

5.1.5 National Policy 47-201 - Trading Securities Using the Internet and Other Electronic Means

NOTICE OF POLICY UNDER THE SECURITIES ACT NATIONAL POLICY 47-201 TRADING SECURITIES USING THE INTERNET AND OTHER ELECTRONIC MEANS

Notice of Policy

The Commission has, under Section 143.8 of the Act, adopted National Policy 47-201, Trading Securities Using the Internet and Other Electronic Means ("NP 47-201" or the "Policy"). NP 47-201 is an initiative of the Canadian Securities Administrators ("CSA") and has been or is expected to be implemented as a policy in all jurisdictions represented by the CSA. NP 47-201 is being adopted concurrently with National Policy 11-201 ("NP 11-201") Delivery of Documents by Electronic Means.

On June 13, 1997, the CSA published a Concept Proposal Respecting Delivery of Documents by Issuers Using Electronic Media (1997), 20 OSCB 3075 and solicited comments in connection therewith. As a result of the CSA's consideration of the comments received, on December 18, 1998, the CSA published for comment NP 11-201 and NP 47-201 at (1998), 21 OSCB 7782 (the "1998 Draft Policies").

During the comment period on the 1998 Draft Policies, which ended on February 17, 1999, the CSA received a number of submissions. The comments provided in these submissions have been considered by the CSA, and the final version of NP 47-201 being published with this Notice reflects the decisions of the CSA in this regard. Appendix A to Notice of National Policy 11-201 lists the commenters on the 1998 Draft Policies and Appendix B provides a summary of the comments received and the responses of the CSA.

After reviewing the comment letters received in connection with its request for comments, the CSA decided to make a number of changes to NP 47-201. The changes made were not material and the CSA consequently are not republishing NP 47-201 for comment.

NP 11-201 and NP 47-201 are effective January 1, 2000.

Substance and Purpose of NP 47-201

The substance and purpose of NP 47-201 is to provide the CSA's views on certain issues relating to the use of electronic media in the distribution of securities. NP 47-201 discusses the jurisdictional issues that arise when a document is posted on the Internet, and sets out the CSA's view that an offering document that is accessible by residents of a local jurisdiction will constitute a trade and/or offering in that local jurisdiction unless the offering document identifies the jurisdictions for which the document is intended and reasonable steps are taken not to transact with residents of jurisdictions in which the offering is not intended to be sold. NP 47-201 also provides guidance on jurisdictional issues relating to trading activities through the use of electronic media.

NP 47-201 further sets out the CSA's views on compliance with other requirements under securities legislation (as defined in NP47-201), such as the requirement to maintain distribution lists and the rules regarding the electronic distribution of information during the "waiting period". CSA recommendations regarding procedures for the posting of roadshows on the Internet are included. While section 2.7 provides guidance for using the Internet to post roadshows, it does not change the requirement of securities legislation that such communications must be in compliance with the "waiting period" requirements of securities legislation.

Summary of Changes from Prior Publication

The changes made to NP 47-201 are as follows:

- a) a number of drafting changes were made to sections 2.2, 2.4, 2.5, and 2.7.
- b) the wording of subsection 2.5(3) has been amended to clarify that a person or company is only required to maintain a record of the names and addresses of those persons or companies who received (which includes viewed) an electronic version of a preliminary prospectus from the first-mentioned person or company;
- c) paragraphs 2.2(3)(b) and (c) were amended to add the phrase "in the local jurisdiction";
- d) additional clarification regarding jurisdictional matters has been added to section 2.3;
- e) a definition of "roadshow" has been added to subsection 2.7(1); and
- f) references to "downloading" have been deleted from paragraph 2.7(2)3.

Text of Policy

The text of NP 47-201 follows. Apart from minor changes described above under the heading "Summary of Changes from Prior Publication", the Policy remains unchanged from the version published at (1998), 21 OSCB 7782.

DATED: December 15, 1999.

APPENDIX B to Notice of National Policy 47-201

The following is a summary of comments received and the CSA-s responses thereto.

General Comments

Comments

One commenter suggested changing the title of NP 47-201 from "Trading Securities Using the Internet and Other Electronic Means" to "Distribution of Securities Using the Internet and Other Electronic Means".

Response

The name of NP 47-201 has not been changed because the CSA are of the view that the Policy covers matters in addition to the distribution of securities using the Internet and other electronic means.

