

MSC Notice 2002-16

NOTICE OF NATIONAL INSTRUMENT 54-101 COMMUNICATION WITH BENEFICIAL OWNERS OF SECURITIES OF A REPORTING ISSUER AND COMPANION POLICY 54-101CP COMMUNICATION WITH BENEFICIAL OWNERS OF SECURITIES OF A REPORTING ISSUER

The Manitoba Securities Commission (the "Commission") has, under section 149.1 of *The Securities Act* (Manitoba) (the "Act"), made National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (including related forms) (the "Instrument") as a rule under the Act, and has, under section 149.5 of the Act, adopted Companion Policy NI 54-101CP *Communication with Beneficial Owners of Securities of a Reporting Issuer* (the "Policy") as a policy under the Act to deal with communication with beneficial owners of securities of a reporting issuer.

The forms are: Forms 54-101F1, 54-101F2, 54-101F3, 54-101F4, 54-101F5, 54-101F6, 54-101F7, 54-101F8 and 54-101F9 (the "Forms"). The full text of the Instrument (including the Forms) and the Companion Policy can be found on the Commission's website at www.msc.gov.mb.ca.

Through the Instrument, the Canadian Securities Administrators (the "CSA") seek to continue, with some changes, the regulatory regime concerning communications with beneficial owners of securities of a reporting issuers currently embodied in National Policy Statement No. 41 *Shareholder Communication* ("NP41"), which the Instrument will, together with National Instrument 54-102, replace.

Effective Dates

The Instrument will come into force on July 1, 2002. If the Instrument comes into force on July 1, 2002, transitional provisions in the Instrument provide that NOBO lists will not be required to be furnished before September 1, 2002, and the sending of proxy-related materials for meetings to be held before September 1, 2004 may only be sent under the Instrument to NOBOs indirectly through the intermediaries holding on behalf of the NOBOs.

The Policy will come into force on the date that the Instrument comes into force.

The Instrument is expected to be also implemented as a rule in each of British Columbia, Alberta, Ontario, Newfoundland, Nova Scotia and Quebec, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA.

Background

Other jurisdictions first published the Instrument for comment on February 27, 1998¹ and after considering the comments, published for comment a revised version on July 17, 1998.² After considering those comments, the Commission along with other jurisdictions of the CSA published a further revised version for comment on September 15, 2000 (the “2000 Proposal”).³

Following the publication of the 2000 Proposal, the CSA received 179 comments as part of the formal comment process. Many comments followed a standard format, of which there were three different types. The CSA also received a large number of informal submissions made outside the formal comment process, including 72 sent by electronic mail and a number sent after the comment period, which echoed comments made in the formal process. All comments and submissions were considered. The names of the commenters that made their submissions formally, a summary of their comments and our responses are contained in Appendix “A” and Appendix “B” to this Notice. We thank all of those who made comments or submissions.

We have made some changes to the 2000 Proposal in response to the comments received and further consultation. We are of the view that republication of the Instrument and Policy for comment is not required.

National Instrument 54-102

National Instrument 54-102 *Interim Financial Statement and Report Exemption* (“NI 54-102”), which replaces the provisions of NP41 and associated rules and blanket orders pertaining to supplemental mailing lists, was published for comment by other jurisdictions on February 27, 1998⁴ and by the Commission on September 15, 2000

The Commission has, concurrently with making the Instrument a rule, made NI 54-102 as a rule, which is the subject of a separate notice being published at the same time as this notice. NI 54-102 will come into force on July 1, 2002.

The Instrument and NI 54-102 collectively replace the provisions of NP41 pertaining to communication with beneficial owners of securities of a reporting issuer.

Purpose of the Instrument and Policy

The Instrument establishes an obligation on reporting issuers to send proxy-related materials to the beneficial owners of its securities who are not registered holders of its securities, provides a

¹ In Ontario, at (1998), 21 OSCB 1388.

² In Ontario, at (1998), 21 OSCB 4491.

