securities Act</i> (Yukon)

**APPENDIX E TO NATIONAL INSTRUMENT 41-101
GENERAL PROSPECTUS REQUIREMENTS**

FINAL PROSPECTUS NOTICE PROVISIONS

Jurisdiction	Securities Legislation Reference
British Columbia	Paragraph 82(c) of the <i>Securities Act</i> (British Columbia)
New Brunswick	Section 86 of the <i>Securities Act</i> (New Brunswick), but only in respect of a communication described in paragraph 82(2)(a) of that Act
Newfoundland and Labrador	Section 70 of the <i>Securities Act</i> (Newfoundland and Labrador), but only in respect of a communication described in paragraph 66(2)(a) of that Act
Nova Scotia	Section 74 of the <i>Securities Act</i> (Nova Scotia), but only in respect of a communication described in paragraph 70(2)(a) of that Act
Ontario	Section 69 of the <i>Securities Act</i> (Ontario), but only in respect of a communication described in clause 65(2)(a) of that Act

Saskatchewan

Paragraph 77(c) of *The Securities Act, 1988*
(Saskatchewan).

16. This Instrument comes into force on August 13, 2013.

17. This Instrument may be cited as MSC Rule-2013-20.

Schedule D-2

Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements

1. *The changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements are set out in this Schedule.*
2. *Section 3.10 is changed by adding the following after subsection (5):*
 - (6) Marketing materials prepared under section 13.7 or 13.8 of the Instrument cannot amend a preliminary prospectus, a final prospectus or any amendment..
3. *The title of Part 6 is changed by adding "of Issuers other than Investment Funds" after "Offerings".*
4. *Part 6 is changed by adding the following section before section 6.1:*

Application

- 6.0 This Part applies to issuers other than investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.
5. *Subsection 6.1(2) is replaced with the following:*
 - (2) Issuers and other persons or companies that engage in advertising or marketing activities should also consider the impact of the requirement to register as a dealer in each jurisdiction where such advertising or marketing activities are undertaken. In particular, the persons or companies would have to consider whether their activities result in the party being in the business of trading in securities. For further information, refer to section 1.3 of Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations.*
6. *Subsection 6.2(9) is changed by adding the following as a second paragraph:*

Although the "testing of the waters" exemption in subsection 13.4(2) of the Instrument allows an investment dealer to solicit expressions of interest from accredited investors before the filing of a preliminary prospectus for an initial public offering, we note that the exemption is

- a limited accommodation to issuers and investment dealers that want a greater opportunity to confidentially test the waters before filing a preliminary prospectus for an initial public offering, and
- subject to a number of conditions to address our regulatory concerns, including conditions to deter conditioning of the market..

7. *The following is added after section 6.3:*

Research reports

6.3A(1) In order to address regulatory concerns such as conditioning of the market, an investment dealer involved with a potential prospectus offering for an issuer should not issue a research report on the issuer or provide media commentary on the issuer prior to the filing of a preliminary prospectus, the announcement of a bought deal under section 7.2 of NI 44-101 or the filing of a shelf prospectus supplement under NI 44-102, unless the investment dealer has appropriate "ethical wall" policies and procedures in place between:

- the business unit that proposes to issue the research report or provide media commentary, and
- the business unit that proposes to act as underwriter for the distribution.

We understand that many investment dealers have adopted written ethical wall policies and procedures designed to contain non-public information about an issuer and assist the investment dealer and its officers and employees in complying with applicable securities laws relating to insider trading and trading by "tippees" (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*).

- (2) Any research reports would have to comply with section 7.7 of the Universal Market Integrity Rules of the Investment Industry Regulatory Organization of Canada and any applicable local rule..

8. *Section 6.4 is changed*

(a) *in subsection (2)*

- (i) *by replacing "exception to" with "exemption from", and*
- (ii) *by replacing "exception is" with "exemption is",*

(b) *in subsection (3)*

- (i) *by replacing "an enforceable" with "a bought deal", and*
- (ii) *by replacing "press" with "news",*

(c) *by replacing subsection (4) with the following:*

- (4) We consider that a distribution of securities commences at the time when
- a dealer has had discussions with an issuer or a selling securityholder, or with another dealer that has had discussions with an issuer or a selling securityholder about the distribution, and
 - those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or the selling securityholder an underwriting of the securities.

CSA staff do not agree with interpretations that a distribution of securities does not commence until a later time (e.g., when a proposed engagement letter or a proposal for an underwriting of securities with indicative terms is provided by a dealer to an issuer or a selling securityholder).

Similarly, we do not agree with interpretations that if an issuer rejects a proposed engagement letter or a proposal for an underwriting from a dealer, the "distribution" has ended and the dealer could immediately resume communications with potential investors concerning their interest in purchasing securities from the issuer. In these situations, we expect the dealer not to resume communications with potential investors until after a "cooling off" period. We have concerns that such interpretations would allow dealers to circumvent the pre-marketing restrictions by continuing to test the waters between a series of rejected proposals in close succession until the issuer finally accepts a proposal.

By way of example, the following are situations which would indicate that "sufficient specificity" has occurred and a distribution of securities has commenced:

- Following discussions with an issuer, a dealer provides the issuer with a document outlining possible prospectus financing scenarios at one or more specified share price ranges. Subsequently, management of the issuer recommends to its board of directors that the issuer pursue a prospectus financing at a share price range contemplated by the dealer, the directors of the issuer give management broad authority to execute on a prospectus financing opportunity within that share price range if one arose and the dealer is advised of this approval.
- Following discussions with an issuer, a dealer advises the issuer that the market was looking good for a possible prospectus offering and that the dealer would likely provide indicative terms for an offering later that day.

CSA staff are aware that a practice has developed for "non-deal road shows" where issuers and dealers will meet with institutional investors to discuss the business and affairs of the issuer. If such a non-deal road show was undertaken in anticipation of a prospectus offering, it would generally be prohibited under securities legislation by virtue of the prospectus requirement.

CSA staff would also have selective disclosure concerns if the issuer provided the institutional investors with material information that has not been publicly disclosed. In this regard, see the guidance in Part V of National Policy 51-201 *Disclosure Standards*,

(d) ***in subsection (6), by replacing "press release that announces the entering into of an enforceable agreement in respect of a bought deal" with "news release that announces the entering into of a bought deal agreement", and***

(e) ***by adding the following after subsection (7):***

(8) The bought deal exemption in Part 7 of NI 44-101 is a limited accommodation to facilitate issuers seeking certainty of financing. This policy rationale is reflected in the terms and conditions of the exemption. In particular, in order for the exemption to be available for use, the issuer must have entered into a bought deal agreement with an underwriter who has, or underwriters who have, agreed to purchase the securities on a firm commitment basis. The definition of bought deal agreement in subsection 7.1(1) in NI 44-101 provides that a bought deal agreement must not have:

- a "market-out clause" (as defined in subsection 7.1(1) of NI 44-101),
- an upsizing option (other than an over-allotment option as defined in section 1.1 of the Instrument), or
- a confirmation clause (other than a confirmation clause that complies with section 7.4 of NI 44-101).

(9) Section 7.3 of NI 44-101 allows a bought deal agreement to be modified in certain circumstances. Subsection 7.3(2) sets out conditions for any amendment to increase the number of securities to be purchased by the underwriters. Subsection 7.3(4) sets out conditions for any amendment to provide for a different type of securities to be purchased by the underwriters, and a different price for the securities. Subsection 7.3(5) sets out conditions for any amendment to add additional underwriters or remove an underwriter. Subsection 7.3(6) provides that a bought deal agreement may be replaced with a more extended form of underwriting agreement if the more extended form of underwriting

agreement complies with the terms and conditions that apply to a bought deal agreement under Part 7 of NI 44-101. Subsection 7.3(7) provides that the parties may agree to terminate a bought deal agreement if the parties decide not to proceed with the distribution. However, section 7.3 is not intended to prevent a party from exercising a termination right under a provision in a bought deal agreement, or a more extended form of underwriting agreement, that permits a party to terminate the agreement if:

- another party or person performs, or fails to perform, certain actions, or
- certain events occur or fail to occur.

(10) Subsection 7.3(3) of NI 44-101 provides that a bought deal agreement may be amended to reduce the number of securities to be purchased, or the price of the securities, provided the amendment is made on or after the date which is four business days after the date the original agreement was entered into. As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. This policy rationale has not been met when a bought deal agreement is amended to provide for a smaller offering or a lower share price, particularly within a short period of time after the original agreement has been signed. If an underwriter does not wish to assume the risk of a bought deal, the underwriter may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.

(11) Section 7.4 of NI 44-101 provides that a bought deal agreement may not contain a confirmation clause (as defined in section 7.1 of NI 44-101) unless certain conditions apply. In particular, confirmation clauses are not permitted unless the confirmation period is only between the day on which the bought deal agreement is signed, and the next business day.

Since "sufficient specificity", as discussed in subsection (4), will have occurred before the time the signed bought deal agreement is presented to the issuer pursuant to paragraph 7.4(1)(a) of NI 44-101, underwriters cannot communicate with investors about the issuer or the distribution until the bought deal agreement is signed by the issuer, confirmed by the lead underwriter in accordance with section 7.4 of NI 44-101, and announced in a news release. Furthermore, the issuer and underwriters would be bound by insider trading and tippee prohibitions in securities legislation until the news release announcing the bought deal has been broadly disseminated.

(12) We note that the use of confirmation clauses in bought deal agreements under Part 7 of NI 44-101 is different from the practice of "overnight marketed deals". In an overnight marketed offering, the issuer is not relying on the bought deal exemption in Part 7 of NI 44-101. Instead, in a typical overnight marketing offering,

- On the first day (day 1), the issuer will file a preliminary prospectus with "bullets" for size of the offering and the price per security.
- After a receipt for the preliminary prospectus is issued on day 1, the underwriters will, after the close of trading, market the deal "overnight" to institutional and other investors.
- On the morning of the second day (day 2), the underwriters will provide the issuer with details of the proposed size of the offering and the price per security. If the issuer accepts the proposed terms, the issuer and the underwriters will sign an agreement in which the underwriters agree to purchase the base amount of the offering on a firm commitment basis. The issuer will then issue and file a news release announcing the agreement.
- Later on day 2, the issuer will file an amended and restated preliminary prospectus that discloses the agreement, the size of the offering and the price per security.
- Alternatively, if the issuer does not accept the terms proposed by the underwriters after the overnight marketing, the issuer will withdraw the preliminary prospectus.

(13) We note that underwriters often specify in a bought deal agreement, or a more extended form of underwriting agreement, that the issuer must file and obtain a receipt for the final prospectus within a short period of time after the first comment letter in respect of the preliminary prospectus is issued by staff of the principal regulator under National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions*. However, issues may arise in the first comment letter that cannot be resolved within the time frame contemplated in the bought deal agreement or the underwriting agreement. Accordingly, issuers and underwriters should not expect that all comments can be resolved within a particular period of time.

As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. This policy rationale may not have been met if a bought deal agreement is terminated because regulatory comments are not settled within a

short period of time after the first comment letter. If an underwriter does not want to assume the risk of a bought deal and allow for a reasonable period of time for the issuer to settle any comments from staff of the principal regulator, the underwriter may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.

- (14) If an underwriter enters into an engagement letter, or similar agreement, with an issuer solely for the purpose of conducting due diligence before a potential bought deal under Part 7 of NI 44-101, that event will not, in and of itself, indicate that "sufficient specificity" has been achieved as discussed in subsection (4), provided that the engagement letter does not contain any other information which indicates that "it is reasonable to expect that the dealer will propose to the issuer an underwriting of securities".

If permitted by the issuer, an underwriter may want to conduct sufficient due diligence before proposing a bought deal under Part 7 of NI 44-101. Where an issuer is required to file technical reports under National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, the underwriter may want to confirm, as part of its due diligence before proposing a bought deal, that the issuer's technical reports are compliant with the requirements of that instrument.

As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. While we recognize that a bought deal agreement or a more extended form of underwriting agreement often contain provisions giving the underwriters a right to terminate the agreement under a "due diligence out", these provisions should not be used in a way that would defeat the policy rationale of the bought deal exemption.

Where underwriters are not willing or able to conduct sufficient due diligence in advance of proposing a bought deal to an issuer, the underwriters may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.

Testing of the waters exemption – IPO issuers

- 6.4A(1) The testing of the waters exemption for issuers planning to conduct an initial public offering (IPO issuers) in subsection 13.4(2) of the Instrument is intended for issuers that have a reasonable expectation of filing a long form prospectus in respect of an initial public offering (IPO) in at least one jurisdiction of Canada. The exemption permits an IPO issuer, through an investment dealer, to determine interest in a potential IPO through limited confidential communication with accredited investors. The purpose of the exemption is to provide a way for an IPO issuer to ascertain if

there is adequate investor interest before starting the IPO process and incurring costs (e.g., retaining advisors to engage in formal due diligence activities and draft a preliminary prospectus).

The exemption is not intended to allow an investment dealer to "pre-sell" the IPO and "fill their book" before the filing of a preliminary prospectus. Consequently, subsection 13.4(4) of the Instrument provides that if any investment dealer solicits an expression of interest under the exemption, the issuer must not file a preliminary prospectus in respect of an IPO until the date which is at least 15 days after the date on which an investment dealer last solicited an expression of interest from an accredited investor under the exemption.

