THE MANITOBA
SECURITIES
COMMISSION

MSC NOTICE 2005-1

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

Notice of Amendments

Each member of the Canadian Securities Administrators (the CSA) is amending National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (the Instrument) and Companion Policy 54-101CP (the Policy).

The amendments to the Instrument have been or are expected to be made by each member of the CSA, and will be implemented as

- a rule in each of British Columbia, Alberta, Manitoba, Ontario, Prince Edward Island, Nova Scotia and Newfoundland and Labrador;
- a commission regulation in Saskatchewan and Québec;
- a policy or code in New Brunswick, the Northwest Territories, Nunavut and the Yukon.

We also expect that the amendments to the Policy will be adopted in all jurisdictions.

In Ontario, the amendments to the Instrument and the other material required by the Act to be delivered to the Chair of the Management Board of Cabinet (the Minister) were delivered on November 26, 2004. If the Minister does not reject the amendments or return them to the Commission for further consideration, the amendments will come into force on February 9, 2005. The amendments to the Policy will come into force on the date that the amendments to the Instrument come into force.

In Québec, the Instrument is a regulation made under section 331.1 of the Act and must be approved, with or without amendment, by the Minister of Finance. The Instrument will come into force on the date of its publication in the Gazette officielle du Québec or on any later date specified in the regulation. It must also be published in the Bulletin.

Provided all necessary ministerial approvals are obtained, the amendments to the Instrument will come into force on February 9, 2005.

Substance and Purpose of the Amendments

The Instrument and Policy came into effect on July 1, 2002. The primary purpose of the Instrument is to ensure that beneficial owners of securities of a reporting issuer can receive proxy-related materials and provide instructions on how the securities they beneficially own are to be voted. To achieve this purpose, the Instrument sets out detailed procedures by which

proxy-related materials are provided to the beneficial owner, and the beneficial owner provides voting instructions. The Instrument also imposes obligations on the reporting issuer, the depository and intermediaries who hold on behalf of the beneficial owner. We have been monitoring the Instrument and Policy since they came into effect. We have also published CSA Staff Notice 54-301 *Frequently Asked Questions*. The amendments are intended to make the Instrument and Policy clearer and also improve the regulatory regime set out in the Instrument.

Details of the proposed amendments were contained in a notice and request for comments published in October 2003.

Summary of Written Comments Received by the CSA

We published the amendments for comment in October 2003. The comment period expired January 2, 2004. During the comment period we received submissions from six commenters. We have considered the comments received and thank all the commenters. The names of the commenters and a summary of their comments, together with our responses, are contained in Appendices A and B to this notice.

After considering the comments, we have made some changes to the amendments as proposed in the notice published in October 2003. As these changes are not material, we are not republishing the amendments for a further comment period.

Summary of Changes to the Amendments

This section describes changes made to the amendments published for comment in October 2003 other than those changes that are of a minor nature, or those made only for the purposes of clarification or for drafting reasons.

- *Client Response Form*

We have amended the note to the client response form portion of Form 54-101F1 to make it clearer that in the case of investment funds, where specific instructions concerning receipt of the investment fund's annual report or financial statements have been provided to the investment fund, the instructions in the client response form with respect to financial statements will not apply.

- *Companion Policy*

Explanations of the interaction of the Instrument and National Instrument 51-102 *Continuous Disclosure Obligations* have been added.

- *Transition*

We have added a transition provision so that a reporting issuer that has filed a notice of a meeting and record date before the coming into force of these amendments is, with respect to that meeting, exempt from these amendments if the reporting issuer complies with the provisions of the Instrument as unamended.

Text of Amendments

The text of the amendments follows the Appendices.

Questions

Please refer your questions to any of:

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Appendix A
Summary of Comments and CSA Responses

Definition of Special Meeting

Two commenters supported the replacement of the references to “non routine” in the instrument with “special resolution”.