³ In Ontario, at (2000), 23 OSCB 5875. For additional information concerning the background of the Instrument, reference should be made to the notices that accompanied the previous versions that were published for comment.

⁴ In Ontario, at (1998), 21 OSCB 1431, then entitled “Supplemental Mailing List and Interim Financial Statement Exemption”.

procedure for the sending of proxy-related materials and other securityholder material to beneficial owners and imposes obligations on various parties in the securityholder communication process.

The Policy sets forth our views on the interpretation and application of the Instrument.

Summary of Changes to the Instrument

There were no material changes made to the Instrument from the version published in the 2000 Proposal. We have made typographical and drafting changes and certain other minor changes based on comments received on the 2000 Proposal, including the following:

- Paragraph (b) of the definition of “non-objecting beneficial owner” in section 1.1 has been revised consequentially to the number changes in paragraph 3.3(b).
- The conjunctive between paragraphs (d) and (e) of the definition of “routine business” in section 1.1 has been revised from “and” to “or”.
- The previous section 1.2 has been deleted as it merely restates general principles of agency law.
- Section 1.4 (which was previously section 1.5) has been simplified through the elimination of redundant language.
- Subparagraph 2.2(1)(b) has been revised to refer simply to “securities regulatory authority”, which is defined in National Instrument 14-101 *Definitions*, in order to clarify the jurisdictional operation of the requirement.
- Subparagraph 2.2(1)(c) has been revised to simply refer to “exchange” to encompass the different terms used in the securities legislation of each jurisdiction.
- Subsection 2.5(4) has been revised to eliminate redundancy.
- Section 2.5 has been revised to clarify how a reporting issuer makes requests for beneficial ownership information from proximate intermediaries that do not hold the relevant securities as a participant in a depository, but are registered holders.
- Section 2.6 has been revised to specify the date for satisfaction of the requirements a reporting issuer must meet in order not to be subject to sections 2.3 or 2.5. Section 2.6 also has been revised to reflect the fact that a nominee of a depository or an intermediary may be the registered holder.

- A new subsection 2.11(2) has been added to respond to concerns expressed that where the reporting issuer sends proxy-related materials directly to NOBOs, the responsibility of the reporting issuer for the process should be made clear to the NOBO.
- Section 2.15 has been revised to clarify that the notice must be sent concurrently. Section 2.15 has also been revised to clarify which proximate intermediaries a reporting issuer is required to send the notice of adjournment or other change for a meeting.
- Section 3.1 has been revised to clarify its application to existing intermediaries and persons or companies that become intermediaries after the Instrument comes into force.
- Section 3.2 has been revised to eliminate the requirement that the explanation to clients and the client response form be sent before the intermediary may hold securities on behalf of a client, in circumstances where it has received oral instructions from the client, provided that it sends the explanation to clients and client response form as part of its opening-account procedures.
- Subparagraph 3.3(b)(ii) (previously 3.3(b)2) has been revised to clarify that the clients referred to in this subparagraph are those clients who were deemed to be NOBOs under NP 41.
- Subparagraph 3.3(b)(iv) has been revised to also include, as materials that may be declined to be received by a client, annual reports and financial statements that are *not* part of proxy-related materials.
- Paragraph 3.3(c) now requires an intermediary to obtain, before January 1, 2004, new instructions on the matters to which a client response form pertains if the client was deemed to be a NOBO under NP41. This change was made to conform with the expiry of the time period provided in section 30 of the *Personal Information Protection and Electronic Documents Act* (Canada).
- Subsection 6.2(2) has been amended by deleting the reference to the forms as the forms are to form part of the Instrument.
- Section 10.1 provides that the Instrument comes into force on July 1, 2002, instead of July 1, 2001.
- Section 10.2 now sets out transitional provisions for reporting issuers that have begun the process of sending meeting materials under NP41 but whose meeting will be held after the coming into force of the Instrument.
- Section 10.3 now provides that, despite section 10.1, a reporting issuer sending proxy-related materials to beneficial owners for a meeting to be held before September 1, 2004 shall send those materials only indirectly under section 2.12.

