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Canadian Securities Administrators' Staff Notice 54-301
Frequently Asked Questions about National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*

Background

On July 1, 2002, National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (NI 54-101) came into force. NI 54-101 replaced National Policy 41.

Frequently asked questions

As is often the case with the introduction of a new rule, users of NI 54-101 find they have questions regarding its application and interpretation. To assist those users, we have compiled a list of frequently asked questions (FAQs) that, while not exhaustive, represent the types of inquiries we have received to date.

We have divided the FAQs into the following categories:

A. Reporting issuer questions
B. Intermediary questions
C. Beneficial owner questions
D. General questions

April 4, 2003

A. Reporting issuer questions

1. We are a reporting issuer and some of the beneficial owners of our securities reside outside Canada. Must we send proxy-related materials to beneficial owners who reside outside Canada? Section 2.12(3) seems to suggest that we must.

You must send proxy-related materials to beneficial owners who hold through proximate intermediaries that are either:

(i) participants in a recognized depository (The Canadian Depository for Securities Limited (CDS)), or
(ii) intermediaries on CDS' intermediary master list.

Section 2.7 of the Instrument requires you to send to beneficial owners proxy-related materials that you must send to registered holders. Section 2.9 sets out the procedure for sending materials directly to non-objecting beneficial owners (NOBOs) and section 2.12 sets out the procedure for sending materials indirectly to beneficial owners. In both instances, you determine the beneficial owners to send materials to by making a request for beneficial ownership information. Section 2.5(1) says that you must send your request for beneficial ownership information to proximate intermediaries that are either:

- participants in a recognized depository that hold securities entitling the holder to receive notice of the meeting or to vote at the meeting, or
- intermediaries (or their nominees) on the depository's intermediary master list that are registered holders of securities entitling the holder to receive notice of the meeting or to vote at the meeting.

Section 2.12(3) does not require you to send proxy-related materials to all beneficial owners outside Canada. It simply clarifies that you cannot use direct delivery if a proximate intermediary is in a foreign jurisdiction and the law of that foreign jurisdiction requires indirect delivery.

2. Item 10.1 of the request for beneficial ownership information (Form 54-101F2) requires the reporting issuer to state whether it will pay the costs associated with the delivery of securityholder materials to objecting beneficial owners (OBOs). We may be prepared to pay the costs up to a certain amount. If we answer "yes", are we exposing ourselves to an undefined and potentially excessive amount?

No. You can add language in the form to state how much you are prepared to pay on a per OBO basis. We expect that the fees of the proximate intermediary (or its service provider) for delivery to OBOs would be similar to the fees they charge for delivery to NOBOs. Section 1.4 of the Instrument requires the fees for delivery to NOBOs to be "a reasonable amount". Currently, we would view an amount not exceeding $1 as reasonable (see section 2.6 of the Companion Policy to the Instrument).

3. Does the Instrument require a reporting issuer to pay for sending proxy-related materials or other securityholder materials to OBOs?

No. You are only required to pay the proximate intermediary for sending securityholder materials (including proxy-related materials) to OBOs if the OBO has declined to receive those materials under section 2.14. However, if you decline to pay in other circumstances, there are three possible consequences:

(i) the intermediary pays (see Part B question 9 of these FAQs);

(ii) the OBO pays; or

(iii) neither the intermediary nor the OBO pays and the intermediary does not send the materials. If OBOs do not receive proxy-related materials, they may not be in a position to provide voting instructions for the meeting.

4. What is "routine" business?

"Routine business" is defined in the Instrument. Any matters that fall outside those listed in the definition are not "routine business". The definition is:

""routine business" means, for a meeting,

(a) consideration of the minutes of an earlier meeting,
(b) consideration of the financial statements of the reporting issuer or an auditor's report on the financial statements of the reporting issuer,
(c) election of directors of the reporting issuer,
(d) setting or changing of the number of directors to be elected within a range permitted by corporate law, if no change to the constating documents of the reporting issuer is required in connection with that action, or
(e) reappointment of an incumbent auditor of the reporting issuer;".

5. Mutual funds (or their managers) have historically sent meeting materials directly to unitholders under NP 41. Does section 10.3 prevent mutual funds from continuing to send materials directly to their unitholders who hold through mutual fund dealers or investment dealers?

Despite section 10.3, a mutual fund can continue, as a person or company designated by the intermediary under section 2.12(2), to send unitholder meeting materials directly to unitholders who hold through mutual fund dealers or investment dealers..

B. Intermediary questions

1. Under section 3.2 and the Explanation to Clients (Form 54-101F1), must we ask clients whether they will consent to electronic delivery even if we (or our service provider) do not offer electronic delivery?

No. The consent provisions only apply if you (or your service provider) intend to provide electronic delivery of securityholder materials to clients. You should still obtain the client's electronic mail address, if available, as it forms part of the ownership information defined in the Instrument and may be of interest to reporting issuers (see section 5.4(4) of the Companion Policy). There are electronic delivery technologies available and we encourage intermediaries to take advantage of them to increase efficiency and cost-effectiveness.