- (2) The testing of the waters exemption for IPO issuers permits an investment dealer to solicit expressions of interest from accredited investors if the conditions of the exemption are met. Any investment dealer relying on this exemption would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstances) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include soliciting expressions of interest).
- (3) In order for the exemption to be used, paragraph 13.4(2)(b) of the Instrument provides that the IPO issuer must not be a "public issuer", as defined in subsection 13.4(1). This means that the IPO issuer must not be a public company in any country, and must not have its securities traded in any country on a stock exchange, marketplace or any other facility for bringing together buyers and sellers of securities and with respect to which trade data is publicly reported. Similarly, subsection 13.4(7) of the Instrument provides that the exemption is not available for use if:
 - any of the IPO issuer's securities are held by a control person that is a public issuer, and
 - the IPO of the IPO issuer would be a material fact or material change with respect to the control person.
- (4) Subsection 13.4(5) of the Instrument requires an issuer to keep a written record of any investment dealer that it authorized to act on its behalf in making solicitations in reliance on the testing of the waters exemption for IPO issuers in subsection 13.4(2) of the Instrument. The issuer must also keep copies of the written authorizations referred to in paragraph 13.4(2)(d) of the Instrument. To meet this requirement, we would expect the issuer to record the name of a contact person for each investment dealer

that it authorized and contact information for that person. During compliance reviews, securities regulators may ask the issuer to provide them with copies of these documents.

- (5) The testing of the waters exemption for IPO issuers may be used at the same time by more than one investment dealer in respect of the same issuer, provided that the issuer has authorized each investment dealer in accordance with paragraph 13.4(2)(d) of the Instrument.
- (6) Paragraph 13.4(6)(a) of the Instrument requires an investment dealer to keep a written record of the accredited investors that it solicits pursuant to the exemption, a copy of any written material and written approval referred to in subparagraph 13.4(3)(a)(i) and a copy of the written confirmations referred to in paragraph 13.4(3)(b). To meet this requirement, we would expect the investment dealer to record the name of the contact person for each accredited investor that it solicited and contact information for that person. During compliance reviews, securities regulators may ask the investment dealer to provide them with copies of these documents.
- (7) An investment dealer soliciting expressions of interest in accordance with the testing of the waters exemption for IPO issuers in subsection 13.4(2) of the Instrument may only solicit expressions of interest from an accredited investor if certain conditions are met. One condition in paragraph 13.4(3)(b) of the Instrument is that before providing the investor with information about the proposed offering, the investment dealer must obtain confirmation in writing from the investor that the investor will keep information about the proposed offering confidential, and will not use the information for any purpose other than assessing the investor's interest in the offering, until the earlier of the information being generally disclosed in a preliminary long form prospectus, or the issuer confirming in writing that it will not be pursuing the potential offering. An investment dealer may obtain this written confirmation from an accredited investor by return email. Here is a sample email that an investment dealer could use:

"We want to provide you with information about a proposed initial public offering of securities. Before we can provide you with this information, you must confirm by return email that:

- *You agree to receive certain confidential information about a proposed initial public offering by an issuer.*

- *You agree to keep the information about the proposed offering confidential and not to use the information for any purpose other than assessing your interest in the offering, until the earlier of (i) the information being generally disclosed in a preliminary prospectus or otherwise, or (ii) the issuer confirming in writing that it will not be pursuing the potential offering."*

An accredited investor may respond to this email by simply stating "I so confirm".

We remind investment dealers and accredited investors that they should not be using the information received under the testing of the waters exemption for IPO issuers in a way that may be considered abusive. For example, we would consider it inappropriate for an accredited investor to use information about the IPO issuer to make decisions about trading in securities of competitors of the IPO issuer. We note that CSA staff may investigate subsequent trading in securities of competitors of IPO issuers that have used the testing of the waters exemption.

(8) Subparagraph 13.4(3)(a)(i) of the Instrument requires that any written materials used by an investment dealer to solicit expressions of interest under the testing of the waters exemption be approved by the issuer. We remind issuers and investment dealers that:

- Any preliminary prospectus filed by the issuer subsequent to the solicitation must contain full, true and plain disclosure of all material facts.
- Selective disclosure concerns would arise if accredited investors were provided with material facts that are not disclosed in any subsequent preliminary prospectus.

(9) We would expect an investment dealer seeking to solicit accredited investors in reliance on the testing of the waters exemption for IPO issuers to:

- conduct reasonable diligence to determine that an investor is an accredited investor before soliciting the investor, and
- retain all documentation that they receive in this regard.

(10) Since soliciting accredited investors under the testing of the waters exemption for IPO issuers would be an act in furtherance of a trade, an issuer and an investment dealer acting on behalf of the

issuer would not be able to rely on the exemption if the issuer was subject to a cease trade order.

- (11) We refer issuers and investment dealers to the guidance in section 6.10 of this Policy. We note that issuers and investment dealers should have procedures in place to prevent "leaks" of information before the filing of a preliminary prospectus for an initial public offering..

9. Section 6.5 is changed

(a) by replacing subsection (1) with the following:

- (1) Securities legislation provides for certain exceptions to the prospectus requirement for limited advertising or marketing activities during the waiting period between the issuance of the receipt for the preliminary prospectus and the receipt for the final prospectus. Despite the prospectus requirement, it is permissible during the waiting period to

- (a) distribute a preliminary prospectus notice (as defined in the Instrument) that

- "identifies" the securities proposed to be issued,
- states the price of such securities, if then determined, and
- states the name and address of a person or company from whom purchases of securities may be made,

provided that any such notice states the name and address of a person or company from whom a preliminary prospectus may be obtained and contains the legend required by subsection 13.1(1) of the Instrument;

- (b) distribute the preliminary prospectus;
- (c) provide standard term sheets, if the conditions in section 13.5 of the Instrument are complied with;
- (d) provide marketing materials, if the conditions in section 13.7 of the Instrument are complied with; and
- (e) solicit expressions of interest from a prospective purchaser, if prior to such solicitation or forthwith after the prospective purchaser indicates an interest in purchasing the securities, a copy of the preliminary prospectus is forwarded to the prospective purchaser.,

- (b) *in subsection (3), by adding "contemplated by paragraph 6.5(1)(a) above" after "security", and*
- (c) *in subsection (4), by adding in the first sentence "as contemplated by paragraph 6.5(1)(a) above" after the first reference to "security".*

10. The following is added after section 6.5:

Standard term sheets

6.5A(1) The standard term sheet provisions in sections 13.5 and 13.6 of the Instrument, section 7.5 of NI 44-101, section 9A.2 of NI 44-102 and section 4A.2 of NI 44-103 permit an investment dealer to provide a standard term sheet to a potential investor if the conditions of the applicable provision are met.

Any investment dealer relying on these provisions would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstance) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include providing a standard term sheet to an investor).

- (2) The Instrument defines "standard term sheet" to mean a written communication regarding a distribution of securities under a prospectus that contains no information other than that referred to in subsections 13.5(2) and (3) or subsections 13.6(2) and (3) of the Instrument, subsections 7.5(2) and (3) of NI 44-101, subsections 9A.2(2) and (3) of NI 44-102 or subsections 4A.2(2) and (3) of NI 44-103 relating to an issuer, securities or an offering. A standard term sheet does not include a preliminary prospectus notice or a final prospectus notice, each as defined in the Instrument.
- (3) Standard term sheets are subject to the provisions in applicable securities legislation which prohibit misleading or untrue statements. Furthermore, standard term sheets must contain the legends required by subsections 13.5(2) and 13.6(2) of the Instrument, subsection 7.5(2) of NI 44-101, subsection 9A.2(2) of NI 44-102 and subsection 4A.2(2) of NI 44-103, as applicable.
- (4) In the case of a standard term sheet provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.5(1)(b) and 13.6(1)(b) of the Instrument require that, other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering must be disclosed in, or derived from, the preliminary prospectus or the final prospectus, respectively.

Similarly, in the case of a standard term sheet for a bought deal under Part 7 of NI 44-101 that is provided before the filing of the preliminary

prospectus, paragraph 7.5(1)(c) of NI 44-101 requires that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 7.5(1)(c)(i) of NI 44-101, or
- later be disclosed in, or derived from, the preliminary prospectus that is subsequently filed.

In the case of a standard term sheet for a tranche of securities to be offered under the shelf procedures (a draw-down) pursuant to a final base shelf prospectus, paragraph 9A.2(1)(b) of NI 44-102 provides that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 9A.2(1)(b)(i) of NI 44-102, or
- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed.

In the case of a standard term sheet after a receipt for a final base PREP prospectus, paragraph 4A.2(1)(b) of NI 44-103 provides that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 4A.2(1)(b)(i) of NI 44-103, or
- later be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed.

In this regard, if an investment dealer includes information in a standard term sheet for a bought deal, a draw-down under a shelf prospectus or an offering under the PREP procedures that is not currently on the public record, the investment dealer and the issuer should be mindful of selective disclosure concerns and take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees" (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*). For example, if the information could affect the market price of the issuer's securities, it should be broadly disseminated in a news release before being included in a standard term sheet. If the information was a material change, it would be subject to the material change news release and reporting requirements set out in Part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*.

- (5) A standard term sheet must not be provided unless a receipt for the relevant prospectus has been issued in the local jurisdiction. Similarly, in the case of a standard term sheet for a bought deal under Part 7 of NI 44-

101 that is provided before the filing of the preliminary prospectus, the standard term sheet must not be provided unless the preliminary prospectus will be filed in the local jurisdiction.

Marketing materials

6.5B(1) The marketing materials provisions in sections 13.7 and 13.8 of the Instrument, section 7.6 of NI 44-101, section 9A.3 of NI 44-102 and section 4A.3 of NI 44-103 permit an investment dealer to provide marketing materials to a potential investor if the conditions of the applicable provision are met.

Any investment dealer relying on these provisions would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstance) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include providing marketing materials to an investor).

- (2) The Instrument defines "marketing materials" to mean written communications intended for potential investors regarding a distribution of securities under a prospectus that contain material facts relating to an issuer, securities or an offering. The definition does not include a standard term sheet, a preliminary prospectus notice or a final prospectus notice. The definition is not intended to include other communications from an investment dealer to an investor, such as a cover letter or email that encloses a copy of a prospectus, a standard term sheet or marketing materials, but does not include any material facts about issuer, securities or an offering.
- (3) The applicable interpretation provisions in the prospectus rules clarify that a reference to "provide" in sections 13.7 and 13.8 of the Instrument, section 7.6 of NI 44-101, section 9A.3 of NI 44-102 and section 4A.3 of NI 44-103 includes showing marketing materials to an investor without allowing the investor to retain or make a copy of the materials. This means that the rules apply not only to situations where marketing materials are physically provided to a potential investor, but also to situations where a potential investor is shown marketing materials but is not permitted to retain a copy. For example, the rules would apply where a potential investor is shown a paper copy of marketing materials during a meeting or other interaction with a broker, but is not permitted to retain the paper copy. Similarly, the rules would apply where a potential investor is shown a version of marketing materials on a projector screen or laptop computer.
- (4) Marketing materials are subject to provisions in applicable securities legislation which prohibit misleading or untrue statements. Accordingly, the issuer and investment dealers involved should have a reasonable, factual basis for any statement in marketing materials. We remind issuers to be cautious when including disclosure in marketing materials about mineral projects. Where this is the case, the disclosure would be

considered "written disclosure" within the meaning of National Instrument 43-101 *Standards of Disclosure for Mineral Projects* and would have to comply with the requirements of that instrument.

Marketing materials must contain the legends, or words to the same effect, referred to in subsections 13.7(5) and 13.8(5) of the Instrument, subsection 7.6(5) of NI 44-101, subsection 9A.3(5) of NI 44-102 and subsection 4A.3(6) of NI 44-103, as applicable.

Furthermore, paragraphs 13.7(1)(c) and 13.8(1)(c) of the Instrument, paragraph 9A.3(1)(c) of NI 44-102 and paragraph 4A.3(1)(c) of NI 44-103 provide that if the cover page or the summary of the prospectus contains cautionary language, other than prescribed language, in bold type (e.g., the suitability of the investment, a material condition to the closing of the offering or a key risk factor), the marketing materials must contain the same cautionary language. For example, if the cover page of the prospectus contained cautionary language in bold type that the offering is suitable only to those investors who are prepared to risk the loss of their entire investment, the marketing materials must contain the same warning. In contrast, the requirement would not apply to prescribed language that is required to be presented in bold type on the cover page of a prospectus (e.g., section 1.8 and subsections 1.9(3) and 1.11(5) of Form 41-101F1).

- (5) In the case of marketing materials provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.7(1)(b) and 13.8(1)(b) of the Instrument require that, other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering must be disclosed in, or derived from, the preliminary prospectus or the final prospectus, respectively. For example, marketing materials provided during the waiting period could only include an estimate of the range of the offering price or the number of securities if that estimate was in the preliminary prospectus or any amendment.

Similarly, in the case of marketing materials for a bought deal under Part 7 of NI 44-101 that are provided before the filing of the preliminary prospectus, paragraph 7.6(1)(c) of NI 44-101 requires that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 7.6(1)(c)(i) of NI 44-101, or
- later be disclosed in, or derived from, the preliminary prospectus that is subsequently filed.

In the case of marketing materials for a draw-down under a final base shelf prospectus, paragraph 9A.3(1)(b) of NI 44-102 provides that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 9A.3(1)(b)(i) of NI 44-102, or
- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed.

In the case of marketing materials after a receipt for a final base PREP prospectus, paragraph 4A.3(1)(b) of NI 44-103 provides that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 4A.3(1)(b)(i) of NI 44-103, or
- later be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed.

In this regard, if an issuer and an investment dealer include information in marketing materials for a bought deal, a draw-down under a shelf prospectus or an offering under the PREP procedures that is not currently on the public record, the issuer and the investment dealer should be mindful of selective disclosure concerns and take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees" (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*). For example, if the information could affect the market price of the issuer's securities, it should be broadly disseminated in a news release before being included in marketing materials. If the information was a material change, it would be subject to the material change news release and reporting requirements set out in Part 7 of National Instrument 51-102 *Continuous Disclosure Obligations*.