One commenter said that the special meeting definition and concept may not strike the right balance between ensuring that beneficial owners are properly informed of significant issues and their desire not to receive materials. The commenter cited the following examples of matters that could be considered to be significant but which would be excluded from the special meeting definition:

- the election of directors, particularly if there is a contest as to board composition;
- non-proxy related materials, such as those relating to take-over bids, issuer bids, rights offerings, class actions or securityholder elections in non-proxy related matters;
- the corporate law concept of special meetings does not necessarily cover significant issues relating to mutual funds;
- certain shareholder proposals can be significant enough that they should fall into the significant category.

The commenter suggested that further consideration is required and that it would be preferable at this time to leave the definition of routine business in place. The commenter also suggested that any amendments to the routine business definition at this time would pose undue costs to intermediaries. The commenter also stated that the proposed amendments do not clearly address how beneficial owners who made elections under NP 41 or under the instrument prior to amendment should be treated.

Response: We have attempted to achieve the right balance between ensuring that beneficial owners are properly informed of significant issues and their desire not to receive materials by providing that beneficial owners may elect to receive only proxy-related materials that are sent in connection with a meeting at which a special resolution is being submitted to securityholders. We believe that the concept of special resolution is an improvement over the concept of non-routine business as it strikes a better balance. Using the concept of special resolution also results in greater certainty for issuers and beneficial owners than would a concept which attempted to encompass all matters that could be considered to be significant to beneficial owners.

Non-proxy related materials will continue to be sent to securityholders if required to be sent by corporate or securities law, as the client response form does not affect these. We believe that transition costs of the change from the non-routine business concept will be outweighed by the cost savings that will be realized from the reduction in material that will be required to be mailed. We have not amended the proposed amendments to the transitional provisions as an intermediary would not be prevented from seeking new instructions from the client after the amendments become effective.

Should beneficial owners be permitted to decline to receive all materials?

Two commenters suggested that, rather than provide beneficial owners with three choices (to decline to receive all materials, to choose to receive only proxy-related materials relating to special meetings, or to choose to receive all materials), beneficial owners should have two clear choices (to choose to receive all materials or to decline to receive all materials). This approach would eliminate the need of the CSA to attempt to determine which materials are deemed significant and would eliminate any concerns that beneficial owners would be left with a false sense that they will receive all materials related to significant matters. One of the commenters suggested that more consideration needs to be given to the question of whether beneficial owners should be entitled to determine whether they wish to receive materials related to significant issues before any amendments are made and suggested that any amendments at this time would pose undue costs to intermediaries and create added confusion for beneficial owners.

Response: We believe that three choices are appropriate, and permitting securityholders to choose to receive only proxy-related materials that are sent in connection with a meeting at which a special resolution is being submitted to securityholders strikes the right balance between ensuring that beneficial owners are properly informed of significant issues and their desire not to receive materials. The use of the concept of special resolution should lessen concerns that securityholders will have a false sense that they will receive all materials related to significant matters. The CSA believe that the proposed amendments will not pose undue costs to intermediaries or create confusion for beneficial owners, as the concept of special resolution provides a standard that is already used in corporate law.

Interaction of NI 54-101 with NI 51-102 *Continuous Disclosure Obligations* and NI 81-106 *Investment Fund Continuous Disclosure*

One commenter noted that there are duplicative and conflicting requirements in NI 54-101 and NI 51-102 that will lead to confusion:

- Beneficial owners who have given their intermediary a global, one-time-only instruction that they want to receive proxy materials and financial statements for all securities in their accounts, in accordance with NI 54-101, would receive annual solicitations from multiple issuers pursuant to NI 51-102 with respect to financial statements (but not proxy materials), which would lead to significant costs and require additional resources in the case of investment managers holding securities of large numbers of issuers for large numbers of clients.

- The global one-time-only instruction under NI 54-101 will relate to proxy materials and financial statements, but the annual solicitations from issuers under NI 51-102 will relate only to some of this material.

- Beneficial owners could selectively request financial statements of some issuers, but would not be able to make this choice in respect of proxy materials, which are typically distributed in the same envelope.