2. The "Electronic Delivery of Documents" section in the Explanation to Clients and Client Response Form (Form 54-101F1) refers to an "enclosed consent form". There is no "enclosed consent form".

We have not provided a consent form in the Instrument because proximate intermediaries can prepare appropriate consents themselves. We expect proximate intermediaries to follow the guidelines for meaningful consent set out in National Policy 11-201.

3. In the Explanation to Clients and Client Response Form (Form 54-101F1), the boxes for checking OBO and NOBO status are the wrong way round.

The English version of Form 54-101F1 is incorrect. The French version is correct. We will amend the Form as soon as possible. In the meantime, you should ensure that the forms you use show the boxes correctly.

4. As part of our account opening procedures, we have already asked clients for their preferred language of communication. Can we rely on our previous instructions or must we ask them again?

You may rely on previously obtained instructions on preferred language if the instructions cover the issues set out in the Explanation to Clients and Client Response Form (Form 54-101F1).

5. Under section 3.2, must we have a completed client response form before we can hold securities on behalf of our client?

No. Section 3.2(b)(i) requires you to have obtained instructions from the client on the matters in the client response form before you can hold securities on behalf of the client. The Instrument does not say you must obtain a completed client response form. You must satisfy yourself that you have got instructions on the matters in the client response form. You must also bear in mind your responsibilities under any relevant IDA requirements.

6. If we have the client's consent to deliver securityholder materials electronically, must the reporting issuer also get consent for us to send the materials electronically?

No. Under section 4.2, if a reporting issuer gives materials to an intermediary for sending indirectly to beneficial owners, the obligation to send them is on the intermediary, not the reporting issuer. If the intermediary sends the materials electronically, it is the intermediary that must have the client's consent.

If a reporting issuer sends materials directly to beneficial owners under section 2.8 or 2.9, the reporting issuer must have the client's consent to electronic delivery.

If an intermediary seeks the consent of a beneficial owner to electronic delivery **by the reporting issuer**, both the intermediary and the reporting issuer must ensure that the consent is consistent with the guidelines in NP 11-201.

7. **In the Explanation to Clients and Client Response Form (Form 54-101F1), under Disclosure of Beneficial Ownership Information, there is an instruction to disclose particulars of fees or charges that the intermediary may ask an OBO to pay. As the fees or charges will differ depending on the reporting issuer, the bulkiness of the materials, whether it is insured mail or regular mail, etc., what exact particulars must we provide?**

You need not set out detailed fee information. The instruction and the optional disclosure in the client response form clarify that, if you intend to recover the costs of delivery to OBOs where the reporting issuer does not pay, you must explain how you intend to recover the costs from the OBO. The specific mechanism by which you recoup your costs from the OBO is a business decision.

8. Must mutual fund dealers send their details to the depository under section 3.1 and must they send their clients the Explanation to Clients and Client Response Form (Form 54-101F1)?

The answer depends on whether the mutual fund dealer is an intermediary as defined in the Instrument. If the mutual fund dealer does not hold shares or units of a mutual fund on behalf of its clients, then it would not be an intermediary for the purposes of section 3.1. If it does hold shares or units of mutual funds on behalf of clients, it is an intermediary and must comply with sections 3.1 and 3.2. Mutual fund dealers that are intermediaries need only send Form 54-101F1 to those clients on whose behalf they actually hold securities.

9. Under the Instrument, can intermediaries charge OBOs for sending them proxy-related materials provided by a reporting issuer?

The Instrument does not prohibit intermediaries from charging OBOs for sending proxy-related or other securityholder materials. Provincial securities legislation may regulate whether intermediaries can charge and whether they must send proxy-related materials if neither the reporting issuer nor the OBO has agreed to pay the costs of sending. You should confirm the position under the appropriate securities legislation.

For example, in Ontario (section 49(2) of the *Securities Act*), the registrant or custodian is not required to send proxy-related materials to a beneficial securityholder if neither the reporting issuer nor the beneficial owner has agreed to pay the reasonable costs of sending. In Alberta (section 104(2) of the *Securities Act*), the registrant or custodian must send proxy-related materials if the beneficial securityholder has agreed to pay the reasonable costs. In British Columbia (section 182 of the *Securities Rules*), the registrant or custodian is not required to send materials if the beneficial owner has not declined to receive the materials and has not agreed to pay the reasonable costs. In Québec (section 165 of the *Securities Act*), a dealer or any other person holding the securities of a reporting issuer on behalf of clients must forward all securityholder materials to the

owner at the expense of a person designated by regulation. The regulation does not designate any person.

In contrast, in Manitoba (section 79(1) of the *Securities Act*), shares of a company registered in the name of a registrant or its nominee and not beneficially owned by the registrant cannot be voted at any shareholders meeting unless the registrant sends the proxy-related materials to the beneficial owner at no expense to the beneficial owner.