Under the above provisions, it is permissible for marketing materials to include information derived from the prospectus and information that is presented in a manner that differs from the manner of presentation in the prospectus. For example, it is permissible for marketing materials to summarize information from the relevant prospectus or to include graphs or charts based on numbers in the relevant prospectus.

- (6) The term "comparables" is defined in each of the prospectus rules to mean information that compares an issuer to other issuers. Comparables may be based on various factors including, but not limited to, market capitalization, the trading price of the securities on a marketplace or other attributes. If an issuer and an investment dealer want to avoid statutory civil liability for comparables in marketing materials, they must comply with subsections 13.7(4) and 13.8(4) of the Instrument, subsection 7.6(4) of NI 44-101, subsection 9A.3(4) of NI 44-102 and subsection 4A.3(5) of NI 44-103, as applicable. Under these provisions, the issuer may remove

any comparables and any disclosure relating to those comparables from the template version of the marketing materials before filing it if:

- The comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials.
- The template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed. The note must appear immediately after where the removed comparables and related disclosure would have been.
- If the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority. Subject to access to information legislation in each jurisdiction, if a complete template version of the marketing materials is delivered under the applicable prospectus rule, the securities regulatory authority or regulator in each jurisdiction will not make these documents available to the public.
- The complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d) of the Instrument.

However, any comparables included in marketing materials provided to an investor would be subject to the provisions in applicable securities legislation which prohibit misleading or untrue statements.

- (7) Paragraphs 13.7(1)(d) and 13.8(1)(d) of the Instrument, paragraph 7.6(1)(d) of NI 44-101, paragraph 9A.3(1)(d) of NI 44-102 and paragraph 4A.3(1)(d) of NI 44-103 provide that a template version of the marketing materials must be approved in writing by the issuer and the lead underwriter before the marketing materials are provided to an investor. This written approval may be given by email.

"Template version" is defined in section 1.1 of the Instrument to mean a version of a document with spaces for information to be added in accordance with subsection 13.7(2) or 13.8(2) of the Instrument, subsection 7.6(2) of NI 44-101, subsection 9A.3(2) of NI 44-102 or subsection 4A.3(3) of NI 44-103. "Limited-use version" is defined to mean a template version in which the spaces for information have been completed in accordance with those provisions. A template version can have no other spaces for information to be added in a limited-use version.

The above provisions specify that if a template version of the marketing materials is approved in writing by the issuer and the lead underwriter and

filed, an investment dealer may provide a limited-use version of the marketing materials that:

- has a date that is different than the template version,
- contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors,
- contains contact information for the investment dealer or underwriters,
- has text in a format, including the type's font, colour or size, that is different than the template version, or
- in the case of a limited-use version of the marketing materials provided after a receipt for a final base PREP prospectus, contains the information referred to in paragraph 4A.3(3)(e) of NI 44-103 (the PREP information).

Consequently, other than spaces for a date, a cover page, the contact information or the PREP information described above, a template version of the marketing materials must contain all the information that the issuer and the underwriters would like an investment dealer to be able to provide in a limited-use version.

However, the prospectus rules provide that if the template version of the marketing materials is divided into separate sections for separate subjects, an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

- (8) In the case of marketing materials provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.7(1)(g) and 13.8(1)(g) of the Instrument require that the marketing materials be provided with a copy of the preliminary prospectus or the final prospectus, respectively, and any amendment. The marketing materials can only be provided if a receipt for the relevant prospectus has been issued in the local jurisdiction.

Similarly, in the case of marketing materials for a bought deal under Part 7 of NI 44-101 that are provided before the filing of the preliminary prospectus, the marketing materials can only be provided if the prospectus will be filed in the local jurisdiction. Paragraph 7.6(1)(g) of NI 44-101 requires that upon issuance of a receipt for the preliminary prospectus for the bought deal, a copy of that prospectus must be sent to each potential investor that received the marketing materials and expressed an interest in acquiring the securities.

In the case of marketing materials for a draw-down under a final base shelf prospectus, the marketing materials can only be provided if a receipt for the final base shelf prospectus has been issued in the local jurisdiction. Paragraph 9A.3(1)(g) of NI 44-102 requires that the marketing materials be provided with a copy of the final base shelf prospectus, any amendment to the final base shelf prospectus and any applicable shelf prospectus supplement that has been filed.

In the case of marketing materials provided after a receipt for a final base PREP prospectus, the marketing materials can only be provided if a receipt for the final base PREP prospectus has been issued in the local jurisdiction. Paragraph 4A.3(1)(g) of NI 44-103 requires that the marketing materials be provided with a copy of:

- the final base PREP prospectus and any amendment, or
- if it has been filed, the supplemented PREP prospectus and any amendment.

National Policy 11-201 *Electronic Delivery of Documents* sets out the circumstances in which a prospectus can be delivered by electronic means. If the investment dealer previously delivered a paper or electronic copy of the prospectus and any amendment to an investor in accordance with applicable securities legislation, it can include a hyperlink to an electronic copy of the prospectus and any amendment with any subsequent marketing materials sent to the investor if no additional amendment to the prospectus has been filed and receipted. The investment dealer should ensure that it is clear to the recipient which of the documents being delivered in the hyperlink constitute the prospectus.

(9) Paragraphs 13.7(1)(e) and 13.8(1)(e) of the Instrument, paragraph 7.6(1)(e) of NI 44-101, paragraph 9A.3(1)(e) of NI 44-102 and paragraph 4A.3(1)(e) of NI 44-103 require that a template version of the marketing materials must be filed on SEDAR on or before the day that the marketing materials are first provided to an investor. In this regard,

- If an investment dealer wants to rely on section 13.7 of the Instrument and provide marketing materials to an investor on the same day that the preliminary prospectus is filed and receipted, the template version of the marketing materials should be filed with the preliminary prospectus pursuant to subparagraph 9.1(1)(a)(vii) of the Instrument or subparagraph 4.1(1)(a)(vii) of NI 44-101, as applicable.
- If an investment dealer wants to rely on section 13.8 of the Instrument and provide marketing materials to an investor on the same day that the final prospectus is filed and receipted, the template version of the marketing materials should be filed with

the final prospectus pursuant to subparagraph 9.2(a)(xiv) of the Instrument or subparagraph 4.2(a)(xii) of NI 44-101, as applicable.

- When a template version of the marketing materials is filed on SEDAR as part of a prospectus filing, they will generally be made public within one business day. However, in the case of a template version of marketing materials for a bought deal under section 7.6 of NI 44-101, the template version of the marketing materials will not be made public on SEDAR until after the preliminary prospectus is filed and receipted.
- Staff of securities regulatory authorities will not be "pre-clearing" a template version of the marketing materials.
- If an issuer files a template version of marketing materials after staff of a securities regulatory authority have completed their review of a preliminary prospectus filing and indicated that they are "clear for final" on SEDAR, the filing of the template version of the marketing materials may result in staff revising the filing's SEDAR status to indicate that staff are "not clear for final" so that staff may have an opportunity to review the template version of the marketing materials.

(10) As noted in Item 36A.1 of Form 41-101F1 and Item 11.6 of Form 44-101F1, marketing materials do not, as a matter of law, amend a preliminary prospectus, a final prospectus or any amendment.

(11) The template version of the marketing materials filed on SEDAR is required to be included in the final prospectus or incorporated by reference into the final prospectus. An investor who purchases a security distributed under the final prospectus may therefore have remedies under the civil liability provisions of applicable securities legislation if the template version of the marketing materials contains a misrepresentation. Furthermore, an investor who purchases a security of the issuer on the secondary market may have remedies under the civil liability for secondary market disclosure provisions of applicable securities legislation if the template version of the marketing materials contains a misrepresentation since:

- the template version of the marketing materials is required to be included in the final prospectus or incorporated by reference into the final prospectus (a final prospectus is a "core document" under the secondary market liability provisions), and
- the template version of the marketing materials is required to be filed and is therefore a "document" under the secondary market liability provisions.

- (12) If a final prospectus or any amendment modifies a statement of material fact that appeared in marketing materials provided during the waiting period, the issuer is required to:
- prepare and file, at the time the issuer files the final prospectus or any amendment, a revised template version of the marketing materials that is blacklined to show the modified statement, and
 - include in the final prospectus, or any amendment, the disclosure referred to in subsection 36A.1(3) of Form 41-101F1 or subsection 11.6(3) of Form 44-101F1, as applicable.

Similar provisions apply for a draw-down under a base shelf prospectus or an offering under the PREP procedures.

If the blacklining software of the issuer or the issuer's service provider has formatting problems or does not function well with certain kinds of documents or formats, the issuer should try to correct the formatting problems or use another method to reflect changes to the marketing materials, such as using the bold type and underlining features of a software package in order to provide easy-to-read blacklines for filing on SEDAR.

- (13) For guidance on marketing materials for income trusts and other indirect offerings, see Part 5 of National Policy 41-201 *Income Trusts and Other Indirect Offerings*.

Standard term sheets and marketing materials – general

6.5C In addition to the requirements on standard term sheets and marketing materials in the applicable prospectus rule, issuers and investment dealers should review other securities legislation for limitations and prohibitions on advertising intended to promote interest in an issuer or its securities. For example,

- A standard term sheet and any marketing materials must not contain any representations prohibited by securities legislation, such as:
 - prohibited representations on resales, repurchases or refunds, and
 - prohibited representations on future value.
- A standard term sheet and any marketing materials must comply with the requirements of securities legislation on listing representations..

11. Section 6.6 is changed

(a) by replacing subsection (1) with the following:

- (1) Some dealers prepare summaries of the principal terms of an offering, sometimes referred to as green sheets, for the information of their registered representatives during the waiting period. However, distributing the green sheet to the public would generally contravene the prospectus requirement unless the green sheet complies with the provisions in the applicable prospectus rule relating to standard term sheets or marketing materials, or other securities legislation relating to information that can be distributed during a prospectus offering.,

(b) by replacing subsection (2) with the following:

- (2) Including material information in a green sheet or other marketing communication that is not contained in the preliminary prospectus could indicate a failure to provide in the preliminary prospectus full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and result in the prospectus certificate constituting a misrepresentation. For additional guidance on pricing information in a green sheet, see subsection 4.2(2) of this Policy and subsection 4.3(2) of 44-101CP.,

(c) in subsection (3), by deleting "and other advertising or marketing materials", and

(d) by adding the following after subsection (3):

- (4) For guidance on green sheets for income trusts or other indirect offerings, see Part 5 *Sales and Marketing Materials* of National Policy 41-201 *Income Trusts and Other Indirect Offerings*..

12. Section 6.7 is replaced with the following:

Advertising or marketing activities following the issuance of a receipt for a final prospectus

- 6.7 Advertising or marketing activities that are permitted during the waiting period may also be undertaken on a similar basis after a receipt has been issued for the final prospectus. In addition, the prospectus and any document filed with or referred to in the prospectus may be distributed..

13. Section 6.8 is changed by deleting "the" before the first reference to "advertising".

14. Section 6.9 is changed by adding the following after subsection (2):

- (3) Nevertheless, we realize that reporting issuers need to consider whether the decision to pursue a potential offering is a material change under applicable securities legislation. If the decision is a material change, the news release and

material change report requirements in Part 7 of NI 51-102 and other securities legislation apply. However, in order to avoid contravening the pre-marketing restrictions under applicable securities legislation, any news release and material change report filed before the filing of a preliminary prospectus or the announcement of a bought deal under section 7.2 of NI 44-101 should be carefully drafted so that it could not be reasonably regarded as intended to promote a distribution of securities or condition the market. The information in the news release and material change report should be limited to identifying the securities proposed to be issued without a summary of the commercial features of the issue (those details should instead be dealt with in the preliminary prospectus which is intended to be the main disclosure vehicle).

Furthermore, after the filing of the news release,

- the issuer should not grant media interviews on the proposed offering, and
- an investment dealer would not be able to solicit expressions of interest until a receipt has been issued for a preliminary prospectus or a bought deal was announced in compliance with section 7.2 of NI 44-101..

15. Section 6.10 is replaced with the following:

Disclosure practices

6.10 At a minimum, participants in all prospectus distributions should consider the following to avoid contravening securities legislation:

- We do not consider it appropriate for a director or an officer of an issuer to give interviews to the media immediately prior to or during the waiting period. It may be appropriate, however, for a director or officer to respond to unsolicited inquiries of a factual nature made by shareholders, securities analysts, financial analysts, the media and others who have an interest in such information.
- Because of the prospectus requirement, an issuer should avoid providing information during a prospectus distribution that goes beyond what is disclosed in the prospectus. Therefore, during the prospectus distribution (which commences as described in subsection 6.4(4) of this Policy and ends following closing), a director or officer of an issuer should only make a statement constituting a forecast, projection or prediction with respect to future financial performance if the statement is also contained in the prospectus. Forward-looking information included in a prospectus must comply with sections 4A.2 and 4A.3 and Part 4B, as applicable, of NI 51-102.
- We understand that underwriters and legal counsel sometimes only advise the working group members of the pre-marketing and marketing restrictions under securities legislation. However, there are often situations where officers and directors of the issuer outside of the working

group also come into contact with the media before or after the filing of a preliminary prospectus. Any discussions between these individuals and the media will also be subject to these same restrictions. Working group members, including underwriters and legal counsel, will usually want to ensure that any other officers and directors of the issuer (as well as the officers and directors of a promoter or a selling securityholder) who may come into contact with the media are also fully aware of the marketing and disclosure restrictions.

