

ALBERTA SECURITIES COMMISSION

Request for Comment

Notice of Proposed Multilateral Instrument 51-104 Disclosure of Corporate Governance Practices and Form 51-104F1

This Notice accompanies proposed Multilateral Instrument 51-104 *Disclosure of Corporate Governance Practices* and Form 51-104F1 (together, the Proposed Instrument). The Proposed Instrument is an initiative of the British Columbia Securities Commission, Québec's Agence nationale d'encadrement du secteur financier¹, and the Alberta Securities Commission (together, the Commissions).

On January 16, 2004, some members of the Canadian Securities Administrators (CSA), including the Alberta Securities Commission, published for comment proposed Multilateral Instrument 58-101, also entitled *Disclosure of Corporate Governance Practices* (MI 58-101) and proposed Multilateral Policy 58-201 *Effective Corporate Governance* (MP 58-201). MP 58-201 contains selected governance standards that are presented as "best practices".

The Proposed Instrument differs in important respects from proposed MI 58-101 and MP 58-201. It is not our intention that any issuer be obliged to comply with two different sets of standards. Rather, our objective in publishing the Proposed Instrument is to solicit comment about the type of disclosure that would be most meaningful to market participants, and would most effectively foster sound corporate governance practices. In determining the approach to be eventually adopted, we will consider comments received on each of the Proposed Instrument, MI 58-101 and MP 58-201. Ideally, this will result in a uniform approach across Canada.

We believe that reporting issuers should be required to explicitly and regularly disclose their actual practices and policies regarding corporate governance. This disclosure will provide better information than is presently available to investors concerning the corporate governance practices of reporting issuers and should raise the level of awareness of all market participants. This, we believe, will enhance protection of investors.

The Commissions are considering whether securities regulators can or should try to determine which particular corporate governance practices and policies are appropriate for all issuers. While MP 58-201 indicates that issuers may flexibly apply the best practices, the format of the required disclosure in MI 58-101 could put pressure on issuers to adopt those practices whether or not they are appropriate for them. The alternative approach in the Proposed Instrument would instead require issuers to disclose their corporate governance practices without suggesting, explicitly or implicitly, what those practices should be.

¹ On February 1, 2004, the Commission des valeurs mobilières du Québec became l'Agence nationale d'encadrement du secteur financier (also known as Autorité des marchés financiers).

Various institutional investors, industry associations and coalitions, management consulting firms, educational institutions, exchanges and other securities regulatory bodies in North America and elsewhere have published or adopted different codes and guidelines. The Commissions invite comment on the impact of adding another package of “best practices” having application to all reporting issuers in Canada.

Indeed, opinions about governance practices have evolved significantly in the past decade and will likely continue to evolve based on issuers’ experience applying the current ideas. Similarly, the actual governance practices of issuers have been changing in response to investor demands, peer pressure, and publicity about the dangers of inadequate governance. We invite comment on whether codifying current views about best practices could stifle future innovation and enhancement of governance practices.

Summary and Discussion of the Proposed Instrument

Summary of Proposed Instrument

The Proposed Instrument would apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers. The Proposed Instrument would require an issuer to disclose its corporate governance practices in accordance with the specific disclosure items that are set out in Form 51-104F1.

MI 58-101 / MP 58-201 differ from the Proposed Instrument in seven principal ways.

1. *Best Practices*

The Proposed Instrument would not require disclosure against best practices. For the reasons outlined in this Notice, the Proposed Instrument would instead focus on providing investors with information from which they can make their own informed assessment of the issuer’s practices.

MI 58-101 would require issuers to file reports and make disclosure comparing their corporate governance practices with the “best practices” described in MP 58-201. In the event that an issuer has not adopted one of the recommended practices, the issuer would have to explain why the issuer’s board considers that course of action to be appropriate.

2. *Meaning of Independence*

The Proposed Instrument would allow directors of issuers that are reporting only in British Columbia to use an objective test for independence. A director is independent “unless a reasonable person with knowledge of all the relevant circumstances would conclude that the director is in fact not independent of management or of any significant shareholder”.

For directors of issuers that are reporting in other jurisdictions, the meaning of independence would be the same as in MI 58-101. That test is, with two exceptions, the same as the independence test in Multilateral Instrument 52-110 *Audit Committees*, recently adopted in all jurisdictions but British Columbia.