We expect that fees for sending securityholder materials to OBOs would be similar to those for sending to NOBOs. Section 1.4 of the Instrument requires the fees for delivery to NOBOs to be "a reasonable amount". Currently, we would view an amount not exceeding $1 as reasonable (see section 2.6 of the Companion Policy to the Instrument).

10. Why is there a reference, in the indirect delivery flow of the flowchart, to the intermediary sending the reporting issuer a search response and omnibus proxy (Form 54-101F4)?

The reference is incorrect. We will amend the flowchart as soon as possible. We remind you to refer to the Instrument to determine your obligations.

11. Managers of discretionary managed accounts have authority in the management agreement to vote the securities on behalf of the underlying beneficial owner. These managers fall within the definition of "intermediary". As they do not hold a general power of attorney, it is arguable that they do not have authority to provide the instructions in the Explanation to Clients and Client Response Form (Form 54-101F1). Must they obtain authority from the underlying beneficial owner to provide the instructions in the Form?

No. For the purposes of the Instrument, we take the view that the manager can provide the instructions in the Form without seeking additional authority from the underlying beneficial owner.

C. Beneficial owner questions

1. Under National Policy 41, non-registered owners could revoke their voting instructions. Can beneficial owners revoke their voting instructions under the Instrument?

Yes. We take the view that a written revocation of voting instructions constitutes new voting instructions. Reporting issuers and intermediaries must use their best efforts to comply with the most current voting instructions. Under the omnibus proxies, they are not allowed to vote except in accordance with the voting instructions received from beneficial owners. Securities legislation also requires intermediaries who are registrants to vote or give a proxy in accordance with written voting instructions received from beneficial owners.

2. Can a beneficial owner decline to receive proxy-related materials relating to meetings involving non-routine business?

No. The client response form permits beneficial owners to decline proxy-related materials only for meetings involving "routine business" as defined in the Instrument.

3. Can beneficial owners of a debenture issued under a trust indenture get proxy-related materials for meetings where registered holders are entitled to vote?

The answer depends on the securities legislation of the relevant jurisdiction. A reporting issuer must, under section 2.7, send proxy-related materials to beneficial owners if, under Canadian securities legislation (defined in National Instrument 14-101), it must send those materials to registered holders. For example, section 83.1 of the Securities Act in Québec would result in proxy-related materials having to be sent to beneficial owners of a debenture issued under a trust indenture if the registered holders of the debenture have the right to vote at a meeting

4. I am a beneficial owner of securities and I have asked my broker to forward all meeting materials to me. Can I vote or ask someone to vote on my behalf at meetings of the reporting issuer of my securities?

Yes. When you receive the request for voting instructions, you can ask your broker (the intermediary) in writing for a legal proxy. The legal proxy grants you the right to vote the securities that you beneficially own. If you wish to nominate someone to vote on your behalf, you can ask your broker to modify the legal proxy to grant your nominee the right to vote.

D. General questions

1. Can a person or company that is not the relevant reporting issuer obtain a NOBO list?

Yes. There are two ways that a third party can obtain the NOBO list:

(i) Under section 6.1, a third party can ask a reporting issuer for its most recent NOBO list for any proximate intermediary.

(ii) Under section 6.2(1), a third party can use the same process for requesting beneficial ownership information from a proximate intermediary that a reporting issuer uses under section 2.5(2) of the Instrument. The third party has the same rights and obligations under the Instrument as a reporting issuer that requests beneficial ownership information, except for:

- fixing a meeting and record date (section 2.1)

- sending a notice of meeting and record dates (section 2.2)
- requesting depository information (section 2.3(1))
- sending a request for beneficial ownership information 20 days before the record date (section 2.5(1))
- sending a legal proxy (section 2.18)
- receiving an omnibus proxy (section 4.1(1)(c))
- receiving a participant omnibus proxy (section 5.4)

The third party must also send a copy of the request for beneficial ownership information concurrently to the reporting issuer and must provide an undertaking (Form 54-101F9) to the proximate intermediary.

2. Section 6.2(3) provides that certain subsections of Parts 2, 4 and 5 do not apply to third parties requesting beneficial ownership information. The exclusions do not include references to section 2.9 and 2.12. Is a dissident shareholder that sends materials to beneficial owners about a meeting subject to the same timing requirements under section 2.9 and 2.12 as a reporting issuer?

No. Dissident shareholder materials are not "proxy related materials" as defined in the Instrument. Sections 2.9 and 2.12 only apply to proxy-related materials.

3. Is the ISIN the same as the CUSIP and, if not, what is the difference?

The ISIN (International Securities Identification Number) is the number issued to a security under the international standard ISO 6166. The National Numbering Agency of the country in which the security is domiciled issues the number. The CUSIP is the number used for Canadian and U.S. securities. The CUSIP number follows the ISO 6166 guidelines for ISINs, except that it does not contain the country code (the first two characters of the ISIN).