- One way for issuers, dealers and other market participants to ensure that advertising or marketing activities contrary to securities legislation are not undertaken (intentionally or through inadvertence) is to develop, implement, maintain and enforce disclosure procedures.

If a director or officer of an issuer (or a promoter, selling securityholder, underwriter or any other party involved with a pending offering) makes a statement to the media after a decision has been made to file a preliminary prospectus or during the waiting period, our regulatory concerns include circumvention of the pre-marketing and marketing restrictions, selective disclosure and unequal access to information, conditioning of the market and the lack of prospectus liability. In addition to the sanctions and enforcement proceedings discussed in section 6.8 of this Policy, staff of a securities regulatory authority may require the issuer to take other remedial action, such as:

- explaining why the issuer's disclosure procedures failed to prevent the party from making the statement to the media and how those procedures will be improved,
- instituting a "cooling-off period" before the filing of the final prospectus,
- including the statement in the prospectus so that it will be subject to statutory civil liability, or
- issuing a news release refuting the statement if it cannot be included in the prospectus (e.g., because the statement is incorrect or unduly promotional) and disclosing the reasons for the news release in the prospectus..

16. Part 6 is changed by adding the following after section 6.11:

Road shows

6.12(1)

Sections 13.9 and 13.10 of the Instrument, section 7.7 of NI 44-101, section 9A.4 of NI 44-102 and section 4A.4 of NI 44-103 provide for road shows for investors. These provisions and the definition of "road show" in section 1.1 of NI 41-101 apply to road shows conducted in person, by telephone conference call, on the internet or by other electronic means.

The provisions also apply if an investment dealer records a live road show and later makes an audio or audio-visual version of the recorded road show available to investors.

- (2) Although members of the media may attend a road show, they should not be specifically invited to the road show by the issuer or by an investment dealer. We note that road shows are intended to be presentations for potential investors and not press conferences for members of the media. Furthermore, issuers and investment dealers should not market a prospectus offering in the media. In this regard, see the guidance in sections 6.9 and 6.10 of this Policy.
- (3) Subsections 13.9(3) and 13.10(3) of the Instrument, subsection 7.7(3) of NI 44-101, subsection 9A.4(3) of NI 44-102 and subsection 4A.4(3) of NI 44-103 provide that if an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to:
 - ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;
 - keep a record of any information provided by the investor; and
 - provide the investor with a copy of the relevant prospectus and any amendment.

However, section 13.11 of the Instrument and section 4A.5 of NI 44-103 provide an exception so that, in the case of a road show for certain U.S. cross-border initial public offerings, an investor attending the road show can provide their name and contact information on a voluntary basis.

For a road show held on the internet or by other electronic means, please see the recommended procedures in section 2.7 of National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means* and, in Québec, *Notice 47-201 relating to Trading Securities Using the Internet and Other Electronic Means*.

- (4) An investment dealer must not provide marketing materials to investors attending a road show unless the materials comply with the relevant marketing materials provisions in sections 13.7 and 13.8 of the Instrument, section 7.6 of NI 44-101, section 9A.3 of NI 44-102 and section 4A.3 of NI 44-103, as applicable. In this context, see the discussion on the meaning of "provide" in subsection 6.5B(3) of this Policy. For example, the provisions would apply where a potential investor is shown a version of marketing materials on a projector screen during a road show conducted in person. Similarly, the provisions would apply where a potential investor is able to view a slide show version of marketing materials during a road show presented online, whether live or recorded.

The above provisions require that a template version of the marketing materials be filed on SEDAR on or before the day they are first provided and included in, or incorporated by reference into, the relevant prospectus.

However, section 13.12 of the Instrument, section 7.8 of NI 44-101, section 9A.5 of NI 44-102 and section 4A.6 of NI 44-103 provide an exception from these filing and incorporation requirements for marketing materials in connection with road shows for certain U.S. cross-border offerings. The exception does not apply to marketing materials other than the marketing materials provided in connection with the road show. Among other things, an issuer relying on the exception must deliver a template version of the marketing materials to the securities regulatory authority in each jurisdiction of Canada where the prospectus was filed. Subject to access to information legislation in each jurisdiction, it is the policy of the securities regulatory authority or regulator in each jurisdiction that the template version of the marketing materials delivered under the applicable prospectus rule will not be made available to the public.

- (5) In the past, issuers conducting internet road shows for cross-border IPOs applied for relief from the waiting period restrictions in Canadian securities legislation. However, given the above-noted road show provisions and the exceptions for certain U.S. cross-border offerings, we do not anticipate a need for similar relief in the future and will instead expect these issuers to comply with the applicable road show provision.

In the past, issuers conducting internet road shows for cross-border IPOs also applied for relief from the dealer registration requirements of Canadian securities legislation. However, if a road show is conducted on behalf of an issuer under the above-noted road show provisions, the issuer will not require relief from the dealer registration requirement since the road show will be conducted by an investment dealer that is registered in the appropriate jurisdictions (see subsection 6.12(6) of this Policy). Consequently, we do not expect to grant the relief from the dealer registration requirements that has been granted in the past to cross-border IPO issuers.

- (6) The road show provisions permit an investment dealer to conduct a road show for potential investors if the conditions of the applicable provision are met. As noted above, a road show may be conducted in person, by telephone conference call, on the internet or by other electronic means. Unless an exemption from the requirement to register as a dealer is available in the circumstances, any investment dealer relying on one of these provisions would have to be registered as an investment dealer in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include conducting a road show for potential investors). For example, if one or more investment dealers acting as underwriters for a prospectus offering

allow potential investors in each jurisdiction of Canada to participate in a road show that the dealers conduct by telephone conference call, then at least one of those dealers must be registered as an investment dealer in every jurisdiction of Canada.

(7) Issuers should note the following with respect to oral statements made at a road show:

- In giving oral presentations at a road show, issuers should generally only discuss information that is contained in, or derived from, the relevant prospectus that has been filed on SEDAR.
- We recognize that issuers need to respond to questions from investors at a road show. In responding to these questions, issuers should avoid making selective disclosure.
- In particular, issuers should take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees" when:
 - participating in a road show, and
 - including information in marketing materials for a bought deal road show before the filing of a preliminary prospectus that is not in the bought deal news release or the other continuous disclosure documents filed by the issuer.

These laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*.

- If an issuer discloses material facts at a road show that are not in a preliminary prospectus that has been filed on SEDAR, the final prospectus should contain that information in order to comply with the statutory requirement that the final prospectus contain full, true and plain disclosure of all material facts.
- Depending on the context, oral statements of a "responsible issuer", as defined in securities legislation, at a road show may be "public oral statements", as defined in securities legislation, and subject to statutory provisions for secondary market civil liability.
- Depending on the nature of the statement, oral statements of an issuer at a road show in relation to mineral projects may fall within the purview of National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.
- Oral statements made during a road show are subject to the provisions of securities legislation against making misleading or untrue statements.

PART 6A: Advertising and Marketing in Connection with Prospectus Offerings of Investment Funds

Application

6A.1 This Part applies to investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.

Scope

6A.2(1) The discussion below is focused on the impact of the prospectus requirement on advertising or marketing activities in connection with a prospectus offering.

- (2) Issuers and other persons or companies that engage in advertising or marketing activities should also consider the impact of the requirement to register as a dealer in each jurisdiction where such advertising or marketing activities are undertaken. In particular, the persons or companies would have to consider whether their activities result in the party being in the business of trading in securities. For further information, refer to section 1.3 of Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.
- (3) Advertising or marketing activities are also subject to regulation under securities legislation and other rules, including those relating to disclosure, and insider trading and registration, which are not discussed below.

The prospectus requirement

6A.3(1) Securities legislation generally provides that no one may trade in a security where that trade would be a distribution unless the prospectus requirement has been satisfied, or an exemption is available.

- (2) The analysis of whether any particular advertising or marketing activity is prohibited by virtue of the prospectus requirement turns largely on whether the activity constitutes a trade and, if so, whether such a trade would constitute a distribution.
- (3) In Québec, since securities legislation has been designed without the notion of a "trade", the analysis is dependent solely on whether the advertising or marketing activities constitute a distribution.

Definition of "trade"

(4) Securities legislation (other than the securities legislation of Québec) defines a "trade" in a non-exhaustive manner to include, among other things:

- any sale or disposition of a security for valuable consideration,
- any receipt by a registrant of an order to buy or sell a security, or

- any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.
- (5) Any advertising or marketing activities that can be reasonably regarded as intended to promote a distribution of securities would be "conduct in furtherance" of the distribution of a security and, therefore, would fall within the definition of a trade.

Definition of distribution

- (6) Even though advertising or marketing activities constitute a "trade" for the purposes of securities legislation (other than the securities legislation of Québec), they would be prohibited by virtue of the prospectus requirement only if they also constitute a distribution under securities legislation. Securities legislation (other than the securities legislation of Québec) defines a distribution to include a "trade" in, among other things, previously unissued securities and securities that form part of a control block.
- (7) The definition of distribution under the securities legislation of Québec includes the endeavour to obtain or the obtaining of subscribers or purchasers of previously unissued securities.

Prospectus exemptions

- (8) It has been suggested by some that advertising or marketing activities, even if clearly made in furtherance of a distribution, could be undertaken in certain circumstances on a prospectus exempt basis. Specifically, it has been suggested that if an exemption from the prospectus requirement is available in respect of a specific distribution (even though the securities will be distributed under a prospectus), advertising or marketing related to such distribution would be exempt from the prospectus requirement. This analysis is premised on an argument that the advertising or marketing activities constitute one distribution that is exempt from the prospectus requirement while the actual sale of the security to the purchaser constitutes a second discrete distribution effected pursuant to the prospectus.
- (9) We are of the view that this analysis is contrary to securities legislation. In these circumstances, the distribution in respect of which the advertising or marketing activities are undertaken is the distribution pursuant to the anticipated prospectus. Advertising or marketing must be viewed in the context of the prospectus offering and as an activity in furtherance of that distribution. If it were otherwise, the overriding concerns implicit and explicit in securities legislation regarding equal access to information, conditioning of the market, tipping and insider trading, and the provisions of the legislation designed to ensure such access to information and curb such abuses, could be easily circumvented.

- (10) We recognize that an issuer and a dealer may have a demonstrable *bona fide* intention to effect an exempt distribution and this distribution may be abandoned in favour of a prospectus offering. In these very limited circumstances, there may be two separate distributions. From the time when it is reasonable for a dealer to expect that a *bona fide* exempt distribution will be abandoned in favour of a prospectus offering, the general rules relating to advertising or marketing activities that constitute an act in furtherance of a distribution will apply.

Advertising or marketing activities

6A.4(1) The prospectus requirement applies to any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a distribution unless a prospectus exemption is available. Accordingly, advertising or marketing activities intended to promote the distribution of securities, in any form, would be prohibited by virtue of the prospectus requirement. Advertising or marketing activities subject to the prospectus requirement may be oral, written or electronic and include the following:

- television or radio advertisements or commentaries;
- published materials;
- correspondence;
- records;
- videotapes or similar material;
- market letters;
- research reports;
- circulars;
- promotional seminar text;
- telemarketing scripts;
- reprints or excerpts of any other sales literature.

- (2) Advertising or marketing activities that are not in furtherance of a distribution of securities would not generally fall within the definition of a distribution and, therefore, would not be prohibited by virtue of the prospectus requirement. The following activities would not generally be subject to the prospectus requirement:

- advertising and publicity campaigns that are aimed at either selling products or services of the issuer or raising public awareness of the issuer;
 - communication of factual information concerning the business of the issuer that is released in a manner, timing and form that is consistent with the regular past communications practices of the issuer if that communication does not refer to or suggest the distribution of securities;
 - the release or filing of information that is required to be released or filed pursuant to securities legislation.
- (3) Any activities that form part of a plan or series of activities undertaken in anticipation or in furtherance of a distribution would usually trigger the prospectus requirement, even if they would be permissible if viewed in isolation. Similarly, we may still consider advertising or marketing activities that do not indicate that a distribution of securities is contemplated to be in furtherance of a distribution by virtue of their timing and content. In particular, where a private placement or other exempt distribution occurs prior to or contemporaneously with a prospectus offering, we may consider activities undertaken in connection with the exempt distribution as being in furtherance of the prospectus offering.

Pre-marketing and solicitation of expressions of interest

- 6A.5(1) In general, any advertising or marketing activities undertaken in connection with a prospectus prior to the issuance of a receipt for the preliminary prospectus are prohibited under securities legislation by virtue of the prospectus requirement.
- (2) A distribution of securities commences at the time when:
- a dealer has had discussions with an issuer or a selling securityholder, or with another dealer that has had discussions with an issuer or a selling securityholder about the distribution, and
 - those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or the selling securityholder an underwriting of the securities.
- (3) We understand that many dealers communicate on a regular basis with clients and prospective clients concerning their interest in purchasing various securities of various issuers. We will not generally consider such ordinary course communications as being made in furtherance of a distribution. However, from the commencement of a distribution, communications by the dealer, with a person or company designed to have the effect of determining the interest that it, or any person or company that

it represents, may have in purchasing securities of the type that are the subject of distribution discussions, that are undertaken by any director, officer, employee or agent of the dealer

- (a) who participated in or had actual knowledge of the distribution discussions, or
- (b) whose communications were directed, suggested or induced by a person referred to in (a), or another person acting directly or indirectly at or upon the direction, suggestion or inducement of a person referred to in (a),

are considered to be in furtherance of the distribution and contrary to securities legislation.

- (4) From the commencement of the distribution no communications, market making, or other principal trading activities in securities of the type that are the subject of distribution discussions may be undertaken by a person referred to in paragraph 3(a) above, or at or upon the direction, suggestion or inducement of a person or persons referred to in paragraph 3(a) or (b) until the earliest of
 - the issuance of a receipt for a preliminary prospectus in respect of the distribution, and
 - the time at which the dealer determines not to pursue the distribution.

