

Chapter 2 - Policies, Legislation and Requests for Comments

2.1 Notice of Proposed National Instrument 41-101

NOTICE OF PROPOSED NATIONAL INSTRUMENT 41-101
PROSPECTUS DISCLOSURE REQUIREMENTS
AND
RESCISSION OF NATIONAL POLICY STATEMENTS
NOS. 12, 13, 32 AND 35

Substance and Purpose of Proposed National Instrument

The purpose of the proposed National Instrument is to consolidate the prospectus disclosure requirements currently set forth in National Policy Statement No. 12 Disclosure of "Market Out" Clauses in Underwriting Agreements in Prospectuses ("NP 12"), National Policy Statement No. 13 Disclaimer Clause on Prospectus ("NP 13"), National Policy Statement No. 32 Prospectus Warning Re: Scope of Distribution ("NP 32") and National Policy Statement No. 35 Purchaser's Statutory Rights ("NP 35") as well as similar prospectus disclosure requirements in the securities legislation of certain provinces.

The proposed National Instrument is an initiative of the Canadian Securities Administrators (the "CSA") and is expected to be adopted or made as a rule in each of British Columbia, Alberta and Ontario, as a commission regulation in Saskatchewan and as a policy in each of the other jurisdictions represented by the CSA. The proposed National Instrument is, in substance, similar to NP 12, NP 13, NP 32 and NP 35, which it will replace, although the required language has been simplified. It is intended that this National Instrument only apply to long form prospectuses. Separate proposed national instruments implementing similar disclosure requirements for short form prospectuses will be published at a later date.

Summary of Proposed National Instrument

Part 1 of the proposed National Instrument deals with the application of the instrument. Part 2 deals with front page prospectus disclosure and is based on NP 13 and NP 32 and on disclosure requirements for prospectuses in the securities legislation of certain provinces. In both sections 2.1 and 2.2, changes in the prescribed wording have been made to make the clauses easier to understand. Part 3 deals with plan of distribution disclosure and is based on NP 12. Again, non-substantive changes have been made to the prescribed language. Part 4 prescribes language to describe purchasers' statutory rights and is based on NP 35. Part 5 of the Rule contains the exemption provisions that result in the receipt for a prospectus being deemed to be evidence of approval of an exemption under the National Instrument.

Authority for Proposed National Instrument

In those jurisdictions in which the National Instrument is to be adopted or made as a rule or regulation, securities legislation provides the securities regulatory authority with rule-making or regulation-making authority in respect of the subject matter of the proposed National Instrument.

In Alberta, the authority of the Alberta Securities Commission to make the proposed National Instrument a rule is found in sections 196(q) and 196.1 of the *Securities Act (Alberta)* (the "Act"), which authorize the Commission to make rules governing, among other things, the format, preparation, form and content of all documents required under or governed by the Act and the regulations, including preliminary prospectuses and prospectuses.

Alternatives Considered

The CSA believes that each of the disclosure requirements now included in the proposed National Instrument have worked well to date. No alternatives were considered.

Unpublished Materials

In proposing the National Instrument, the CSA have not relied on any significant unpublished study, report or other written materials.

Anticipated Costs and Benefits

The benefits of the proposed National Instrument will result from the maintenance of the consistent disclosure requirements now in use and their consolidation into one Instrument. No material costs have been identified in connection with the proposed National Instrument.

Rules to be Revoked

In Alberta, the Commission will revoke sections 99 and 100 of the Rules under the Act, which are duplicative of sections 2.2 and 2.1, respectively, of the proposed National Instrument.

Comments

Interested parties are invited to make written submissions with respect to the proposed National Instrument. Submissions received by September 16, 1997 will be considered.

Submissions should be sent to all of the Canadian securities regulatory authorities listed below in care of the Ontario Securities Commission, in duplicate, as indicated below:

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

c/o Daniel P. Iggers, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Submissions should also be addressed to the Commission des valeurs mobilières du Québec as follows:

Jacques Labelle, General Secretary
Commission des valeurs mobilières du Québec
800 Victoria Square
Stock Exchange Tower
P.O. Box 246, 17th Floor
Montréal, Québec H4Z 1G3

A diskette containing the submissions (in DOS or Windows format, preferably WordPerfect) should also be submitted. As securities legislation in certain provinces requires that a summary of written comments received during the comment period be published, confidentiality of submissions cannot be maintained.

