

Request for Comment
Proposed Amendments to National Instrument 54-101
Communication with Beneficial Owners of
Securities of a Reporting Issuer
and
Companion Policy 54-101CP

Introduction

We, the Canadian Securities Administrators (CSA) are publishing for comment proposed amendments to National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* (the Instrument) and to Companion Policy 54-101CP (the Policy).

Additional information on the proposed amendments, required for publication in Ontario, can be found in the form of notice published in the OSC Bulletin or on its Website at www.osc.gov.on.ca.

Background

The Instrument and Policy came into effect on July 1, 2002. The Instrument is a reformulation of National Policy 41 *Shareholder Communication* (NP 41) and establishes a regulatory regime for communications with beneficial owners of securities of reporting issuers.

Substance and Purpose of the Proposed Amendments

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 proposed amendments are intended to make the Instrument and Policy clearer and also improve the regulatory regime set out in the Rule.

Summary of the Proposed Amendments to the Instrument

- *Legal proxies*

We propose to amend the definition of “legal proxy” in section 1.1 and the text of the legal proxy (Form 54-101F8) to clarify that a beneficial owner may designate a person to have voting power under a legal proxy.

- *Types of proxy-related materials that a beneficial owner may decline to receive*

The explanation to clients and client response form (Form 54-101F1) currently permit a beneficial owner to decline proxy-related materials only if they relate to meetings involving “routine business”. We propose that beneficial owners be permitted to decline to receive all proxy-related materials. We also propose that beneficial owners be able to choose to receive

only proxy-related materials relating to special meetings, i.e. meetings where shareholder approval of fundamental changes to the issuer is being sought.

We therefore propose to:

- (i) repeal the definition of “routine business” in section 1.1;
- (ii) add definitions of “special meeting” and “special resolution” in section 1.1;
- (iii) delete the third paragraph under the heading “Receiving Securityholder Materials” in the “Explanation to Clients” portion of Form 54-101F1 and substitute a new paragraph explaining that a beneficial owner can decline to receive all types of securityholder materials;
- (iv) delete Part 2 of the “Client Response Form” portion of Form 54-101F1 and replace it with a new Part 2 that gives beneficial owners the following three choices:
 - (a) receive all securityholder materials sent to beneficial owners;
 - (b) receive no securityholder materials sent to beneficial owners; or
 - (c) receive only proxy-related materials sent in connection with a special meeting,

and add text to explain that the instructions on the Client Response Form will not apply to annual reports and financial statements of an investment fund if an investment fund chooses to obtain instructions from the client on whether the client wishes to receive those documents;

- (v) replace paragraph 2.2(2)(h) with a paragraph that references “special meeting” instead of “routine business”; and
- (vi) replace items 7.5(a) and 9.3(a) in Part 1 of Form 54-101F2 in order to remove the references to “routine business”.

- *Abridging time*

We propose to amend section 2.20 to permit a reporting issuer to also abridge the time for fixing a record date for notice of meeting in subsection 2.1(b).

- *Electronic delivery*

We propose to amend paragraph 3.2(b)(iii) and the “Explanation to Clients” portion of Form 54-101F1 to clarify that an intermediary need only seek consent for electronic delivery of documents from a client if applicable, i.e. only if the intermediary offers electronic delivery.

- *Transitional instructions*

We propose to delete section 3.3 in its entirety and replace it with a new section 3.3. The main differences from the previous section 3.3 are:

- (i) new paragraph 3.3(b)(ii) permits intermediaries to treat a deemed NOBO under NP41 as a NOBO under the Instrument;
- (ii) new paragraph 3.3(b)(iv) deems clients who chose not to receive material relating to annual or special meetings of securityholders or audited financial statements, to have declined to receive all securityholder materials; and
- (iii) new subparagraph 3.3(b)(v) provides that where an intermediary was permitted not to provide material relating to annual meetings of securityholders or audited financial statements (as a result of the client failing to return instructions), the client is deemed to have declined to receive all securityholder materials except proxy-related materials relating to a special meeting.