Advertising or marketing activities during the waiting period

6A.6(1) Securities legislation provides an exception to the prospectus requirement for limited advertising or marketing activities during the waiting period between the issuance of the receipt for the preliminary prospectus and the receipt for the final prospectus. Despite the prospectus requirement, it is permissible during the waiting period to:

- (a) distribute a preliminary prospectus notice (as defined in the Instrument) that:
 - "identifies" the securities proposed to be issued,
 - states the price of such securities, if then determined, and
 - states the name and address of a person or company from whom purchases of securities may be made,

provided that any such notice states the name and address of a person or company from whom a preliminary prospectus may be obtained,

- (b) distribute the preliminary prospectus, and
 - (c) solicit expressions of interest from a prospective purchaser, if prior to such solicitation or forthwith after the prospectus purchaser indicates an interest in purchasing the securities, a copy of the preliminary prospectus is forwarded to the prospectus purchaser.
- (2) The use of any other marketing information or materials during the waiting period would result in the violation of the prospectus requirement.
- (3) The "identification" of the security contemplated by paragraph 6A.6(1)(a) above does not permit an issuer or dealer to include a summary of the commercial features of the issue. These details are set out in the preliminary prospectus which is intended as the main disclosure vehicle pending the issuance of the final receipt. The purpose of the permitted advertising or marketing activities during the waiting period is essentially to alert the public to the availability of the preliminary prospectus.
- (4) For the purpose of identifying a security as contemplated by paragraph 6A.6(1)(a) above, the advertising or marketing material may only:
- indicate whether a security represents debt or a share in an incorporated entity or an interest in a non-corporate entity,
 - name the issuer if the issuer is a reporting issuer, or name and describe briefly the business of the issuer if the issuer is not already a reporting issuer (the description of the business should be cast in general terms and should not attempt to summarize the proposed use of proceeds),
 - indicate, without giving details, whether the security qualifies the holder for special tax treatment, and
 - indicate how many securities will be available.

Green Sheets

- 6A.7(1) Some dealers prepare summaries of the principal terms of an offering, sometimes referred to as green sheets. Typically green sheets include information beyond the limited information for which an exemption to the prospectus requirement is available during the waiting period. If so, we would consider the distribution of a green sheet to a potential investor to contravene the prospectus requirement.
- (2) Including material information in a green sheet or other marketing communication that is not contained in the preliminary prospectus could indicate a failure to provide in the preliminary prospectus full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and result in the prospectus certificate containing a misrepresentation.

- (3) We may request copies of green sheets and other advertising or marketing materials as part of our prospectus review procedures. Any discrepancies between the content of a green sheet and the preliminary prospectus could result in the delay or refusal of a receipt for a final prospectus and, in appropriate circumstances, could result in enforcement action.

Advertising or marketing activities following the issuance of a receipt for a final prospectus

6A.8 Advertising or marketing activities that are not prohibited by the prospectus requirement during the waiting period may also be undertaken on the same basis after a receipt has been issued for the final prospectus relating to the distribution. In addition, the prospectus and any document filed with or referred to in the prospectus may be distributed.

Sanctions and enforcement

6A.9 Any contravention of the prospectus requirement through advertising or marketing activities is a serious matter that could result in a cease trade order in respect of the preliminary prospectus to which such advertising or marketing activities relate. In addition, a receipt for a final prospectus relating to any such offering may be refused. In appropriate circumstances, enforcement proceedings may be initiated.

Media reports and coverage

6A.10(1) We recognize that an issuer does not have control over media coverage; however, an issuer should take appropriate precautions to ensure that media coverage which can reasonably be considered to be in furtherance of a distribution of securities does not occur after a decision has been made to file a preliminary prospectus or during the waiting period.

- (2) We may investigate the circumstances surrounding media coverage of an issuer which appears immediately prior to or during the waiting period and which can reasonably be considered as being in furtherance of a distribution of securities. Action will be taken in appropriate circumstances.

Disclosure practices

6A.11 At a minimum, participants in all prospectus distributions should consider the following practices to avoid contravening securities legislation:

- We do not consider it appropriate for a director or an officer of an issuer to give interviews to the media immediately prior to or during the waiting period. It may be appropriate, however, for a director or officer to respond to unsolicited inquiries of a factual nature made by shareholders, securities analysts, financial analysts, the media and others who have a legitimate interest in such information.
- Because of the prospectus requirement, an issuer is not permitted to provide information during a prospectus distribution that goes beyond

what is disclosed in the prospectus. Therefore, during the prospectus distribution (which commences as described in subsection 6A.5(2) of this Policy and ends following closing), a director or officer of an issuer can only make a statement constituting a forecast, projection or prediction with respect to future financial performance if the statement is also contained in the prospectus.

- We understand that underwriters and legal counsel sometimes only advise the working group members of the pre-marketing and marketing restrictions under securities legislation. However, there are often situations where officers and directors of the issuer outside of the working group also come into contact with the media before or after the filing of a preliminary prospectus. Any discussions between these individuals and the media will also be subject to these same restrictions. Working group members, including underwriters and legal counsel, will usually want to ensure that any other officers and directors of the issuer (as well as the officers and directors of a promoter or a selling securityholder) who may come into contact with the media are also fully aware of the marketing and disclosure restrictions.
- One way for issuers, dealers and other market participants to ensure that advertising or marketing activities contrary to securities legislation are not undertaken (intentionally or through inadvertence) is to develop, implement, maintain and enforce disclosure procedures.

Misleading or untrue statements

6A.12 In addition to the prohibitions on advertising and marketing activities that result from the prospectus requirement, securities legislation in certain jurisdictions prohibits any person or company from making any misleading or untrue statement that would reasonably be expected to have a significant effect on the market value of securities. Therefore, in addition to ensuring that advertising or marketing activities are carried out in compliance with the prospectus requirement, issuers, dealers and their advisers must ensure that any statements made in the course of advertising or marketing activities are not untrue or misleading and otherwise comply with securities legislation..

17. *These changes become effective on August 13, 2013.*

Schedule E
Changes to
National Policy 41-201 *Income Trusts and Other Indirect Offerings*

1. ***The changes to National Policy 41-201 Income Trusts and Other Indirect Offerings are set out in this Schedule.***
2. ***Section 5.1 is replaced with the following:***

5.1 What are our concerns about sales and marketing materials?

Registrants often solicit interest from potential investors during the "waiting period" between the issuance of a receipt for a preliminary prospectus and the issuance of a receipt for the prospectus, and in the period following the receipt for the prospectus until the primary distribution is completed. Along with the distribution of the preliminary prospectus (or prospectus, if then available) to potential investors, that process often involves the preparation and distribution of materials such as:

- green sheets, for the benefit of registered salespersons and banking group members; or
- standard term sheets or marketing materials prepared in accordance with National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

The information included in green sheets is typically a simplified summary version of the disclosure in the prospectus, and should be limited to information included in, or directly derivable from, the prospectus (the exceptions are information about the basic terms of comparable offerings and general market information not specific to the issuer).

The information included in standard term sheets and marketing materials must comply with the conditions in National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

Green sheets and marketing materials used in the context of income trust offerings often include prominent reference to "yield". We are concerned that expressions of "yield" in these marketing materials may not be clearly understood, both because the term itself may have connotations or common usages that are not consistent with the attributes of income trust units and because the relationship between the "yield" described in the marketing materials and the information in the prospectus may not be clear.

"Yield" is generally used in the context of income trust offerings to refer to the return that would be generated over a one-year period, as a percentage of the offering price of the units, if the amounts intended to be distributed by the income trust according to its distribution policy are so distributed. In connection with their ongoing approach to disclosure, issuers should carefully consider yield expectations previously communicated to investors through marketing materials or otherwise. Whether and to what extent those yield expectations are met are important aspects of overall disclosure of performance. Issuers should include in their interim and annual MD&A, where applicable, a comparison between the expected yield figure previously communicated and the actual yield..

3. *Section 5.2 is replaced with the following:*

5.2 What information do we expect green sheets and marketing materials to contain?

We are concerned that use of the term "yield" in green sheets and marketing materials may imply that the entitlement of unitholders to distributions is fixed. We expect expressions of yield to be accompanied by disclosure that, unlike fixed-income securities, there is no obligation of the income trust to distribute to unitholders any fixed amount, and reductions in, or suspensions of, cash distributions may occur that would reduce yield based on the offering price.

A related concern is that disclosure of a yield in green sheets may cause confusion because yield is not typically disclosed in the prospectus. If a green sheet contains an expression of yield, we expect the statement to be tied to the disclosure in the prospectus on which the marketing is based (including, in particular, the pro forma presentation of distributable cash in the prospectus). Specifically, expressions of yield in green sheets for income trust offerings should be accompanied by disclosure indicating the proportion of the pro forma distributable cash (as set out in the prospectus) that the stated yield would represent. Guidance for disclosure about distributable cash in green sheets is set out in section 6.5.2 of this policy.

Under National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules, all information in marketing materials must generally be disclosed in, or derived from, the prospectus on which the marketing is based.

In addition, if reference is made to tax efficiencies that may be realized on distributions (such as returns of capital to investors), we expect that disclosure to be clear and, to the extent practical, quantified. For example, the estimated tax-deferred portion of distributions for the foreseeable period, and the tax implications, should be clearly stated or cross-referenced..

4. *Section 5.3 is changed*

(a) *by adding in the title "and marketing materials" after "green sheets",*

(b) by striking out "Yes." at the beginning of the first paragraph, and

(c) by adding the following as a new paragraph after the first paragraph:

Under National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules, a template version of marketing materials must be filed on or before the day that the marketing materials are first provided..

5. Section 6.5.2 is changed by replacing the last paragraph in section 6.5.2 with the following:

In order to meet the requirements for MD&A, disclosure of an issuer's distributable cash for a period should be accompanied by the information referred to in sections 2.5, 2.6, 2.7 and 2.8, as applicable, as well as the above table and accompanying narrative. Issuers should also refer to the guidance in sections 2.5, 2.6, 2.7, 2.8 and 6.5.2 of this policy when considering how to present disclosure of an issuer's distributable cash, including disclosure contained in:

- annual and interim MD&A,
- news releases, and
- sales and other materials such as:
 - green sheets, and
 - marketing materials prepared in accordance with National Instrument 41-101 *General Prospectus Requirements* and other prospectus rules.

See also Part 5 of this policy..

6. These changes become effective on August 13, 2013.

Schedule F
Amendments to
National Instrument 44-101 Short Form Prospectus Distributions and
Changes to Companion Policy

Schedule F-1

THE MANITOBA SECURITIES COMMISSION
MSC Rule No. 2013-21
(Section 149.1, *The Securities Act*)

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. Subsection 4.1(1) is amended

(a) by adding the following after subparagraph (a)(vi):

(vii) **Marketing Materials** – a copy of any template version of the marketing materials required to be filed under paragraph 7.6(1)(e) of this Instrument or paragraph 13.7(1)(e) of NI 41-101 that has not previously been filed; and,

(b) in subparagraph (b)(ii) by replacing "Handbook." with "Handbook; and", and

(c) by adding the following after subparagraph (b)(ii):

(iii) **Marketing Materials** – a copy of any template version of the marketing materials required to be delivered under paragraph 7.6(4)(c) or 7.8(2)(c) of this Instrument or paragraph 13.7(4)(c) or 13.12(2)(c) of NI 41-101 that has not previously been delivered.

3. Section 4.2 is amended

(a) by deleting "and" after subparagraph (a)(x.1),

(b) by adding the following after subparagraph (a)(xi):

(xii) **Marketing Materials** – a copy of any template version of the marketing materials required to be filed under paragraph 7.6(1)(e) or 7.6(7)(a) of this Instrument or paragraph 13.7(1)(e), 13.7(7)(a) or 13.8(1)(e) of NI 41-101 that has not previously been filed; and,

(c) by deleting "and" after subparagraph (b)(i),

(d) in subparagraph (b)(ii), by replacing "listing of the exchange." with "listing of the exchange, and", and

(e) by adding the following after subparagraph (b)(ii):

(iii) a copy of any template version of the marketing materials required to be delivered under paragraph 7.6(4)(c) or 7.8(2)(c) of this Instrument or paragraph 13.7(4)(c) or 13.12(2)(c) of NI 41-101 that has not previously been delivered..

4. Part 7 is amended by replacing sections 7.1 and 7.2 with the following:

Definitions and interpretations

7.1(1) In this Part:

"bought deal agreement" means a written agreement

(a) under which one or more underwriters has agreed to purchase all securities of an issuer that are to be offered in a distribution under a short form prospectus on a firm commitment basis, other than securities issuable on the exercise of an over-allotment option,

(b) that does not have a market-out clause,

(c) that, other than an over-allotment option, does not provide an option for any party to increase the number of securities to be purchased, and

(d) that, other than what is agreed to under a confirmation clause that complies with section 7.4, is not conditional on one or more additional underwriters agreeing to purchase any of the securities offered;

"comparables" means information that compares an issuer to other issuers;

"confirmation clause" means a provision in a bought deal agreement that provides that the agreement is conditional on the lead underwriter confirming that one or more additional underwriters has agreed to purchase certain of the securities offered;

"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;

"U.S. cross-border offering" means an offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus

filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC;

"U.S. prospectus" means a prospectus that has been prepared in accordance with the disclosure and other requirements of U.S. federal securities law for an offering of securities registered under the 1933 Act.

7.1(2) In this Part, for greater certainty, a reference to "provides" includes showing a document to a person without allowing the person to retain or make a copy of the document.