3. Disclosure of Independent Directors

The Proposed Instrument would require an issuer to identify each director as independent or not and, for each director that is not independent, to describe the relationship that makes the director not independent.

The disclosure contemplated by MI 58-101 / MP 58-201 respecting board composition would require only a statement indicating whether the majority of the board is independent. We question whether investors would find it more useful to have issuers identify independence of directors on an individual basis or through a simple statement like "the board is made up of a majority of independent directors".

4. Annual Disclosure

The Proposed Instrument would require that issuers give the corporate governance disclosure in the information circular.

MI 58-101 would provide that the issuer include disclosure required by 58-101F1 or 58-101F2 in the issuer's annual information form (AIF) and cross-reference it in any information circular soliciting proxies for the election of directors.

Typically, issuers do not distribute the AIF to investors and it is only available on SEDAR. This means that fewer people are likely to read the governance information. The information circular is the more widely distributed document, and is therefore the document that investors and other market participants are more likely to read. In addition, the information circular is provided to shareholders to inform them when they decide how to vote on election of directors and other annual meeting matters. Governance disclosure is particularly relevant to those decisions.

5. Board Committees

The Proposed Instrument would require disclosure of all board committees, including the identity of the members of those committees and the purpose and function of each committee. MI 58-101 / MP 58-201 would require issuers to provide disclosure only about compensation and nomination committees. Although disclosure about those committees is important, we invite comment as to whether issuers should be able to structure their committees to meet their needs and should be required to describe all of their committees in order to give a full picture of governance practices.

6. Codes of Ethics

The Proposed Instrument would require the disclosure of any steps taken to promote a culture of ethical business conduct. This may include the fact that an issuer has a code of conduct, but there would not be a requirement to file the code or reproduce it in the disclosure.

MI 58-101 would require issuers to file codes of ethics and amendments on SEDAR. It would also require issuers to issue news releases in respect of each and every waiver from the code of ethics. We question whether these requirements might actually discourage issuers from adopting meaningful codes of ethics because of the added

disclosure obligations associated with them, and the negative inferences that investors might draw from disclosure about even minor waivers.

7. *Venture Issuers*

The Proposed Instrument would simply require that all issuers disclose their corporate governance practices. It does not prescribe or suggest best practices. As a result, there is no modified disclosure obligation for venture issuers.

MI 58-101 / MP 58-201 would require issuers to disclose their corporate governance practices as compared against a set of best practices. In recognizing that some of the practices would not necessarily be practical or appropriate for smaller issuers, MI 58-101 would require that venture issuers provide disclosure only concerning those aspects of corporate governance outlined in Form 58-101F2 (composition of the board, board mandate and code of business conduct and ethics).

Specific Request for Comment

The Commissions invite comments on the regulatory approach you think we should adopt for Canadian corporate governance disclosure requirements. More specifically, we are requesting comments on the strengths or weaknesses of the approach reflected in the Proposed Instrument — to allow issuers the flexibility to decide which corporate governance practices are most suitable for them, and mandate disclosure of those choices to enable market participants to assess the appropriateness of the practices used.

We also refer you to the Request for Comment and Notice of Proposed MP 58-201 and MI 58-101 issued on January 16, 2004, which outlines specific issues for your consideration.

In British Columbia only, we are also requesting comments on the British Columbia Securities Commission's decision to not adopt MI 58-101 and MP 58-201.

Related Instruments

The Proposed Instrument is related to National Instrument 51-102 *Continuous Disclosure Obligations*, National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* and Multilateral Instrument 52-110 *Audit Committees*.

Comments

We invite you to make written submissions on the Proposed Instrument. We will consider submissions received by June 22, 2004. **Comments received after the deadline will not be considered.**

Submissions should be addressed to the British Columbia Securities Commission, the Alberta Securities Commission, and the Autorité des marchés financiers.

Please deliver your submissions to the addresses below.

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Your comment letter will be part of the public record, unless you request confidentiality. We will circulate your comment letter among the securities regulatory authorities, whether or not you request confidentiality. If you request confidentiality, we will not put your letter in the public file, but we might still have to disclose it if someone makes a request under freedom of information legislation.

Questions may be referred to the following people:

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Text of Proposed Instrument

The text of the Proposed Instrument follows.

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