Specific Comments

1. Distribution Lists

Comments

In connection with the provision in subsection 2.5(3) of NP 47-201 that any person or company who makes disclosure materials available electronically record the name of all persons or companies that receive or view a copy of a preliminary prospectus by electronic means, one commenter noted that section 67 of the Act only requires a dealer to maintain such a record and that NP 47-201 should not impose a more onerous obligation on market participants than found in the Act. Further, another commenter noted that section 67 of the Act requires that both the names and addresses be kept of all persons or companies to whom a preliminary prospectus has been forwarded. The commenter suggested that compelling persons or companies to provide name and address information prior to merely viewing a preliminary prospectus on a website is unduly onerous and would deter individuals from using electronic methods of communication. Additionally, two commenters questioned whether the Act prescribes that a record be maintained of the names and addresses of persons who merely view a preliminary prospectus. These commenters suggested that a name and address list should be maintained only for those persons who download a prospectus, not those who merely view it on a website. Other commenters recommended that the requirement to maintain a list of persons who have received a preliminary prospectus be eliminated, particularly as anyone is now able to access a preliminary prospectus through SEDAR.

Response

The CSA reiterate that NP 47-201 only represents guidelines, not a mandatory change of any substantive requirements. Market participants are free to determine how best to comply with the substantive requirements of securities legislation. The CSA are of the view that it is appropriate to keep a record of the names and addresses of those persons and companies who download or view an electronic version of a preliminary prospectus so that such persons and companies can be provided with amendments to such prospectus, if any. In the CSA-s view, maintaining such a record is not onerous, particularly where persons wishing to view or download a prospectus from a website are first required to provide the necessary name and address information electronically. The CSA do not agree with the suggestion that it is appropriate to eliminate the requirement to maintain such a record, although it is acknowledged that some persons may download a prospectus directly from SEDAR, for example, without having their name and addresses recorded in accordance with section 67 of the Act or the guidelines provided in NP 47-201.

2. Jurisdictional Issues and A Safe Harbour@ Provisions

Comments

One commenter favoured the approach taken by the SEC on jurisdictional issues, stating that regulators in Canada should only assert jurisdiction where Internet communications are directed to persons in a Canadian jurisdiction and further, that regulators should provide guidelines as to when electronic communications would be considered to be directed to Canadians. The commenter also noted that NP 47-201 currently states that only British Columbia, Alberta and Quebec will assert jurisdiction over persons operating within those provinces who distribute securities outside of those provinces through the Internet. The concern raised was that the Ontario Securities Commission (the ACommission@), for example, would not exercise its jurisdiction over persons distributing securities from Ontario to persons outside of Ontario through the use of the Internet. The commenter submitted that NP 47-201 as currently drafted would have the effect of revising section 25 of the Act because, as regards to more Aconventional@ types of solicitation, the Commission has in the past asserted its jurisdiction over such operations (e.g., telephone Aboiler rooms@ operating from Ontario). Another commenter raised concerns regarding the potential conflict between A safe harbour@ provisions in subsection 2.2(2) and section 2.3 of NP 47-201, which appears to take away that A safe harbour@ protection in the provinces of British Columbia, Alberta and Quebec.

Another commenter suggested that subsection 2.2(2) of NP 47-201 be revised such that it could not be implied that a registrant, for example, could be responsible for the conduct of any other party with respect to taking reasonable precautions not to sell to anyone resident in a jurisdiction in which securities are not qualified for sale. Secondly, the commenter stated that issuers should not be required to specify in a prospectus both the Canadian *and* the foreign jurisdictions in which an offering is to be made, particularly if this is not currently required under securities legislation. Likewise, in order to avoid any discrepancy in the content of documents, the commenter suggested that disclosure of the jurisdictions in which an offering is to be made should be made at the Internet site at which the prospectus is posted rather than in the prospectus itself.

The commenter also suggested minor revisions to subsection 2.2(3) of NP 47-201 to make it clear that all inquiries from a particular jurisdiction should be referred to a registered dealer in that jurisdiction.

Response

Section 2.3 of NP 47-201 is included to clarify the position of securities regulators in British Columbia, Alberta and Quebec that a person or company located within those jurisdictions that is distributing securities outside of those jurisdictions through the Internet will nevertheless be considered to be trading within those jurisdictions. While other securities regulatory authorities (as defined in NP 47-201) have not explicitly adopted this position, it was not the intent of Part 2 of NP 47-201 to suggest that the other securities regulatory authorities would not assert jurisdiction over market participants who breach securities legislation in their jurisdiction through the use of electronic medium. Jurisdiction will be asserted on a case by case basis, with due regard to the legal tests ordinarily applied in such circumstances. For example, the Ontario Securities Commission would continue to review the nature of parties= conduct in Ontario to determine if it should assert jurisdiction and, in appropriate circumstances, will do so even if the investors are located outside of Ontario. Section 2.3 has been amended to clarify this point. Minor revisions have also been made to paragraphs 2.2(3)(b) and (c) to take into account the comments made in respect thereof.