Solicitations of expressions of interest

7.2 Subject to subsection 7.4(2), the prospectus requirement does not apply to a solicitation of an expression of interest made before the issuance of a receipt for a preliminary short form prospectus for securities to be qualified for distribution under a short form prospectus pursuant to this Instrument or for securities to be issued or transferred pursuant to an over-allotment option that are qualified for distribution under a short form prospectus pursuant to this Instrument, if

(a) before the solicitation,

(i) the issuer has entered into a bought deal agreement;

(ii) the bought deal agreement has fixed the terms of the distribution, including, for greater certainty, 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 not more than four business days after the date that the bought deal agreement was entered into; and

(iii) immediately upon entering into the bought deal agreement, the issuer issued and filed a news release announcing the agreement,

(b) the issuer files a preliminary short form prospectus for the securities pursuant to this Instrument within four business days after the date that the bought deal agreement was entered into,

(c) 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 that, in response to the solicitation, expressed an interest in acquiring the securities, and

(d) except for a bought deal agreement under paragraph (a) or a more extended form of underwriting agreement referred to in subsection 7.3(6), no agreement of purchase and sale for the securities is entered into until the short form prospectus has been filed and a receipt has been issued.

Amendment or termination of bought deal agreement

7.3(1) Except as provided in subsections (2) to (7), a party to a bought deal agreement referred to in paragraph 7.2(a) must not agree to modify the terms of a distribution provided for under a bought deal agreement.

7.3(2) The parties to a bought deal agreement referred to in paragraph 7.2(a) may increase the number of securities to be purchased by an underwriter or underwriters, if

(a) the number of additional securities to be purchased does not exceed 100% of the total of the base offering contemplated by the original agreement plus any securities that would be acquired upon the exercise of an over-allotment option;

(b) the type of securities to be purchased, and the price per security, is the same as under the original agreement;

(c) 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 was entered into;

(d) immediately upon agreeing to change the number of securities to be purchased, the issuer issued and filed a news release announcing the amendment;

(e) no previous amendment has been made to the original agreement to increase the number of securities to be purchased; and

(f) the amended agreement is a bought deal agreement and the conditions in section 7.2 are complied with.

7.3(3) The parties to a bought deal agreement referred to in paragraph 7.2(a) may reduce the number of securities to be purchased, or the price of the securities, if the amendment is made on or after the date which is four business days after the date the original agreement was entered into.

7.3(4) The parties to a bought deal agreement referred to in paragraph 7.2(a) may provide for a different type of securities to be purchased by the underwriter or underwriters, and a different price for the securities, if

(a) in the case where a different type of securities is to be substituted in whole or in part for the securities that were the subject of the original agreement, or offered in addition to the securities that were the subject of the original agreement, the aggregate dollar amount of the securities to be purchased by the underwriter or underwriters on a firm commitment basis under the amended agreement is the same as the aggregate dollar amount of the securities that were to be purchased by the underwriter or underwriters on a firm commitment basis under the original agreement or under an agreement amended in accordance with subsection (2);

(b) before a solicitation of an expression of interest in the different type of securities and immediately upon entering into the amendment to the original agreement, the issuer issued and filed a news release announcing the amendment;

(c) the issuer files a preliminary short form prospectus for the different type of securities pursuant to this Instrument within four business days after the date that the original agreement was entered into;

(d) no previous amendment has been made to the original agreement to provide for a different type of securities to be purchased; and

(e) the amended agreement is a bought deal agreement and the conditions in section 7.2 are complied with.

7.3(5) The parties to a bought deal agreement referred to in paragraph 7.2(a) may add or remove an underwriter or adjust the number of securities to be purchased by each underwriter on a proportionate basis, if

(a) the aggregate dollar amount of the securities to be purchased by the underwriter or underwriters on a firm commitment basis under the amended agreement is the same as the aggregate dollar amount of the securities that were to be purchased by the underwriter or underwriters on a firm commitment basis under the original agreement or under an agreement amended in accordance with subsection (2); and

(b) the amended agreement is a bought deal agreement and the conditions in section 7.2 are complied with.

7.3(6) The parties to a bought deal agreement referred to in paragraph 7.2(a) may replace the bought deal agreement with a more extended form of underwriting agreement that includes, without limitation, termination rights, if the more extended form of underwriting agreement complies with the terms and conditions that apply to a bought deal agreement under this Part.

7.3(7) The parties to a bought deal agreement referred to in paragraph 7.2(a) may agree to terminate the agreement if the parties decide not to proceed with the distribution.

Confirmation clause

7.4(1) A bought deal agreement referred to in paragraph 7.2(a) must not contain a confirmation clause unless

(a) under the bought deal agreement, the lead underwriter must provide the issuer with a copy of the agreement that has been signed by the lead underwriter;

(b) the issuer signs the bought deal agreement on the same day that the lead underwriter provides the agreement in accordance with paragraph (a);

(c) the lead underwriter has discussions with other investment dealers regarding their participation in the distribution as additional underwriters; and

(d) on the business day after the day that the lead underwriter provides the agreement in accordance with paragraph (a), the lead underwriter provides notice in writing to the issuer that

(i) the lead underwriter has confirmed the terms of the bought deal agreement, or

(ii) the lead underwriter will not be confirming the terms of the bought deal agreement and the agreement has been terminated.

7.4(2) Where an issuer has entered into a bought deal agreement that has been confirmed in accordance with subsection (1), the prospectus requirement does not apply to a solicitation of an expression of interest made before the issuance of a receipt for a preliminary short form prospectus for securities to be qualified for distribution under a short form prospectus pursuant to this Instrument, or for securities to be issued or transferred pursuant to an over-allotment option that are qualified for distribution under a short form prospectus pursuant to this Instrument, if

(a) before the solicitation,

(i) the bought deal agreement has fixed the terms of the distribution, including, for greater certainty, 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 not more than four business days after the date that the lead underwriter provides the notice in accordance with subparagraph (1)(d)(i); and

(ii) immediately after the lead underwriter provides the notice in accordance with subparagraph (1)(d)(i), the issuer issues the news release referred to in subparagraph 7.2(a)(iii),

(b) the issuer files a preliminary short form prospectus for the securities pursuant to this Instrument within four business days after the date that the lead underwriter provides the notice in accordance with subparagraph (1)(d)(i),

(c) 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 that, in response to the solicitation, expressed an interest in acquiring the securities, and

(d) except for a bought deal agreement under paragraph 7.2(a), no agreement of purchase and sale for the securities is entered into until the short form prospectus has been filed and a receipt has been issued.

Standard term sheets after announcement of bought deal but before a receipt for a preliminary short form prospectus

7.5(1) An investment dealer that provides a standard term sheet to a potential investor before the issuance of a receipt for a preliminary short form prospectus is exempt from the prospectus requirement with respect to providing the standard term sheet if

- (a) the standard term sheet complies with subsections (2) and (3);
- (b) the issuer is relying on the exemption in section 7.2 and has complied with paragraph 7.2(a);
- (c) other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering
 - (i) is disclosed in, or derived from,
 - (A) the news release described in subparagraph 7.2(a)(iii), or
 - (B) a document referred to in subsection 11.1(1) of Form 44-101F1 that the issuer has filed, or
 - (ii) will be disclosed in, or derived from, the preliminary short form prospectus that is subsequently filed; and
- (d) the preliminary short form prospectus will be filed in the local jurisdiction.

7.5(2) A standard term sheet provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A preliminary short form prospectus containing important information relating to the securities described in this document has not yet been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada].

Copies of the preliminary short form prospectus may be obtained from [*insert contact information for the investment dealer or underwriters*]. 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 document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the preliminary short form prospectus, final short form prospectus and any amendment, for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

7.5(3) A standard term sheet provided under subsection (1) may contain only the information referred to in subsection (2) and the information referred to in subsection 13.5(3) of NI 41-101.

Marketing materials after announcement of bought deal but before a receipt for a preliminary short form prospectus

7.6(1) An investment dealer that provides marketing materials to a potential investor before the issuance of a receipt for a preliminary short form prospectus is exempt from the prospectus requirement with respect to providing the marketing materials if

- (a) the marketing materials comply with subsections (2) to (8);
- (b) the issuer is relying on the exemption in section 7.2 and has complied with paragraph 7.2(a);
- (c) other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering
 - (i) is disclosed in, or derived from,
 - (A) the news release described in subparagraph 7.2(a)(iii), or
 - (B) a document referred to in subsection 11.1(1) of Form 44-101F1 that the issuer has filed, or
 - (ii) will be disclosed in, or derived from, the preliminary short form prospectus that is subsequently filed;
- (d) a template version of the marketing materials is approved in writing by the issuer and the lead underwriter before the marketing materials are provided;
- (e) a template version of the marketing materials is filed on or before the day that the marketing materials are first provided;
- (f) the preliminary short form prospectus will be filed in the local 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 person or company that received the marketing materials and expressed an interest in acquiring the securities.

7.6(2) If a template version of the marketing materials is approved in writing by the issuer and lead underwriter under paragraph (1)(d) and filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that

- (a) has a date that is different than the template version;
- (b) contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors;

(c) contains contact information for the investment dealer or underwriters; or

(d) has text in a format, including the type's font, colour or size, that is different than the template version.

7.6(3) If a template version of the marketing materials is divided into separate sections for separate subjects and is approved in writing by the issuer and lead underwriter under paragraph (1)(d), and that template version is filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

7.6(4) The issuer may remove any comparables, and any disclosure relating to those comparables, from the template version of the marketing materials before filing it under paragraph (1)(e) or (7)(a) if

(a) the comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials;

(b) the template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed in accordance with this subsection, provided that the note appears immediately after where the removed comparables and related disclosure would have been;

(c) if the preliminary short form prospectus is subsequently filed in the local jurisdiction, a complete template version of the marketing materials is delivered to the securities regulatory authority; and

(d) the complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

7.6(5) Marketing materials provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A preliminary short form prospectus containing important information relating to the securities described in this document has not yet been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada]. A copy of the preliminary short form prospectus is required to be delivered to any investor that received this document and expressed an interest in acquiring the securities.

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

7.6(6) If marketing materials are provided before the issuance of a receipt for a preliminary short form prospectus under subsection (1), the issuer must include the template version of the marketing materials filed under paragraph (1)(e) in its final short form prospectus or incorporate by reference the template version of the marketing materials filed under paragraph (1)(e) into its final short form prospectus in the manner described in subsection 11.6(1) of Form 44-101F1.

7.6(7) If the final short form prospectus or any amendment modifies a statement of a material fact that appeared in marketing materials provided before the issuance of a receipt for the preliminary short form prospectus under subsection (1), the issuer must

(a) prepare and file, at the time the issuer files the final short form prospectus or any amendment, a revised template version of the marketing materials that is blacklined to show the modified statement, and

(b) include in the final short form prospectus, or any amendment, the disclosure required by subsection 11.6(3) of Form 44-101F1.

7.6(8) A revised template version of the marketing materials filed under subsection (7) must comply with section 13.8 of NI 41-101.

7.6(9) If marketing materials are provided before the issuance of a receipt for a preliminary short form prospectus under subsection (1) but the issuer does not comply with subsection (6), the marketing materials are 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.

Road shows after announcement of bought deal but before a receipt for a preliminary short form prospectus

7.7(1) An investment dealer that conducts a road show for potential investors before the issuance of a receipt for a preliminary short form prospectus is exempt from the prospectus requirement with respect to the road show if

(a) the road show complies with subsections (2) to (4);

(b) the issuer is relying on the exemption in section 7.2 and has complied with paragraph 7.2(a); and

(c) the preliminary short form prospectus will be filed in the local jurisdiction.

7.7(2) Subject to section 7.8, an investment dealer must not provide marketing materials to an investor attending a road show conducted under subsection (1) unless the marketing materials are provided in accordance with section 7.6.

7.7(3) If an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to

- (a) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;
- (b) keep a record of any information provided by the investor; and
- (c) upon issuance of a receipt for the preliminary prospectus, provide the investor with a copy of the preliminary prospectus and any amendment.

7.7(4) If an investment dealer permits an investor, other than an accredited investor, to attend a road show, the investment dealer must commence the road show with the oral reading of the following statement or a statement to the same effect:

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

Exception from filing and incorporation requirements for road shows for certain u.s. cross-border offerings

7.8(1) Subject to subsections (2) to (4), if an investment dealer provides marketing materials to a potential investor in connection with a road show for a U.S. cross-border offering, the following provisions do not apply to the template version of the marketing materials relating to the road show:

- (a) paragraph 7.6(1)(e);
- (b) subsections 7.6(6) to (9);
- (c) paragraphs 11.6(1)(b) and (c), paragraph 11.6(3)(b) and subsection 11.6(4) of Form 44-101F1.

7.8(2) Subsection (1) does not apply unless

- (a) the underwriters have a reasonable expectation that the securities offered under the U.S. cross-border offering will be sold primarily in the United States of America;
- (b) the issuer and the underwriters who sign the final short form prospectus filed in the local jurisdiction provide a contractual right containing the language set out in subsection 36A.1(5) of Form 41-101F1, or words to the same effect, except that the language may specify that the contractual right does not apply to any comparables provided in accordance with subsection (3); and

(c) if the prospectus is filed in the local jurisdiction, the template version of the marketing materials relating to the road show is delivered to the securities regulatory authority.

7.8(3) If the template version of the marketing materials relating to the road show contains comparables, the template version of the marketing materials must contain the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

7.8(4) For greater certainty, subsection (1) does not apply to marketing materials other than the marketing materials provided in connection with the road show..

