

CSA Notice of Amendments to National Instrument 51-102 *Continuous Disclosure Obligations* and Changes to Certain Policies Related to the Business Acquisition Report Requirements

August 20th, 2020

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are making amendments and changes to:

- National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**);
- Companion Policy 51-102CP *Continuous Disclosure Obligations* (**Companion Policy 51-102CP**);
- Companion Policy to National Instrument 41-101 *General Prospectus Requirements* (**Companion Policy 41-101CP**);
- Companion Policy to National Instrument 44-101 *Short Form Prospectus Distributions* (**Companion Policy 44-101CP**);

(the **Amendments**).

Provided all necessary ministerial approvals are obtained, the Amendments are effective on November 18, 2020.

Details of the Amendments are outlined in Annexes C through F of this notice and will also be available on websites of CSA jurisdictions, including:

www.bsc.bc.ca
www.albertasecurities.com
www.fcaa.gov.sk.ca
www.mbsecurities.ca
www.osc.gov.on.ca
www.lautorite.qc.ca
nssc.novascotia.ca

Substance and Purpose

A reporting issuer that is not an investment fund is required to file a business acquisition report (**BAR**) after completing a significant acquisition. Part 8 of NI 51-102 sets out three significance tests: the asset test, the investment test and the profit or loss test. An acquisition of a business or related businesses is a significant acquisition that requires the filing of a BAR under Part 8 of NI

51-102:

- for a reporting issuer that is not a venture issuer, if the result from any one of the three significance tests exceeds 20%;
- for a venture issuer, if the result of either the asset test or investment test exceeds 100%

(collectively, the **BAR requirements**).

The Amendments

- alter the determination of significance for reporting issuers that are not venture issuers such that an acquisition of a business or related businesses is a significant acquisition only if at least two of the existing significance tests are triggered (the **Two-Trigger Test**); and
- increase the threshold of the significance tests for reporting issuers that are not venture issuers from 20% to 30%.

The Amendments are aimed at reducing the regulatory burden imposed by the BAR requirements in certain instances, without compromising investor protection.

Background

The BAR requirements were introduced in 2004¹ to provide investors with relatively timely access to historical financial information on a significant acquisition. They also require a reporting issuer that is not a venture issuer to include pro forma financial statements in a BAR. Since adoption, however, the CSA has heard that, in some cases, the significance tests may produce anomalous results, that preparation of a BAR entails significant time and cost, and that the information necessary to comply with the BAR requirements may, in some instances, be difficult to obtain. In addition, some reporting issuers have applied for, and in appropriate circumstances were granted, exemptive relief from certain of the BAR requirements.

On September 5, 2019, the CSA published a Notice and Request for Comment (the **Publication for Comment Materials**) proposing the Amendments. The Amendments were developed over the course of an extensive consultation process, including comment letters and other stakeholder feedback received respecting the BAR requirements in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.² In addition, the CSA considered data (including analyzing in each jurisdiction the BARs filed and the exemptive relief from the BAR requirements granted over an approximate three-year period) to assess the impact of the Amendments on a look back basis.

Based on the 16 comment letters responding to the Publication for Comment Materials, the CSA is not making any material changes to the Amendments. We have summarized our responses to the feedback received, which reflect the following:

¹ Certain aspects of these requirements were subsequently amended in 2015 as they apply to venture issuers.

² The comment letters were summarized in CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

- 13 commenters expressed general support for the Amendments while one commenter opposed.
- 10 commenters specifically expressed support for the Two-Trigger Test while one commenter objected to this amendment.
- Seven commenters specifically supported increasing the significance test threshold to 30% while two commenters objected to this amendment and recommended we maintain the 20% threshold. Three commenters recommended a greater increase in the percentage than what we proposed.

In addition, we considered other options to reduce the regulatory burden associated with the BAR requirements but determined that they either did not align with our policy objectives or that the reduction in burden did not justify a potential significant loss of information to investors. We also considered international developments, including the final amendments published in May 2020 by the U.S. Securities and Exchange Commission³, but think that the Amendments appropriately address concerns raised by stakeholders in the Canadian market.

Summary of Written Comments Received by the CSA

The Publication for Comment Materials were published on September 5, 2019 and the comment period ended on December 4, 2019. We considered all the comments received and thank the commenters for their input. The names of the commenters are contained in Annex A along with a summary of the comments and our responses in Annex B.

The comment letters can be viewed on the website of each of:

- the Alberta Securities Commission at www.albertasecurities.com
- the Autorité des marchés financiers at www.lautorite.qc.ca
- the Ontario Securities Commission at www.osc.gov.on.ca

Summary of Changes

We have revised the Amendments and changes proposed in the Publication for Comment Materials to remove an outdated cross reference and to reflect current drafting principles. As these changes are not material, we are not publishing the Amendments for a further comment period.