- *Obligations of persons or companies that are not reporting issuers*

We propose to clarify the obligations of persons or companies that are not reporting issuers through the following amendments:

- (i) substitute the current subsection 6.2(1) to clarify that a person or company who takes any action permitted to be taken by a reporting issuer is subject to the same rights and obligations of a reporting issuer unless the Instrument specifies otherwise;
- (ii) add a subsection 6.2(6) to specify that a person or company other than a reporting issuer that sends materials indirectly to beneficial owners must pay the proximate intermediary a fee, and add a corresponding section 4.8 to provide that a proximate intermediary is not required to forward securityholder materials received from a person or company that is not a reporting issuer unless the proximate intermediary receives reasonable assurance of payment; and
- (iii) amend subsection 6.2(3) to provide that subsections 6.1(1) and (2) also do not apply to paragraphs 2.12(1)(a) and 2.12(1)(b) and section 2.14.

- *Permitted purposes for communicating with beneficial owners*

We propose to repeal Part 7 of the Instrument and replace it with a new Part 7 that sets out both permitted uses for a NOBO list in section 7.1 and permitted uses of the indirect delivery scheme of section 2.12 in section 7.2.

- *Correction of instructions regarding disclosure of beneficial ownership information*

We propose to correct the instructions in the “Explanation to Clients” portion of Form 54-101F1 regarding which boxes to check to object or not object to disclosure of beneficial ownership information.

Authority for the Proposed Amendments

In Ontario, paragraph 143(1)26 of the *Securities Act* authorizes the Commission to make rules describing requirements for the validity and solicitation of proxies. Paragraph 143(1)27 authorizes the Commission to make rules providing for the application of Part XVIII (Continuous Disclosure) and Part XIX (Proxies and Proxy Solicitation) of the Act in respect of registered or beneficial owners of voting securities of reporting issuers or other persons or companies on behalf of whom the securities are held, including requirements for reporting issuers, recognized clearing agencies, registered holders, registrant and other persons or companies who hold securities on behalf of persons or companies but who are not the registered holders. Paragraph 143(1)39 authorizes the Commission to make rules requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by the Act or the regulations or the rules made thereunder, and all documents determined by the regulations or the rules made under the Act to be ancillary to the documents, including interim financial statements and financial statements, proxies and information circulars, take-over bid circulars, issuer bid circulars and directors' circulars.

Related Instruments

The Instrument and the Policy are related to each other and to Part XIX of the Act.

Unpublished Materials

No unpublished materials were relied on.

Anticipated Costs and Benefits

We anticipate that the benefits of the proposed amendments will outweigh the costs, if any.

Request for Comments

We welcome your comments on the proposed amendments to the Instrument and Policy.

We also request comments on the following specific issues:

- The proposed amendments will permit beneficial owners to decline to receive all proxy-related materials or to receive only proxy-related materials relating to special meetings. We would like comments on whether the definition of special meeting should be broader so that all meetings where shareholders are asked to approve fundamental changes to the issuer, including those meetings where minority approval is sought, would be defined as a special meeting.
- We would also like your comments on whether proxy-related materials relating to meetings where shareholders are being asked to approve fundamental changes to the issuer should be sent to all beneficial holders, that is, the beneficial holder would not be given the choice to decline to receive proxy-related materials relating to special meetings.
- Proposed National Instrument 51-102 and proposed National Instrument 81-106 both deal to a certain extent with how issuers are supposed to obtain instructions from beneficial owners of their securities regarding the sending of financial statements. We would like comments on

how these proposed instruments should interact with the shareholder communication regime in the Instrument.

- The proposed amendments include a number of text changes to forms that are prepared by intermediaries. We would like comments as to whether the costs associated with these changes (e.g. reprinting) outweigh the anticipated benefit of greater shareholder choice in what materials shareholders receive.

Please submit your comments in writing on or before January 2, 2004. If you are not sending your comments by email, a diskette containing the submissions (in Windows format, Word) should also be forwarded.

Address your submission to all of the CSA member commissions, as follows:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

Deliver your comments **only** to the two addresses that follow. Your comments will be forwarded to the remaining CSA member jurisdictions.

c/o John Stevenson, Secretary
Ontario Securities Commission
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Suite 800, Box 55
Toronto, Ontario M5H 3S8
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Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
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We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period.

Questions

Please refer your questions to any of:

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The text of the proposed amendments follows or can be found elsewhere on a CSA member website.

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