5. *Section 5.1 of Form 44-101F1 is amended in paragraph (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:*

Marketing materials

11.6(1) If marketing materials were provided under subsection 7.6(1) of the Instrument or subsection 13.7(1) or 13.8(1) of NI 41-101, the issuer must

(a) include a section under the heading "Marketing Materials" proximate to the beginning of the short form prospectus that contains the disclosure required by this Item,

(b) subject to subsection (2), include the template version of the marketing materials filed under the Instrument or NI 41-101 in the final short form prospectus, or incorporate by reference the template version of the marketing materials filed under the Instrument or NI 41-101 into the final short form prospectus, and

(c) indicate that the template version of the marketing materials is not part of the final short form prospectus to the extent that the contents of the template version of the marketing materials have been modified or superseded by a statement contained in the final short form prospectus.

11.6(2) An issuer may comply with paragraph (1)(b) by including the template version of the marketing materials filed under the Instrument or NI 41-101 in the section of the short form prospectus under the heading "Marketing Materials" or in an appendix to the short form prospectus that is referred to in that section.

11.6(3) If the final short form prospectus or any amendment modifies a statement of material fact that appeared in marketing materials provided earlier,

(a) provide details of how the statement in the marketing materials has been modified, and

(b) disclose that, pursuant to subsection 7.6(7) of the Instrument or subsection 13.7(8) or 13.8(8) of NI 41-101,

(i) the issuer has prepared a revised template version of the marketing materials which has been blacklined to show the modified statement, and

(ii) the revised template version of the marketing materials can be viewed under the issuer's profile on www.sedar.com.

11.6(4) State that any template version of the marketing materials filed under NI 41-101 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.

11.6(5) If the issuer relies on the exception in subsection 7.8(1) of the Instrument or subsection 13.12(1) of NI 41-101, include the statement set out in subsection 36.A.1(5) of Form 41-101F1, or words to the same effect.

GUIDANCE

Marketing materials do not, as a matter of law, amend a preliminary short form prospectus, a final short form prospectus or any amendment..

7. This Instrument comes into force on August 13, 2013.

8. This Instrument may be cited as MSC Rule 2013-21.

Schedule F-2

Changes to Companion Policy 44-101CP to National Instrument 44-101 Short Form Prospectus Distributions

1. *The changes to Companion Policy 44-101CP to National Instrument 44-101 Short Form Prospectus Distributions are set out in this Schedule.*
2. *Part 1 is changed by adding the following after subsection 1.7(5):*
 - 1.8 **Bought Deal Provisions** - Issuers and investment dealers relying on the bought deal provisions in Part 7 of NI 44-101 should refer to the guidance in Part 6 of the Companion Policy to NI 41-101.
 - 1.9 **Marketing Activities** - Issuers and investment dealers should also refer to the guidance on marketing activities in Part 6 of the Companion Policy to NI 41-101. While NI 44-101 has provisions on marketing after the announcement of a bought deal and before a receipt for a preliminary short form prospectus, NI 41-101 has general provisions that apply to marketing during the waiting period and after a receipt for a final prospectus..
3. *Section 3.6 is changed*
 - (a) *in the heading, by adding "or Marketing Materials" after "Reports", and*
 - (b) *by adding the words "or a subsequently filed template version of marketing materials" after "a subsequently filed material change report".*
4. *These changes become effective on August 13, 2013.*

Schedule G

Amendments to National Instrument 44-102 *Shelf Distributions* and Changes to Companion Policy

Schedule G-1

THE MANITOBA SECURITIES COMMISSION
MSC Rule No. 2013-22
(Section 149.1, *The Securities Act*)

AMENDMENT INSTRUMENT FOR NATIONAL INSTRUMENT 44-102 *SHELF DISTRIBUTIONS*

1. *National Instrument 44-102 Shelf Distributions* is amended by this Instrument.
2. The following new Part 9A is added after section 9.2:

PART 9A – Marketing in Connection with Shelf Distributions

Definitions

9A.1(1) In this Part,

"**comparables**" means information that compares an issuer to other issuers;

"**U.S. cross-border offering**" means an offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC;

"**U.S. prospectus**" means a prospectus that has been prepared in accordance with the disclosure and other requirements of U.S. federal securities law for an offering of securities registered under the 1933 Act.

9A.1(2) In this Part, for greater certainty, a reference to "provides" includes showing a document to a person without allowing the person to retain or make a copy of the document.

Standard term sheets after a receipt for a final base shelf prospectus

9A.2(1) An investment dealer must not provide a standard term sheet to a potential investor after a receipt for a final base shelf prospectus or any amendment is issued unless

- (a) the standard term sheet complies with subsections (2) and (3);

(b) other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering

(i) is disclosed in, or derived from, the final base shelf prospectus, any amendment or an applicable shelf prospectus supplement that has been filed, or

(ii) will be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed; and

(c) a receipt for the final base shelf prospectus has been issued in the local jurisdiction.

9A.2(2) A standard term sheet provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A final base shelf prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada].

Copies of the final base shelf prospectus, and any applicable shelf prospectus supplement, may be obtained from [*insert contact information for the investment dealer or underwriters*].

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final base shelf prospectus, any amendment and any applicable shelf prospectus supplement for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

9A.2(3) A standard term sheet provided under subsection (1) may contain only the information referred to in subsection (2) and the information referred to in subsection 13.5(3) of NI 41-101.

Marketing materials after a receipt for a final base shelf prospectus

9A.3(1) An investment dealer must not provide marketing materials to a potential investor after a receipt for a final base shelf prospectus or any amendment is issued unless

(a) the marketing materials comply with subsections (2) to (8);

(b) other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering

(i) is disclosed in, or derived from, the final base shelf prospectus, any amendment or an applicable shelf prospectus supplement that has been filed, or

(ii) will be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed;

(c) other than prescribed language, the marketing materials contain the same cautionary language in bold type as contained on the cover page, and in the summary, of the final base shelf prospectus;

(d) a template version of the marketing materials is approved in writing by the issuer and the lead underwriter before the marketing materials are provided;

(e) a template version of the marketing materials is filed on or before the day that the marketing materials are first provided;

(f) a receipt for the final base shelf prospectus has been issued in the local jurisdiction; and

(g) the investment dealer provides a copy of the final base shelf prospectus, any amendment and any applicable shelf prospectus supplement that has been filed, with the marketing materials.

9A.3(2) If a template version of the marketing materials is approved in writing by the issuer and lead underwriter under paragraph (1)(d) and filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that

(a) has a date that is different than the template version;

(b) contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors;

(c) contains contact information for the investment dealer or underwriters; or

(d) has text in a format, including the type's font, colour or size, that is different than the template version.

9A.3(3) If a template version of the marketing materials is divided into separate subjects and is approved in writing by the issuer and lead underwriter under paragraph (1)(d), and that template version is filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

9A.3(4) The issuer may remove any comparables, and any disclosure relating to those comparables, from the template version of the marketing materials before filing it under paragraph (1)(e) or subparagraph (7)(b)(ii) if

(a) the comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials;

(b) the template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed in accordance with this subsection, provided that the note appears immediately after where the removed comparables and related disclosure would have been;

(c) if the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority; and

(d) the complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

9A.3(5) Marketing materials provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A final base shelf prospectus containing important information relating to the securities described in this document has been filed with the securities regulatory authority[ies] in [each of/certain of the provinces/provinces and territories of Canada]. A copy of the final base shelf prospectus, any amendment to the final base shelf prospectus and any applicable shelf prospectus supplement that has been filed, is required to be delivered with this document.

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final base shelf prospectus, any amendment and any applicable shelf prospectus supplement for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

9A.3(6) An investment dealer must not provide marketing materials under subsection (1) after a receipt for the final base shelf prospectus is issued and after the applicable shelf prospectus supplement is filed unless the issuer

(a) has included the template version of the marketing materials filed under paragraph (1)(e) in the applicable shelf prospectus supplement, or incorporated by reference the template version of the marketing materials filed under paragraph (1)(e) into the applicable shelf prospectus supplement in the manner described in paragraph 4 of subsection 6.3(1), or

(b) has included in the applicable base shelf prospectus a statement that any template version of the marketing materials filed after the date of the shelf prospectus supplement and before the termination of the distribution is deemed to be incorporated into the shelf prospectus supplement.

9A.3(7) If marketing materials are provided under subsection (1) after a receipt for the final base shelf prospectus is issued but before the applicable shelf prospectus supplement is filed, the issuer must

(a) include the template version of the marketing materials filed under paragraph (1)(e) in the applicable shelf prospectus supplement, or incorporate by reference the template version of the marketing materials filed under paragraph (1)(e) into the applicable shelf prospectus supplement in the manner described in paragraph 4 of subsection 6.3(1); and

(b) if the applicable shelf prospectus supplement modifies a statement of material fact that appeared in marketing materials provided earlier under subsection (1),

(i) indicate in the shelf prospectus supplement that the template version of the marketing materials is not part of the shelf prospectus supplement to the extent that the contents of the template version of the marketing materials have been modified or superseded by a statement contained in the shelf prospectus supplement,

(ii) prepare and file, at the time the issuer files the shelf prospectus supplement, a revised template version of the marketing materials that is blacklined to show the modified statement,

(iii) provide details in the shelf prospectus supplement of how the statement in the marketing materials has been modified, and

(iv) disclose in the shelf prospectus supplement that pursuant to subsection (7),

(A) the issuer has prepared a revised template version of the marketing materials which has been blacklined to show the modified statement, and

(B) the revised template version of the marketing materials can be viewed under the issuer's profile on www.sedar.com.

9A.3(8) Any revised template version of the marketing materials filed under subsection (7) must comply with this section.

9A.3(9) If marketing materials are provided under subsection (1) but the issuer did not comply with subsection (6) or paragraph (7)(a), as applicable, the marketing materials are deemed for purposes of securities legislation to be incorporated into the applicable shelf prospectus supplement as of the date of the shelf prospectus supplement to the extent not otherwise expressly modified or superseded by a statement contained in the shelf prospectus supplement.

Road shows after a receipt for a final base shelf prospectus

9A.4(1) An investment dealer must not conduct a road show for potential investors after a receipt for a final base shelf prospectus or any amendment is issued unless

(a) the road show complies with subsections (2) to (4); and

(b) a receipt for the final base shelf prospectus has been issued in the local jurisdiction.

9A.4(2) Subject to section 9A.5, an investment dealer must not provide marketing materials to investors attending a road show conducted under subsection (1) unless the marketing materials are provided in accordance with section 9A.3.

9A.4(3) If any investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to

(a) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;

(b) keep a record of any information provided by the investor; and

(c) provide the investor with a copy of the final base shelf prospectus, any amendment to the final base shelf prospectus and any applicable shelf prospectus supplement that has been filed.

9A.4(4) If an investment dealer permits an investor, other than an accredited investor, to attend a road show, the investment dealer must commence the road show with the oral reading of the following statement or a statement to the same effect:

This presentation does not provide full disclosure of all material facts relating to the securities offered. Investors should read the final base shelf prospectus, any amendment and any applicable shelf prospectus supplement for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

Exception from filing and incorporation requirements for road shows for certain u.s. cross-border offerings

9A.5(1) Subject to subsections (2) to (4), if an investment dealer provides marketing materials to a potential investor in connection with a road show for a U.S. cross-border offering, the following provisions do not apply to the template version of the marketing materials relating to the road show:

(a) paragraph 9A.3(1)(e);

(b) subsections 9A.3(6) to (9).

9A.5(2) Subsection (1) does not apply unless

(a) the underwriters have a reasonable expectation that the securities offered under the U.S. cross-border offering will be sold primarily in the United States of America;

(b) the issuer and the underwriters who sign the base shelf prospectus or the applicable shelf prospectus supplement filed in the local jurisdiction provide a contractual right containing the language set out in subsection 36A.1(5) of Form 41-101F1, or words to the same effect, except that the language may specify that the contractual right does not apply to any comparables provided in accordance with subsection (3); and

(c) if the base shelf prospectus is filed in the local jurisdiction, the template version of the marketing materials relating to the road show is delivered to the securities regulatory authority.

9A.5(3) If the template version of the marketing materials relating to the road show contains comparables, the template version of the marketing materials must contain the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

9A.5(4) For greater certainty, subsection (1) does not apply to marketing materials other than the marketing materials provided in connection with the road show..

3. This Instrument comes into force on August 13, 2013.

4. This Instrument may be cited as MSC Rule 2013-22.

Schedule G-2

Changes to Companion Policy 44-102CP to National Instrument 44-102 Shelf Distributions

1. *The changes to Companion Policy 44-102CP to National Instrument 44-102 Shelf Distributions are set out in this Schedule.*
2. *Section 1.3 is replaced with the following:*

- 1.3 **Marketing before the Filing of a Shelf Prospectus Supplement** - After a receipt has been issued for a base shelf prospectus, we do not have the same regulatory concerns about "marketing" before the filing of a shelf prospectus supplement as we do about "pre-marketing" before the filing of a short form prospectus or a long form prospectus (see section 6.4 of Companion Policy 41-101CP).

A preliminary form of shelf prospectus supplement describing a tranche of securities to be offered under the shelf procedures (a draw-down) may be used in marketing the securities before the public offering price is determined. Issuers are reminded that the ability to use a preliminary form of shelf prospectus supplement in this manner for a distribution of equity securities under an unallocated base shelf prospectus is subject to the requirement in section 3.2 of National Instrument 44-102 to issue a news release once the issuer or selling securityholder has formed a reasonable expectation that the distribution will proceed.

Issuers should also consider whether the decision to pursue a draw-down under an allocated base shelf prospectus is a material change under applicable securities legislation. If the decision is a material change, the news release and material change report requirements in Part 7 of NI 51-102 and other securities legislation apply.