The CSA do not consider there to be a conflict between subsection 2.2(2) and section 2.3 of NP 47-201 as the latter section can be viewed as an anti-avoidance provision; for instance, a person operating out of a local jurisdiction and perpetrating a fraud on investors outside of that local jurisdiction may still be subject to the regulatory authority of the local jurisdiction from which such person physically operates.

The CSA do not consider that subsection 2.2(2) of NP 47-201 requires a person to be liable for the conduct of any other person unless such liability is otherwise imposed by law. The CSA are also of the view that it is not burdensome for an offering document to state the jurisdictions in which the offering is to be made.

3. Roadshows

Comments

One commenter agreed that issuers and underwriters should attempt to control electronic access to roadshows transmitted over the Internet, but noted that issuers and underwriters do not have the ability to control how an electronic roadshow is used or distributed once it has been received by the intended recipient and do not have the ability to ensure that all viewers are identified as is currently required by paragraph 2.7(2)2 of NP 47-201. The commenter suggested that the reference to "viewer" be changed to "intended recipient". Further, several commenters submitted that paragraph 2.7(2)2 and the roadshow guidelines in general are potentially inconsistent with current securities legislation and should be revised because:

- a) anyone who can access an Internet roadshow can also get a copy of the preliminary prospectus from the SEDAR website;
- b) the requirement for password protection and controlled access will effectively result in only institutional investors being able to view a roadshow since retail investors will likely find out about the offering after the deal has been priced and the final prospectus filed;
- c) there is no requirement currently to identify every person at a conventional roadshow;
- d) there is no requirement currently to provide a prospectus before one's attendance at a roadshow; and
- e) there is no restriction on how widely an investor may circulate a printed version of a "green sheet" or a printed prospectus after a roadshow.

In summary, several commenters were of the view that the guidelines fail to encourage the use of electronic roadshows to broaden audiences and democratize distributions and that the guidelines could effectively restrict the use of electronic roadshows to the same "favoured few" who are currently invited to conventional roadshows.

Two commenters also recommended the deletion of the references to "download" and "downloading" in subsection 2.7(2) of NP 47-201 because, in their view, the only way to view electronic transmissions via the Internet is by downloading such files from the remote server to one's personal computer. One commenter suggested deleting paragraph 2.7(2)3 altogether. Finally, another commenter suggested that a definition of the term "roadshow" be added to NP 47-201.

Response

The CSA have incorporated the definition of "roadshow" suggested by one of the commenters, with a minor modification, as subsection 2.7(1) of NP 47-201. References to "downloading" in paragraph 2.7(2)3 have also been deleted. Otherwise, the CSA are satisfied that the roadshow guidelines are not only appropriate but encourage greater use of roadshows when compared to the manner in which roadshows are currently conducted. The CSA understand that issuers and underwriters cannot necessarily control how the information presented at a roadshow is used and cannot be certain that all viewers are identified. The intent of NP 47-201 is to encourage issuers and underwriters to take all reasonable steps to comply with the guidelines and to use their best efforts to ensure that the principles set out therein are followed. Finally, the CSA note that the guidelines are not more restrictive than those in other jurisdictions and, in the CSA's view, strike a reasonable

balance between the needs of issuers and underwriters on the one hand and investor protection on the other hand.

4. Advertising

Comments

One commenter raised concerns about section 2.6 of NP 47-201 which states that the posting of new information on one's website during a distribution may be construed as advertising and be subject to the rules restricting advertising during a distribution. The commenter referred to the recommendations in the Allen Report that prospectuses and continuous disclosure requirements be integrated in one seamless disclosure system. The commenter suggested that NP 47-201 should focus on which components of an issuer's or dealer's website would be deemed to be part of a prospectus and thereby caught by the civil liability provisions. The commenter further stated that if section 2.6 is retained, it should clarify that the posting of material information on one's website (e.g., new releases, quarterly reports, etc.) will not be construed as advertising. This commenter also raised the concern that an issuer's ongoing updating of its website to maintain the currency of the information on its website could come into conflict with the "no advertising" commentary in NP 47-201 and asked for clarification of this matter.