Questions may be referred to any of:

Veronica Singer
Policy Advisor
British Columbia Securities Commission
(604) 660-4780

Agnes Lau
Deputy Director, Securities Analysis
Alberta Securities Commission
(403) 422-2191

Barbara Shourounis
Director
Saskatchewan Securities Commission
(306) 787-5645

Susan Wolburgh Jenah
Manager, Market Operations
Ontario Securities Commission
(416) 593-8245

Daniel Laurion
Deputy Director, Legislation and Market Development
Commission des valeurs mobilières du Québec
(514) 873-5009 (Ext. 266)

Proposed National Instrument

The text of the proposed National Instrument follows, together with footnotes that are not part of the National Instrument but have been included to provide background and explanation.

Rescission of National Policy Statements Nos. 12, 13, 32 and 35

NP 12, NP 13, NP 32 and NP 35 will be replaced by the proposed National Instrument and will be rescinded.

DATED: May 16, 1997

NATIONAL INSTRUMENT 41-101
PROSPECTUS DISCLOSURE REQUIREMENTS
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NATIONAL INSTRUMENT 41-101

PROSPECTUS DISCLOSURE REQUIREMENTS^{1,2}

PART 1 APPLICATION AND INTERPRETATION

- 1.1 Application** - Except as otherwise provided in securities legislation,³ this Instrument applies to a preliminary prospectus and a prospectus used to distribute a security in a local jurisdiction.⁴
- 1.2 Preliminary Prospectus** - The statements required by this Rule to be included in a prospectus shall also be included in a preliminary prospectus.
- 1.3 Variations** - The statements required by this Rule to be included in a preliminary prospectus or a prospectus may be modified to reflect the terms and conditions of a distribution.

¹ This Instrument is based on National Policy Statement Nos. 12, 13, 32 and 35. The proposed National Instrument is expected to be adopted as a rule in each of British Columbia, Alberta and Ontario, as a Commission regulation in Saskatchewan and as a policy in all other jurisdictions represented by the CSA.

² A national definition instrument has been adopted as National Instrument 14-101 Definitions. It contains definitions of certain terms used in more than one national instrument. National Instrument 14-101 also provides that a term used in a national instrument and defined in the statute relating to securities of the applicable jurisdiction, the definition of which is not restricted to a specific portion of the statute, will have the meaning given to it in that statute, unless the context otherwise requires. National Instrument 14-101 also provides that a provision or a reference within a provision of a national instrument that specifically refers by name to a jurisdiction, other than the local jurisdiction, shall not have any effect in the local jurisdiction, unless otherwise stated in the provision.

³ The term "securities legislation" is defined in National Instrument 14-101 Definitions as meaning the particular statute and legislative instruments of the local jurisdiction set out in an appendix to that instrument and will generally include the statute, regulations and, in some cases, the rules, forms, rulings and orders relating to securities in the local jurisdiction.

⁴ The term "local jurisdiction" is defined in National Instrument 14-101 Definitions. The definition is "in a national instrument adopted or made by a Canadian securities regulatory authority, the jurisdiction in which the Canadian securities regulatory authority is situate". The term "Canadian securities regulatory authorities" is defined in National Instrument 14-101 Definitions as meaning the securities commissions or similar regulatory authorities set out in an appendix to that instrument.

PART 2 FRONT PAGE DISCLOSURE

- 2.1 Prospectus Warning⁵ and Disclaimer Clause⁶** - The following statement shall be included in italics⁷ at the top of the front page of a prospectus:

"The securities described in this prospectus may only be distributed where it is legal to sell them, by people who are legally permitted to sell them. No securities regulatory authority⁸ has expressed an opinion about these securities and it is an offence to claim otherwise."

- 2.2 Preliminary Prospectus Disclosure** - The following legend shall be included in red ink on the left hand side of the front page of a preliminary prospectus:

"This preliminary prospectus relating to the securities described in it has been filed in [each of/certain of] the [provinces/provinces and territories of Canada] but has not yet become final for the purpose of a distribution. Information contained in this preliminary prospectus may not be complete and may have to be amended. The securities may not be distributed until a receipt is obtained for the prospectus."