In order to address selective disclosure concerns, an issuer will generally file any preliminary form of shelf prospectus supplement on SEDAR and ask their principal regulator to make it public. However, staff of securities regulatory authorities will not be "pre-clearing" any preliminary form of shelf prospectus supplement (unless the issuer is filing a draft supplement pursuant to an undertaking previously given to securities regulatory authorities).

If an issuer does not issue a news release about a potential draw-down under a base shelf prospectus, then the relevant investment dealers should consider measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees" (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201 *Disclosure Standards*) before circulating a preliminary form of shelf prospectus supplement to investors.

Issuers and investment dealers should also refer to the guidance on marketing activities in Part 6 of the Companion Policy to NI 41-101. While NI 44-102 has provisions on marketing after a receipt for a final base shelf prospectus, NI 41-101 has general provisions that apply to marketing during the waiting period.

3. *These changes become effective on August 13, 2013.*

Schedule H

Amendments to National Instrument 44-103 *Post-Receipt Pricing* and Changes to Companion Policy

Schedule H-1

THE MANITOBA SECURITIES COMMISSION
MSC Rule No. 2013-23
(Section 149.1, *The Securities Act*)

AMENDMENT INSTRUMENT FOR NATIONAL INSTRUMENT 44-103 *POST-RECEIPT PRICING*

1. *National Instrument 44-103 Post-Receipt Pricing is amended by this Instrument.*
2. *The following new Part 4A is added after section 4.10:*

PART 4A – MARKETING IN CONNECTION WITH THE PREP PROCEDURES

Definitions

4A.1(1) In this Part,

"**comparables**" means information that compares an issuer to other issuers;

"**U.S. cross-border initial public offering**" means an initial public offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC;

"**U.S. cross-border offering**" means an offering of securities of an issuer being made contemporaneously in the United States of America and Canada by way of a prospectus filed with a securities regulatory authority in a jurisdiction of Canada and a U.S. prospectus filed with the SEC, and includes a U.S. cross-border initial public offering;

"**U.S. prospectus**" means a prospectus that has been prepared in accordance with the disclosure and other requirements of U.S. federal securities law for an offering of securities registered under the 1933 Act.

4A.1(2) In this Part, for greater certainty, a reference to "provides" includes showing a document to a person without allowing the person to retain or make a copy of the document.

Standard Term Sheets after a Receipt for a Final Base PREP Prospectus

4A.2(1) An investment dealer must not provide a standard term sheet to a potential investor after a receipt for a final base PREP prospectus or any amendment is issued unless

- (a) the standard term sheet complies with subsections (2) and (3);
- (b) other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering
 - (i) is disclosed in, or derived from, the final base PREP prospectus, the supplemented PREP prospectus or any amendment that has been filed, or
 - (ii) will be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed; and
- (c) a receipt for the final base PREP prospectus has been issued in the local jurisdiction.

4A.2(2) A standard term sheet provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A [final base PREP prospectus/supplemented PREP prospectus] containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada].

Copies of the [final base PREP prospectus/supplemented PREP prospectus] may be obtained from [*insert contact information for the investment dealer or underwriters*].

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the supplemented PREP prospectus and any amendment for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

4A.2(3) A standard term sheet provided under subsection (1) may contain only the information referred to in subsection (2) and the information referred to in subsection 13.5(3) of NI 41-101.

Marketing materials after a receipt for a final base PREP prospectus

4A.3(1) An investment dealer must not provide marketing materials to a potential investor after a receipt for a final base PREP prospectus or any amendment is issued unless

- (a) the marketing materials comply with subsections (2) to (9);
- (b) other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering

(i) is disclosed in, or derived from, the final base PREP prospectus, the supplemented PREP prospectus or any amendment that has been filed, or

(ii) will be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed;

(c) other than prescribed language, the marketing materials contain the same cautionary language in bold type as contained on the cover page, and in the summary, of the final base PREP prospectus;

(d) a template version of the marketing materials is approved in writing by the issuer and the lead underwriter before the marketing materials are provided;

(e) a template version of the marketing materials is filed on or before the day that the marketing materials are first provided;

(f) a receipt for the final base PREP prospectus has been issued in the local jurisdiction; and

(g) the investment dealer provides the marketing materials with a copy of

(i) the final base PREP prospectus and any amendment, or

(ii) if it has been filed, the supplemented PREP prospectus and any amendment.

4A.3(2) A template version of the marketing materials filed under paragraph 1(e) may contain blank spaces for the PREP information set out in section 3.3, provided that the omitted information is contained in the supplemented PREP prospectus that is subsequently filed.

4A.3(3) If a template version of the marketing materials is approved in writing by the issuer and lead underwriter under paragraph 1(d) and filed under paragraph 1(e), an investment dealer may provide a limited-use version of the marketing materials that

(a) has a date that is different than the template version;

(b) contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors;

(c) contains contact information for the investment dealer or underwriters;

(d) has text in a format, including the type's font, colour or size, that is different than the template version; or

(e) contains the omitted information referred to in subsection (2), provided that the omitted information is contained in the supplemented PREP prospectus that is subsequently filed.

4A.3(4) If a template version of the marketing materials is divided into separate sections for separate subjects and is approved in writing by the issuer and lead underwriter under paragraph (1)(d), and that template version is filed under paragraph (1)(e), an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

4A.3(5) The issuer may remove any comparables, and any disclosure relating to those comparables, from the template version of the marketing materials before filing it under paragraph (1)(e) or (8)(b) if

(a) the comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials;

(b) the template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed in accordance with this subsection, provided that the note appears immediately after where the removed comparables and related disclosure would have been;

(c) if the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority; and

(d) the complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

4A.3(6) Marketing materials provided under subsection (1) must be dated and include the following legend, or words to the same effect, on the first page:

A [final base PREP prospectus/supplemented PREP prospectus] containing important information relating to the securities described in this document has been filed with the securities regulatory authorit[y/ies] in [each of/certain of the provinces/provinces and territories of Canada]. A copy of the [final base PREP prospectus/supplemented PREP prospectus], and any amendment, is required to be delivered with this document.

This document does not provide full disclosure of all material facts relating to the securities offered. Investors should read the supplemented PREP prospectus and any amendment for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

4A.3(7) An investment dealer must not provide marketing materials under subsection (1) after a receipt for the final base PREP prospectus is issued unless the issuer

(a) has included the template version of the marketing materials filed under paragraph (1)(e) in the final base PREP prospectus, and any amendment, or incorporated by reference the template version of the marketing materials filed under paragraph (1)(e) into the final

base PREP prospectus, and any amendment, in the manner described in subsection 36A.1(1) of Form 41-101F1 or subsection 11.6(1) of Form 44-101F1, as applicable, or

(b) has included in the final base PREP prospectus a statement that any template version of the marketing materials filed after the date of the final base PREP prospectus and before the termination of the distribution is deemed to be incorporated into the final base PREP prospectus.

4A.3(8) If an amendment to a final base PREP prospectus or a supplemented PREP prospectus modifies a statement of material fact that appeared in marketing materials provided under subsection (1), the issuer must

(a) indicate in the amendment that the template version of the marketing materials is not part of the final base PREP prospectus or supplemented PREP prospectus, as amended, to the extent that the contents of the template version of the marketing materials have been modified or superseded by a statement contained in the amendment;

(b) prepare and file, at the time the issuer files the amendment to the final base PREP prospectus or supplemented PREP prospectus, as applicable, a revised template version of the marketing materials that is blacklined to show the modified statement; and

(c) include in the amendment to the final base PREP prospectus or supplemented PREP prospectus, as applicable, the disclosure required by subsection 36A.1(3) of Form 41-101F1 or subsection 11.6(3) of Form 44-101F1, as applicable.

4A.3(9) Any revised template version of the marketing materials filed under subsection (8) must comply with this section.

4A.3(10) If marketing materials are provided under subsection (1) but the issuer did not comply with subsection (7), the marketing materials are deemed for purposes of securities legislation to be incorporated into the final base PREP prospectus as of the date of the final base PREP prospectus to the extent not otherwise expressly modified or superseded by a statement contained in the final base PREP prospectus.

Road shows after a receipt for a final base prep prospectus

4A.4(1) An investment dealer must not conduct a road show for potential investors after a receipt for a final base PREP prospectus or any amendment is issued unless

(a) the road show complies with subsections (2) to (4); and

(b) a receipt for the final base PREP prospectus has been issued in the local jurisdiction.

4A.4(2) Subject to section 4A.6, an investment dealer must not provide marketing materials to investors attending a road show conducted under subsection (1) unless the marketing materials are provided in accordance with section 4A.3.

4A.4(3) If an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to

- (a) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;
- (b) keep a record of any information provided by the investor; and
- (c) provide the investor with a copy of
 - (i) the final base PREP prospectus and any amendment, or
 - (ii) if it has been filed, the supplemented PREP prospectus and any amendment.

4A.4(4) If an investment dealer permits an investor, other than an accredited investor, to attend a road show, the investment dealer must commence the road show with the oral reading of the following statement or a statement to the same effect:

This presentation does not provide full disclosure of all material facts relating to the securities offered. Investors should read the supplemented PREP prospectus and any amendment for disclosure of those facts, especially risk factors relating to the securities offered, before making an investment decision.

Exception from procedures for road shows for certain u.s. cross-border initial public offerings

4A.5(1) Subject to subsection (2), paragraphs 4A.4(3)(a) and (b) do not apply to an investment dealer that conducts a road show in connection with a U.S. cross-border initial public offering.

4A.5(2) Subsection (1) does not apply unless

- (a) the issuer is relying on the exemption from U.S. filing requirements in Rule 433(d)(8)(ii) under the 1933 Act in respect of the road show; and
- (b) the investment dealer establishes and follows reasonable procedures to
 - (i) ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to voluntarily provide their name and contact information; and
 - (ii) keep a record of any information voluntarily provided by the investor.

Exception from filing and incorporation requirements for road shows for certain u.s. cross-border offerings

4A.6(1) Subject to subsections (2) to (4), if an investment dealer provides marketing materials to a potential investor in connection with a road show for a U.S. cross-border

offering, the following provisions do not apply to the template version of the marketing materials relating to the road show:

- (a) Paragraph 4A.3(1)(e);
- (b) subsections 4A.3(7) to (10).

4A.6(2) Subsection (1) does not apply unless

- (a) the underwriters have a reasonable expectation that the securities offered under the U.S. cross-border offering will be sold primarily in the United States of America;
- (b) the issuer and the underwriters who sign the base PREP prospectus or the supplemented PREP prospectus filed in the local jurisdiction provide a contractual right containing the language set out in subsection 36A.1(5) of Form 41-101F1, or words to the same effect, except that the language may specify that the contractual right does not apply to any comparables provided in accordance with subsection (3); and
- (c) if the base PREP prospectus has been filed in the local jurisdiction, the template version of the marketing materials relating to the road show is delivered to the securities regulatory authority.

4A.6(3) If the template version of the marketing materials relating to the road show contains comparables, the template version of the marketing materials must contain the disclosure referred to in paragraph 13.7(4)(d) of NI 41-101.

4A.6(4) For greater certainty, subsection (1) does not apply to marketing materials other than the marketing materials provided in connection with the road show.

3. This Instrument comes into force on August 13, 2013.
4. This Instrument may be cited as MSC Rule 2013-23.

Schedule H-2

Changes to Companion Policy 44-103CP to National Instrument 44-103 Post-Receipt Pricing

1. *The changes to Companion Policy 44-103CP to National Instrument 44-103 Post-Receipt Pricing are set out in this Schedule.*

2. *Part 3 is changed by adding the following after section 3.4:*

3.5 Marketing Activities - Issuers and investment dealers should also refer to the guidance on marketing activities in Part 6 of the Companion Policy to NI 41-101. While the Instrument has provisions on marketing after a receipt for a final base PREP prospectus, NI 41-101 has general provisions that apply to marketing during the waiting period..

3. *These changes become effective on August 13, 2013.*

Schedule I

Changes to

National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*

1. *The changes to National Policy 47-201 Trading Securities Using the Internet and Other Electronic Means are set out in this Schedule.*

2. *Section 2.7 is replaced with the following:*

2.7 Road Shows

- (1) For the purposes of this Policy, "road show" has the meaning assigned in National Instrument 41-101 *General Prospectus Requirements*.
- (2) National Instrument 41-101 and other prospectus rules set out the circumstances in which an investment dealer may hold a road show in connection with a distribution of securities, including a road show held on the internet or by other electronic means.
- (3) Subsections 13.9(3) and 13.10(3) of National Instrument 41-101, subsection 7.7(3) of National Instrument 44-101 *Short Form Prospectus Distributions*, subsection 9A.4(3) of National Instrument 44-102 *Shelf Distributions* and subsection 4A.4(3) of National Instrument 44-103 *Post-Receipt Pricing* provide that the investment dealer conducting the road show must establish and follow reasonable procedures to:
 - ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;
 - keep a record of any information provided by the investor; and
 - provide the investor with a copy of the relevant prospectus and any amendment.
- (4) In this connection, the following procedures are recommended for a road show held on the internet or by other electronic means:
 - (a) Pursuant to securities legislation, a copy of the filed prospectus is required to be made available to each viewer before each road show transmission, and each transmission should contain visual statements emphasizing that the information conveyed through the road show does not contain all of the information in the prospectus, which should be reviewed for complete information. A copy of the prospectus could be sent electronically to viewers in accordance with the guidelines contained in National Policy 11-201.

- (b) Electronic access to the transmission of a road show on the internet or by other electronic means should be controlled by the investment dealer conducting the road show, using such means as password protection or a similar mechanism, in order to ensure that all viewers are identified and have been offered a prospectus..

3. *These changes become effective on August 13, 2013.*