Response

As stated previously, NP 47-201 does not change any substantive requirements of securities legislation. The CSA note that section 2.6 is not intended to prohibit issuers from posting material change reports, press releases, interim financial statements and other forms of disclosure on their websites. Section 2.6 simply states that in certain circumstances, posting information on a website during a distribution could constitute a breach of current advertising restrictions. It is not possible to detail in NP 47-201 every potential circumstance that could arise in connection with the posting of information on a website. Issuers, underwriters and their counsel will need to consider this matter on a case by case basis and, where appropriate, develop policies regarding the use and maintenance of issuers' and underwriters' websites.

The CSA will provide the comments received on the issue of advertising restrictions to the committee which will be reviewing the current advertising restrictions and the proposed integrated disclosure regime.

5. Security Issuer Registration

Comments

One commenter noted the growing popularity of direct public offerings over the Internet south of the border and stated that the rules in the U.S. allowing smaller issuers to raise funds under Form SB-2 through the Internet without the use of an underwriter are being used by Canadian companies as well. The commenter stated that it is now easier for a Canadian company to raise funds in the U.S. in this fashion than it is in Canada and recommended that the 'security issuer' dealer category be eliminated, thereby allowing Canadian companies to sell their securities directly without first having to be registered.

Response

The purpose of NP 47-201 is to provide guidance regarding offerings using the electronic medium in the context of the current regulatory regime. However, the issue of registration categories will be referred to staff involved in currently ongoing regulatory initiatives to streamline and harmonize the registration system.

6. Electronic Signatures

Comment

One commenter asked that the CSA consider clarifying the circumstances in which the use of authentication technologies will be permitted in order to eliminate the need for manual signatures.

Response

The CSA intend to review the possibilities available for the use of authentication technologies as resources permit.

**NATIONAL POLICY 47-201
TRADING SECURITIES USING THE INTERNET
AND OTHER ELECTRONIC MEANS**

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**NATIONAL POLICY 47-201
TRADING SECURITIES USING THE INTERNET
AND OTHER ELECTRONIC MEANS**

PART 1 GENERAL

1.1 Definitions

In this Policy

"securities legislation" means the statutes and other instruments listed in Appendix B of National Instrument 14-101 Definitions;

"securities regulatory authorities" means the securities commissions and similar regulatory authorities listed in Appendix C of National Instrument 14-101 Definitions;

1.2 Purpose of this Policy

- (1) In recent years, market participants have begun using the Internet and other electronic means of communication to offer and sell securities and to facilitate distributions of securities. While the use of these methods of communication can be beneficial to market participants, enabling them to provide and access information in a timely, cost-efficient and user-friendly manner, the securities regulatory authorities recognize that the use of the Internet and other electronic means of communication in this context can raise investor protection concerns and issues concerning the application of securities legislation.
- (2) The purpose of this Policy is to state the views of the securities regulatory authorities on a number of matters relating to the use of the Internet and other electronic means of communication in connection with trades and distributions of securities.

1.3 National Policy 11-201 - Market participants are referred to National Policy 11-201 Delivery of Documents by Electronic Means for a discussion of the views of the securities regulatory authorities concerning the use of electronic means to satisfy the delivery requirements of securities legislation.

PART 2 USE OF THE INTERNET FOR TRADING IN SECURITIES

2.1 General Jurisdictional Issue - Information on the Internet may reach both intended recipients and anyone else in the world who has access to the Internet. The interjurisdictional nature of the Internet makes it important for issuers and other market participants to consider how they will satisfy the registration and prospectus requirements contained in securities legislation and similar requirements under the securities laws of foreign jurisdictions.

2.2 Trading in a Jurisdiction

- (1) The securities regulatory authorities generally consider a person or company to be trading in securities in a local jurisdiction if that person or company posts on the Internet a document that offers or solicits trades of securities, and if that document is accessible to persons or companies in that local jurisdiction.
- (2) Despite subsection (1), the securities regulatory authorities consider the posting of a document on the Internet that offers or solicits trades of securities not to be a trade or, if applicable, a distribution, in a local jurisdiction if

- (a) the document contains a prominently displayed disclaimer that expressly identifies the local jurisdictions and/or foreign jurisdictions in which the offering or solicitation is qualified to be made, and that identification does not include the local jurisdiction; and
 - (b) reasonable precautions are taken by all persons or companies offering or soliciting trades of securities through the document posted on the Internet not to sell to anyone resident in the local jurisdiction.
- (3) Market participants are reminded that the registration requirements of securities legislation apply in connection with the posting of a prospectus or other offering document on the Internet for use in connection with a distribution in a local jurisdiction. The act of posting a prospectus or offering document in those circumstances is an act in furtherance of a trade in that local jurisdiction, and the person or company posting the prospectus or offering document must, in order to comply with the registration requirements
- (a) be registered to trade in the local jurisdiction;
 - (b) have the benefit of an exemption from the registration requirements in connection with the distribution in the local jurisdiction; or
 - (c) refer all inquiries concerning the document to a registered dealer in the local jurisdiction.