- It is not clear how beneficial owners would be advised that failing to request financial statements from issuers on an annual basis overrides their NI 54-101 instructions.

- The CSA suggest that the annual request form be delivered to beneficial owners as part of the proxy materials, but a beneficial owner might question why the request form refers to the financial statements and MD&A but excludes the proxy materials.

- As there is no deadline for responding to issuers' annual solicitations, and as beneficial owners may order financial statements under NI 51-102 for up to two years, issuers and intermediaries would be unable to accurately estimate the quantities of material to order.

Response: The requirement in NI 51-102 to send the request form only to those securityholders that have indicated they want to receive materials under NI 54-101 is appropriate. The basic principle behind the delivery requirement is that only those investors that want the financial statements should receive copies of them. The request form under NI 51-102 gives securityholders an opportunity to respond to each issuer individually and "customize" their instructions on an issuer-by-issuer basis.

The Companion Policy to NI 51-102 indicates that failing to request the financial statements and MD&A will override the instructions given under NI 54-101, to the extent those instructions relate to the financial statements and MD&A only. Failing to request the financial statements will not affect securityholders' right to receive other meeting materials in accordance with their instructions. We have also added this explanation to the Companion Policy to NI 54-101.

One commenter said that NI 51-102, NI 81-106 and NI 54-101 should fit together without gaps or inconsistencies, and suggested that the CSA consider providing guidance to all market participants on which instrument is paramount in the event of conflict.

Response: Although NI 51-102 and NI 54-101 provide for different requirements with respect to financial statements and proxy-related material, the CSA believe that these requirements are not conflicting and will not cause undue confusion. It was considered to be important that NI 51-102 include a requirement that securityholders receive a notice annually reminding them that they may request financial statements for specific issuers. The Companion Policy to NI 51-102 indicates that failing to request the financial statements and MD&A will override the instructions given under NI 54-101, to the extent those instructions relate to the financial statements and MD&A only. We have also added this explanation to the Companion Policy to NI 54-101.

One commenter suggested that beneficial owners who do not respond to issuers annually (which may be due to not realizing that failing to respond to the NI 51-102 request form will override the NI 54-101 instructions with respect to financial statements or a lack of resources to deal with multiple requests from issuers) could result in a beneficial owner wanting to vote but not being able to do so without the financial statements, or voting nonetheless, leading to a corporate governance deficiency and calling into question the integrity of the vote.

Response: Investors that want the financial statements will still have access to the statements. Once they request the statements, issuers must deliver a copy within 10 days of receiving the request, if the financial statements have already been filed. We do not agree that delivering the financial statements only on request will result in corporate governance deficiencies. The effect of NI 51-102 and NI 54-101 is to give securityholders choice as to what materials to receive.

One commenter suggested that because of the unique business and legal arrangements that apply to the mutual funds industry, mutual funds, mutual fund securities and mutual fund dealers should be explicitly carved out of the application of NI 54-101. The commenter stated that the requirement to obtain instructions from investors as to whether they object to their beneficial

ownership information being disclosed is unnecessary and possibly misleading in the context of mutual funds since client information is provided by dealers to mutual fund managers because of tax reporting obligations that are fulfilled by fund managers on behalf of clients. The commenter also noted that the client response form election with respect to receiving financial statements and meeting materials will be unnecessary in relation to mutual funds as NI 81-106 will require mutual funds to identify which clients wish to receive financial statements, and according to industry practice mutual fund managers send meeting materials directly to all securityholders.

Response: The requirement to obtain instructions as to whether investors object to their beneficial ownership information being disclosed, and whether an exemption for mutual funds should be provided in NI 54-101 or NI 81-106, will require further consideration.

Proposed NI 81-106 provides that an investment fund that complies with the provisions of that instrument dealing with the delivery of financial statements and management reports is exempt from the financial statement delivery requirements of NI 54-101. The note to the client response form has been amended to make it clearer that where specific instructions concerning receipt of the investment fund's annual report or financial statements have been provided to an investment fund, the instructions in the client response form with respect to financial statements will not apply. We have retained the instructions in the client response form with respect to financial statements as investment funds that are not mutual funds may not have beneficial owner information and may use NI 54-101. We believe the provisions of NI 54-101 with respect to mailings in connection with meetings can be relevant to investment funds, and we have not amended these provisions.