Consequential Amendments

We are making the following consequential changes:

- revised subsection 5.9(5) of Companion Policy 41-101CP and subsection 4.9(3) of Companion Policy 44-101CP to reflect the application of the Two-Trigger Test;

³ Amendments to Financial Disclosures about Acquired and Disposed Businesses, Release No. 33-10786; 34-88914; IC-33872; File No. S7-05-19.

- added guidance to subsection 8.1(4) of Companion Policy 51-102CP reminding issuers of the differing interpretations of "business" for securities and accounting purposes; and
- removed an outdated reference in paragraph 8.6(4)(b) of Companion Policy 51-102CP.

Local Matters

Annex G to this notice outlines the consequential amendments to local securities legislation and includes additional text, as required, to respond to local matters in a local jurisdiction. Each jurisdiction that is proposing local amendments will publish an Annex G.

Contents of Annexes

This notice includes the following annexes:

- Annex A – List of Commenters
- Annex B – Summary of Comments and CSA Responses
- Annex C – Amendments to NI 51-102
- Annex D – Changes to Companion Policy 51-102CP
- Annex E – Changes to Companion Policy 41-101CP
- Annex F – Changes to Companion Policy 44-101CP
- Annex G – Local Matters

Questions

Please refer your questions to any of the following:

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ANNEX A
LIST OF COMMENTERS

No.	Commenter	Date
1.	The Canadian Advocacy Council of CFA Societies Canada	October 18, 2019
2.	The Real Property Association of Canada	November 26, 2019
3.	Canadian Coalition for Good Governance	November 27, 2019
4.	Investment Industry Association of Canada (IIAC)	November 28, 2019
5.	Magna International Inc.	December 2, 2019
6.	Cenovus Energy Inc.	December 3, 2019
7.	Quebec Bourse	December 4, 2019
8.	Canadian Investor Relations Institute	December 4, 2019
9.	Stikeman Elliott LLP	December 4, 2019
10.	Ernst & Young LLP	December 4, 2019
11.	McCarthy Tétrault LLP	December 4, 2019
12.	Chartered Professional Accountants of Canada	December 4, 2019
13.	Portfolio Management Association of Canada	December 4, 2019
14.	TSX Inc. and TSX Venture Exchange Inc.	December 4, 2019
15.	PricewaterhouseCoopers LLP	December 19, 2019
16.	Veritas Investment Research	January 6, 2020

ANNEX B
SUMMARY OF COMMENTS AND CSA RESPONSES

No.	Subject	Summarized Comment	Response
1	General Support	<p>13 commenters supported the proposed amendments.</p> <p>One commenter strongly opposed to the proposed amendments.</p>	<p>We thank the commenters for their views.</p> <p>We acknowledge the views expressed in the comment letter opposing the proposed amendments. However, we think the proposed amendments achieve the right balance between investor protection and reducing regulatory burden.</p>
2	Adoption of the two-trigger test to determine significance	<p>Ten commenters explicitly expressed support for the two-trigger test.</p> <p>One commenter specifically objected to the adoption of the two-trigger test.</p>	<p>We thank the commenters for their views.</p> <p>We acknowledge the views expressed in the comment letter objecting to the two-trigger test. However, our analysis indicates that the two-trigger test is more effective in reducing anomalous results arising from the current tests than most of the other options considered, including those suggested by certain commenters.</p>
3	30% significance threshold for the two-trigger test	<p>Seven commenters explicitly supported increasing the significance threshold to 30%.</p> <p>Three commenters recommended CSA provide further information to help them better understand</p> <ul style="list-style-type: none"> • the relative importance between the two proposed amendments with respect to the anticipated impact on the number of expected filings, and 	<p>We thank the commenters for their views.</p> <p>We note that increasing the significance test threshold is consistent with the consultation feedback received and with the CSA’s strategic plan to reduce regulatory burden while maintaining investor protection.</p> <p>Our analysis of the BARs filed and the BAR exemptive relief granted on a</p>