- Section 10.4 now provides that there is no requirement to furnish a NOBO list before September 1, 2002.
- Form 54-101F1 *Explanation to Clients and Client Response Form*:
 - In the *Explanation to Clients*, under the heading “Receiving Securityholder Materials,” the explanation has been revised to include in the referenced materials that may be declined, annual reports and financial statements that are not part of proxy-related materials. The *Client Response Form* has been amended accordingly.
 - In the *Explanation to Clients*, under the heading “Electronic Delivery of Documents,” the instruction has been revised to clarify that the instruction is addressed to the intermediary and that the client’s consent referred to in the instruction relates to the sending of documents by the intermediary only.
- In Form NI 54-101F2, footnotes have been added to Part 1 and Part 2 to define “routine business”.

Staged Implementation

The implementation of the provisions of the Instrument related to furnishing NOBO lists and the use of NOBO lists by reporting issuers to send proxy-related materials directly to NOBOs has been staged in order to enable market participants to identify and resolve any potential difficulties that may be encountered in establishing the necessary systems and administrative infrastructure. The CSA will continue to consult with and monitor the ability of market participants to:

- Ensure effectiveness of the process for generating and transmitting NOBO lists, before the NOBO lists are made available to be used for the direct sending of proxy-related materials to NOBOs.
- Negotiate reasonable fees for services, particularly fees payable to intermediaries for NOBO lists.

The CSA will also monitor related developments in the regulation of securityholder communication, including those in the United States of America.

If, during the period of staged implementation, it becomes apparent to the CSA that the use by reporting issuers of NOBO lists to send proxy-related materials to NOBOs should be accelerated or delayed, the CSA reserves the ability to respond by way of appropriate amendments to the Instrument.

To facilitate such consultation and monitoring, the Commission intends to establish an advisory committee comprising representatives of the market participant groups affected by the Instrument (i.e., reporting issuers, transfer agents of reporting issuers, intermediaries and depositories).

Summary of Changes to Policy

The Policy is the same as the version published in the 2000 Proposal, except for the following minor changes based on comments received on the 2000 Proposal:

- A new section 2.6 has been added under the heading “General” to provide guidance on the interpretation of what is a “reasonable amount” for fees.
- A new section 2.7 has been added under the heading “General” to remind market participants using the services of an agent that they remain fully responsible for compliance with the requirements of the Instrument.
- Paragraph 3.2(1) has been revised to reflect the changes to section 2.15 of the Instrument.
- Additional text has been added to section 4.4 to explain the circumstances in which the Instrument requires that FINS numbers will be required to be included in NOBO lists.
- Section 5.4(5) has been modified to clarify that the client’s consent relates only to the sending by the intermediary and the relevance of that consent to a reporting issuer.
- A new Part 6 has been added to remind market participants that trafficking of a NOBO list, contrary to Part 7 of the Instrument, will constitute a breach of securities legislation. The previous Part 6 is now Part 7, and the previous Part 7 has been deleted to eliminate redundancy.

Rescission of NP41

Effective the date the Instrument and NI 54-102 come into force, NP41 will be rescinded.

Questions

Questions may be referred to staff of the Commission or to the CSA staff who developed the Instrument:

Diane Joly
Directrice de la recherche et du développement des marchés
Commission des valeurs mobilières du Québec
(514) 940-2150
Diane.Joly@cvmq.com

Glenda A. Campbell
Vice Chair
Alberta Securities Commission
(403) 297-6454
Glenda.Campbell@seccom.ab.ca

Veronica Armstrong
Senior Policy Advisor
British Columbia Securities Commission
(604) 899-6738
or (800) 373-6393 (in B.C.)
varmstrong@bcsc.bc.ca

Robert F. Kohl
Senior Legal Counsel, Registrant Regulation
Capital Markets Branch
Ontario Securities Commission
(416) 593-8233
rkohl@osc.gov.on.ca

April 12, 2002