Costs

One commenter said that the activities and costs involved in implementing the proposed amendments would be significant, time consuming and expensive, although the benefits to be gained are unclear. The commenter suggested that further consideration be given to the issues.

Response: We believe that the proposed amendments make the instrument clearer and improve the regulatory regime. In particular, in our view, the amendment to permit beneficial owners to decline to receive all proxy-related materials and to permit beneficial owners to choose to receive only proxy-related materials relating to special meetings instead of non-routine business strikes the right balance between ensuring that beneficial owners can receive information on significant issues and their desire not to receive materials.

General Comments

Three commenters noted that the effective date should not fall during the peak proxy season in the first half of the year. Two commenters suggested that the instrument include a transition period in order that the necessary changes can be made to securityholder response forms and computer systems can be reprogrammed before the amendments to the instrument become effective. One commenter suggested that an effective date later than June 30, 2004 would interfere with the effective date for implementation of the second stage of NI 54-101.

Response: The effective date of February 9, 2005 will not interfere with the peak proxy season. We have also added a transition provision so that a reporting issuer that has filed a notice of a meeting and record date before the coming into force of these amendments is, with respect to that meeting, exempt from these amendments if the reporting issuer complies with the provisions of the Instrument as unamended.

One commenter asked that the CSA consider amending the provisions dealing with legal proxies to continue the process that was followed under NP 41, whereby beneficial owners could indicate on the voting instruction form that they or a third party appointee would attend the meeting in person and the intermediary would issue cumulative proxies to the transfer agent. The commenter suggested that the requirement under NI 54-101 that the beneficial owner make a separate request for a legal proxy which must be prepared and mailed by the intermediary to the beneficial owner has the following implications:

- It is inefficient and imposes higher processing costs, and where late requests are received, it is less likely the beneficial owner will receive the legal proxy in time to attend the meeting;

- Except under section 2.18, it is not clear who is to pay the processing costs;

- Sections 2.19 and 4.6 require reporting issuers and intermediaries to tabulate and execute voting instructions received, but does not deal with the situation where a legal proxy has been delivered; it is difficult to reconcile voting instructions with votes cast in person using a proxy. The commenter suggested that sections 2.19 and 4.6 be amended to exempt reporting issuers and intermediaries from the obligation to tabulate or execute voting instructions in these circumstances.

Response:

The CSA acknowledge that it may be difficult to reconcile voting instructions with votes cast in person using a proxy where a beneficial owner completes the voting instructions and also requests a legal proxy. This issue will require further consideration.

Two commenters said that the CSA should reconsider the issue of responsibility for the cost of delivery to OBOs. One of the commenters noted that where none of the issuer, the intermediary or the OBO agrees to pay for the costs of delivery, the OBO may not receive proxy-related materials. The commenters suggested that issuers should be responsible to pay for OBO delivery, as this would support efficiency, equitable and clearly defined obligations and similar treatment of all securityholders.

Response: These concerns were raised by a number of commenters when NI 54-101 was published for comment on three occasions in 1998 and 2000. The CSA decided to permit the market to determine how the costs of sending to OBOs would be borne where the matter is not addressed by local rule. As we have indicated in response to earlier comments, we believe it would be unfair to require the reporting issuer to pay for sending materials to beneficial securityholders who have chosen not to identify themselves to the reporting issuer. In addition, the amendments will permit OBOs, as well as NOBOs, to decline to receive all securityholder materials, so that OBOs will not be in a position of having to pay for delivery of materials they do not wish to receive.

Appendix B
List of Commenters

ADP Investor Communications

Computershare Trust Company of Canada

Investment Dealers Association of Canada

Investment Funds Institute of Canada

Pacific Corporate Trust Company

RBC Global Services