No.	Subject	Summarized Comment	Response
		<ul style="list-style-type: none"> the rationale behind the proposed increase of the significance test threshold from 20% to 30%. 	<p>look-back basis indicates that the two-trigger test is more effective in reducing anomalous results than most of the other options considered. This analysis also helped the CSA conclude that increasing the significance test threshold to 30% would achieve an appropriate balance between investor protection and reduction of burden.</p>
4	<p>Keeping the significance test threshold at 20% for the two-trigger test</p>	<p>Two commenters objected to increasing the significance test threshold from 20% to 30%.</p>	<p>Additionally, we received feedback that the 30% threshold more appropriately recognizes the profile of Canadian issuers when compared with US issuers and the burden of preparing a BAR for smaller transactions.</p>
5	<p>Increasing the significance threshold to 50% or higher for the two-trigger test</p>	<p>Three commenters recommended increasing the significance test threshold to 50% or 75%.</p>	<p>Finally, we considered the suggestions to further increase the significance threshold but determined that the reduction in burden did not justify a potentially significant loss of information to investors.</p>
6	<p>Eliminating the BAR</p>	<p>Four commenters recommended eliminating the BAR, citing only modest relevance or limited value.</p> <p>Among these four commenters, one commenter recommended replacing the BAR with a detailed news release and/or a material change report.</p> <p>Among these four commenters, two commenters recommended eliminating the BAR for all issuers, including venture issuers.</p>	<p>We thank the commenters for their views.</p> <p>At this time, we are not proposing to eliminate the BAR entirely as we think that the BAR provides investors with relevant information for their decision-making purposes.</p>

No.	Subject	Summarized Comment	Response
7	Keeping the current BAR requirements	One commenter strongly opposed the proposed amendments based on the view that historical financial information contained in the BAR is useful for making investment decisions.	<p>We thank the commenter for its view.</p> <p>We agree that the BAR contains relevant information that may be helpful for making investment decisions. We think the proposed amendments achieve the right balance between investor protection and reducing regulatory burden.</p>
8	Alignment with SEC	Five commenters recommended some form of consideration or alignment with the SEC proposed amendments, such as modifying the investment test to reflect the fair value of the acquired business, and otherwise monitoring developments.	<p>We thank the commenters for their views. We have monitored international developments, including the SEC final amendments published in May 2020.</p> <p>We think that the proposed amendments provide an appropriate solution to address concerns raised by stakeholders in the Canadian market.</p>
9	Pro forma financial statements	Three commenters recommended eliminating pro forma financial statements, citing only modest relevance or limited value.	We thank the commenters for their views. At this time, we are not proposing to eliminate pro forma financial statements as we think they provide useful information to some investors for making investment decisions.
10	Profit or loss test	<p>Four commenters recommended the following changes to the profit or loss test:</p> <ul style="list-style-type: none"> • replace the profit or loss test with alternatives such as EBITDA • make substantive amendments to the BAR requirements to address the challenges related to the profit or loss test 	<p>We thank the commenters for their views. At this time, we are not proposing to make changes to the profit or loss test.</p> <p>We understand from the consultation feedback that the primary concern with the profit or loss test was that it often produces anomalous results. Our data analysis indicates that the two-trigger</p>

No.	Subject	Summarized Comment	Response
		<ul style="list-style-type: none"> • align with the SEC’s proposal to add a revenue component • increase the significance test threshold from 20-30% 	<p>test is more effective in reducing anomalous results than the other suggestions raised during the consultation, such as removing the profit or loss test or introducing a revenue test etc.</p>
11	Other specific recommendations to BAR requirements	<p>One commenter suggested the following:</p> <ul style="list-style-type: none"> • clarifying the specific time-frame that applies to consider acquisitions of related businesses on a combined basis; • narrowing the definition of "acquisition of a related business". <p>One commenter suggested modifying the BAR requirements to treat the required significance tests as a filtering mechanism for the optional significance tests.</p>	<p>We thank the commenters for their views.</p> <p>At this time, we are not proposing to make further changes to other areas of the BAR requirements. We acknowledge the suggestions and continue to welcome feedback that may lead to policy projects in the future.</p>
12	51-102CP amendments – S. 8.1(4)	<p>One commenter indicated that the proposed amendments add ambiguity in determining whether or not an acquisition would be considered a business for regulatory purposes versus IFRS purposes.</p>	<p>We thank the commenter for its view. We remind issuers that the evaluation of the term "business" for securities regulatory purposes should be conducted separately from the determination for accounting purposes.</p>
13	Tailoring the BAR requirements to specific industry	<p>Three commenters recommended changes tailored to issuers in specific industries.</p>	<p>We thank the commenters for their views. At this time, we are not proposing any industry specific rules or amendments.</p>

No.	Subject	Summarized Comment	Response
14	Other disclosure requirements	Three commenters made specific recommendations to other continuous disclosure requirements, including for instance, permitting semi-annual reporting.	We thank the commenters for their views. Commenters are encouraged to continue providing their views to the other relevant policy initiatives as a result of the other CSA reducing regulatory burden efforts.
15	Application to non-venture issuers	No commenter objected to the application of the proposed amendments to non-venture issuers only. One commenter explicitly agreed that no further changes are required for venture issuers.	We thank the commenters for their views.