2.3 Trading from a Jurisdiction - A person or company located in British Columbia, Alberta or Quebec that is distributing securities entirely outside of those jurisdictions through the Internet is considered to be trading within those jurisdictions and is therefore subject to applicable registration and prospectus requirements in those jurisdictions. The securities regulatory authorities in those jurisdictions may provide relief from those provisions in appropriate circumstances. The securities regulatory authorities in the remaining jurisdictions will assert jurisdiction over market participants on a case by case basis, with due regard to the legal tests ordinarily applied in such circumstances.

2.4 Application of Securities Laws of Foreign Jurisdictions - Canadian issuers and other market participants are reminded that foreign securities regulators may take the view that documents posted on a website that is accessible by persons or companies in their jurisdiction may constitute an offering of securities in that foreign jurisdiction. In some foreign jurisdictions, securities regulators have informed the market as to the steps that should be taken to ensure that such regulators do not take the view that a document posted on a website constitutes an offering of securities in that foreign jurisdiction. Some of those steps could include the use of disclaimers in the document and/or measures that restrict access to the document. Issuers and other market participants are urged to inform themselves of any relevant guidelines in this regard. Reference is made to a report of the Technical Committee of the International Organization of Securities Commissions (IOSCO) dated September 1998 entitled "Securities Activity on the Internet", which is available on the website of IOSCO at www.iosco.org. The annex to that report refers market participants to the rules, policies and guidelines of various international securities regulators on these matters.

2.5 Distribution Lists

- (1) Securities legislation requires certain persons or companies distributing securities under a prospectus to record the names and addresses of all persons or companies that have received a copy of the preliminary prospectus. Issuers and registrants are reminded that this requirement applies whether a preliminary prospectus is distributed in paper form or by electronic means.

- (2) The securities regulatory authorities are of the view that no relief from this requirement is necessary or warranted in connection with the electronic distribution of prospectuses, since current technology makes it feasible for a person or company either to monitor who has had access to a preliminary prospectus or to require a written or electronic consent form from each recipient of a preliminary prospectus.
- (3) In order to comply with securities legislation, a person or company should therefore record the names and addresses of all recipients of a preliminary prospectus by electronic means from such person or company, including those recipients who merely view a preliminary prospectus by electronic means.

2.6 Advertising - Persons or companies should be aware that the posting of new information on a website during a period of distribution may be construed as advertising, which is subject to restrictions in certain jurisdictions.

2.7 Roadshows

- (1) For the purposes of this Policy, Aroadshow[®] means a presentation in a jurisdiction by a dealer to a prospective purchaser of securities during the Awaiting period[®] in compliance with securities legislation requirements. The Awaiting period[®] is the time between the issuance of a receipt for the preliminary prospectus pertaining to the distribution and the issuance of a receipt for the final prospectus.
- (2) The securities regulatory authorities do not object in principle to an issuer or underwriter holding a roadshow over the Internet during the "waiting period" in connection with a distribution of securities. However, care should be taken to ensure that the transmission of a roadshow over the Internet complies with the Awaiting period[®] requirements and securities legislation generally. In this connection, the following guidelines are recommended:
 1. Pursuant to securities legislation, a copy of the filed preliminary prospectus is required to be made available to each viewer before each roadshow transmission, and each transmission should contain visual statements emphasizing that the information conveyed through the roadshow does not contain all of the information in the preliminary prospectus, which should be reviewed for complete information. A copy of the preliminary prospectus could be sent electronically to viewers in accordance with the guidelines contained in National Policy 11-201.
 2. Electronic access to the transmission of a roadshow over the Internet should be controlled by the issuer or underwriter conducting the roadshow, using such means as password protection, in order to ensure that all viewers are identified and have been offered a preliminary prospectus. Any persons or companies that are "prospective purchasers" as referred to in the provisions of securities legislation relating to roadshows may be invited to view the roadshow.
 3. An issuer or underwriter should not transmit a roadshow to a person or company unless that person or company has agreed not to copy or further distribute the transmissions. An issuer or underwriter should take reasonable steps to prevent copying or further distribution of transmissions.

PART 3 EFFECTIVE DATE

3.1 Effective Date - This National Policy comes into force on January 1, 2000.