⁵ NP 32 currently is limited in its application to offerings in more than one province of Canada. There does not appear to be any policy rationale for this result. Accordingly, in the reformatted instrument, the disclosure requirement applies in all cases.

⁶ As the accepted practice is to have the language required by NP 13 appear at the top of the first page following the language prescribed by NP 32, the two provisions have been collapsed into this section, which applies in all cases.

⁷ Neither NP 32 nor NP 13 currently requires that the prescribed language be printed in italics. As it is accepted practice to use italics, this has been made an express requirement. NP 13 suggests that the disclaimer clause should be printed in capital letters. As this practice is generally not followed, the required disclosure appears in the normal upper and lower case format.

⁸ The term "securities regulatory authority" is defined in National Instrument 14-101 Definitions as meaning, for a local jurisdiction, the securities commission or similar regulatory authority set out in an appendix to that instrument opposite the name of the local jurisdiction.

PART 3 PLAN OF DISTRIBUTION DISCLOSURE

3.1 Plan of Distribution Disclosure - If securities are distributed under a prospectus by an underwriter that has agreed to purchase a specified number or principal amount of the securities at a specified price and the underwriter's obligations are subject to conditions, the following statements shall be included in the prospectus:

(1) On the front page of the prospectus:

"We, as principals, conditionally offer these securities⁹, subject to prior sale, if, as and when issued by [issuer] and accepted by us in accordance with the conditions contained in the underwriting agreement referred to under Plan of Distribution."

(2) In the section of the prospectus that describes the plan of distribution of the securities:

"Under an agreement dated [insert date of agreement] between [issuer] and [insert name of underwriter[s]] as underwriter[s], [issuer] has agreed to sell and the underwriter[s] [has/have] agreed to purchase on [insert closing date] the securities at a price of [insert offering price] payable in cash to [issuer] against delivery. The obligations of the underwriter[s] under the agreement may be terminated at [its/their] discretion on the basis of [its/their] assessment of the state of the financial markets and may also be terminated upon the occurrence of certain stated events. The underwriter[s] [is/are], however, obligated to take up and pay for all the securities if any of the securities are purchased under the agreement."

PART 4 PURCHASERS' STATUTORY RIGHTS

4.1 Purchasers' Statutory Rights - A statement in substantially the following form shall appear in a prospectus:

⁹ Reference to "Debentures" in NP 12 has been deleted as the disclosure applies to all securities. The price of the securities has been left blank, unlike the current language of NP 12.

"Securities legislation in [certain of the provinces [and territories] of Canada/the Province of [insert name of local jurisdiction, if applicable] provides purchasers with the right to withdraw from an agreement to purchase securities within two business days after receipt or deemed receipt of a prospectus and any amendment. [In several of the provinces/provinces and territories], [T/]he securities legislation further provides a purchaser with remedies for rescission [or [, in some jurisdictions,] damages] if the prospectus and any amendment contains a misrepresentation or is not delivered to the purchaser, provided that the remedies for rescission [or damages] are exercised by the purchaser within the time limit prescribed by the securities legislation of the purchaser's province [or territory]. The purchaser should refer to any applicable provisions of the securities legislation of the purchaser's province [or territory] for the particulars of these rights or consult with a legal adviser."

PART 5 EXEMPTION

5.1 Exemption

- (A) The regulator¹⁰ or the securities regulatory authority may grant an exemption to this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
- (B) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

5.2 Evidence of Exemption - Without limiting the manner in which an exemption under section 5.1 may be evidenced, the issuance by the regulator of a receipt for a prospectus or an amendment to a prospectus is evidence of the granting of the exemption if

- (a) the person or company that sought the exemption has delivered to the regulator on or before the date that the preliminary prospectus was filed, a letter or memorandum describing the matters relating to the exemption, and indicating why consideration should be given to the granting of the exemption; and

¹⁰ The term "regulator" is defined in National Instrument 14-101 Definitions as meaning, in a local jurisdiction, the person set out in an appendix to that instrument opposite the name of the local jurisdiction.

- (b) the regulator has not sent written notice to the contrary to the person or company that sought the exemption before the issuance of the receipt.