ANNEX C

THE MANITOBA SECURITIES COMMISSION MSC RULE 2020-8

(Section 149.1, *The Securities Act*)

AMENDMENTS TO NATIONAL INSTRUMENT 51-102 *CONTINUOUS DISCLOSURE OBLIGATIONS*

1. *National Instrument 51-102 Continuous Disclosure Obligations is amended by this Instrument.*
2. *Subsection 8.3(1) is amended by replacing "subsection (3) and subsections 8.10(1) and 8.10(2)" with "subsection (5) and subsections 8.10(1) and (2)".*
3. *Paragraph 8.3(1)(a) is amended by replacing "any of the three" with "2 or more of the".*
4. *In the following provisions, "20" is replaced with "30":*
 - (a) *paragraph (b) of subsection 8.3(1);*
 - (b) *paragraphs (a), (b) and (c) of subsection 8.3(2);*
 - (c) *paragraph (b) of subsection 8.3(3);*
 - (d) *paragraphs (a), (b) and (c) of subsection 8.3(4).*
5. *Subsection 8.3(5) is replaced with the following:*

8.3(5) Despite subsection (1) and for the purposes of subsection (3), an acquisition of a business or related businesses is not a significant acquisition,

 - (a) for a reporting issuer that is not a venture issuer, if the acquisition does not satisfy at least two of the optional significance tests under subsection (4); or
 - (b) for a venture issuer, if the acquisition would not satisfy the optional significance tests set out in paragraphs (4) (a) and (b) if "30 percent" were read as "100 percent"..
- 6.(1) This Instrument comes into force on November 18, 2020.
- 6.(2) In Saskatchewan, despite subsection (1), if these regulations are filed with the Registrar of Regulations after November 18, 2020, these regulations come into force on the day on which they are filed with the Registrar of Regulations.
7. This Instrument may be cited as MSC Rule 2020-8.

ANNEX D

CHANGES TO COMPANION POLICY 51-102CP *CONTINUOUS DISCLOSURE OBLIGATIONS*

1. *Companion Policy 51-102CP Continuous Disclosure Obligations is changed by this Document.*

2. *Subsection 8.1(4) is changed by adding the following at the end of the subsection:*

Reporting issuers are reminded that an acquisition may constitute the acquisition of a business for securities legislation purposes, even if the acquired set of activities or assets does not meet the definition of a “business” for accounting purposes..

3. *Subsection 8.2(1) is replaced with the following:*

8.2 Significance Tests

(1) **Application of Significance Tests** – Subsection 8.3(2) of the Instrument sets out the required significance tests for determining whether an acquisition of a business by a reporting issuer is a “significant acquisition”. The application of the significance tests depends on the status of the reporting issuer such that:

- (a) if the reporting issuer is not a venture issuer, an acquisition is significant if it satisfies two or more of the significance tests at a 30% threshold; or
- (b) if the reporting issuer is a venture issuer, an acquisition is significant if it satisfies either of the asset or investment test at a 100% threshold.

The test must be applied as at the acquisition date using the most recent audited annual financial statements of the reporting issuer and the business..

4. *Paragraph 8.6(4)(b) is replaced with the following:*

(b) When complete financial records of the business acquired do not exist, carve-out financial statements should be prepared..

5. These changes become effective on November 18, 2020.

ANNEX E

CHANGES TO COMPANION POLICY TO NATIONAL INSTRUMENT 41-101 GENERAL PROSPECTUS REQUIREMENTS

1. *Companion Policy to National Instrument 41-101 General Prospectus Requirements is changed by this Document.*
2. *Subsection 5.9(5) is changed by replacing the text of the first bullet with:*

if the indirect acquisition would be considered a significant acquisition under subsection 35.1(4) of Form 41-101F1 if the issuer applied those provisions to its proportionate interest in the indirect acquisition of the business;.
3. This change becomes effective on November 18, 2020.

ANNEX F

CHANGES TO COMPANION POLICY TO NATIONAL INSTRUMENT 44-101 SHORT FORM PROSPECTUS DISTRIBUTIONS

1. *Companion Policy to National Instrument 44-101 Short Form Prospectus Distributions is changed by this Document.*
2. *Subsection 4.9(3) is changed by replacing the text of the first bullet with:*

if the indirect acquisition would be considered a significant acquisition under Part 8 of NI 51-102 if the issuer applied those provisions to its proportionate interest in the indirect acquisition of the business; and.
3. This change becomes effective on November 18, 2020.