CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* Related to Financial Statement Requirements

August 12, 2021

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are publishing for a 60-day comment period proposed changes (the **Proposed Changes**) to:

- Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* (**41-101CP**)

We are also proposing consequential changes to Companion Policy 51-102CP *Continuous Disclosure Obligations* (the **Consequential Change**).

We are issuing this Notice to solicit your comments on the Proposed Changes and on the Consequential Change.

The public comment period expires on **October 11, 2021**.

The text of the Proposed Changes and Consequential Change is published with this notice in the following annexes:

- Annex A – Proposed Changes to 41-101CP
- Annex B – Consequential Change to Companion Policy 51-102CP
- Annex C – Local Matters

The Notice will also be available on the following websites of CSA jurisdictions:

www.lautorite.qc.ca
www.bcsc.bc.ca
www.albertasecurities.com
www.osc.gov.on.ca
nssc.novascotia.ca
www.fcaa.gov.sk.ca
www.fcnb.ca
www.mbsecurities.ca

Substance and Purpose of the Proposed Changes

Form 41-101F1 *Information Required in a Prospectus* (**Form 41-101F1**) requires an issuer that is not an investment fund to include certain financial statements in its long form prospectus. These required inclusions include the financial statements of the issuer and any business or businesses acquired, or proposed to be acquired, if a reasonable investor reading the prospectus would regard the primary business of the issuer to be the business or businesses acquired, or proposed to be acquired (collectively, the **Primary Business Requirements**).

The purpose of the Primary Business Requirements is to provide investors with financial history of the business of the issuer even if this financial history spanned multiple legal entities over the relevant time period.

The Primary Business Requirements also apply to instances where securities legislation and exchange requirements refer to disclosure prepared in accordance with Form 41-101F1. An example of this would be the requirement in Form 51-102F5 for an information circular relating to a restructuring transaction to contain prospectus-level disclosure.

In practice, when acquisitions are involved, issuers and their advisors often consult with CSA staff to consider what financial statements must be included in the prospectus and to confirm whether one or more businesses comprised part of the primary business of the issuer. Sometimes these discussions result in inconsistent interpretation that adds time, cost and uncertainty for issuers.

The Proposed Changes aim to reduce the regulatory burden resulting from uncertainty about the interpretation of the Primary Business Requirements, without compromising investor protection.

Background

In April 2017, the CSA published CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers* (the **Consultation Paper**) to identify and consider areas of securities legislation that could benefit from a reduction of undue regulatory burden, without compromising investor protection or the efficiency of the capital markets. While not specifically identified as an option in the Consultation Paper, commenters suggested that CSA staff revisit the interpretation of Item 32 in Form 41-101F1. These comments reflected a range of suggestions, including revisiting the requirements for an issuer to include three years of historical financial statements for each entity considered the primary business. Commenters also noted that inconsistent interpretation of these requirements across the CSA can lead to additional regulatory burden.

The Proposed Changes are informed by the comment letters received in response to the Consultation Paper and other stakeholder feedback. The comment letters were summarized in CSA Staff Notice 51-353 *Update on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*.

In considering the Proposed Changes, we monitored amendments to the financial disclosure requirements of Regulation S-X issued by the U.S. Securities and Exchange Commission on May 21, 2020. We also considered our experiences with pre-file discussions and applications.

Based on our work, we have determined that investors and issuers would benefit from a harmonized approach to the interpretation of the Primary Business Requirements among CSA jurisdictions and from additional clarity regarding historical financial information required in an initial public offering (**IPO**) prospectus. We think that the Proposed Changes will reduce regulatory burden without compromising investor protection by eliminating the time and cost of many pre-file discussions and applications required in connection with the Primary Business Requirements.

Summary of the Proposed Changes and Consequential Change

The Proposed Changes provide additional explanation in 41-101CP for both IPO venture and non-venture issuers regarding:

- the interpretation of primary business and predecessor entity;
- clarification on when an issuer can use an optional test to calculate the significance of an acquisition;
- guidance as to when and for what time periods financial statements would be required in certain circumstances;
- guidance on the circumstances when we may require additional information to meet the requirement for full, true and plain disclosure and the nature of that information;
- clarification of when we would not consider an acquisition of mining assets to be a business.

The Proposed Changes include various examples that illustrate different scenarios of when a reasonable investor would consider certain acquisitions to be the primary business of an issuer and the financial statements required by Item 32 of Form 41-101F1 in those scenarios.

The Proposed Changes further align with consultation feedback to revisit the interpretation of the Primary Business Requirements and seek to reduce inconsistent interpretation of requirements. We also expect that the number of pre-file applications will decrease significantly if the proposed changes are implemented.

The Consequential Change adds clarification of when we would not consider an acquisition of mining assets to be a business requiring a business acquisition report.

Local Matters

An annex to this notice outlines the consequential changes to local securities legislation and includes additional text, as required, to respond to local matters in a local jurisdiction. Each jurisdiction that is proposing local amendments will publish an annex C.

Request for Comments

We welcome your comments on the Proposed Changes and on the Consequential Change.

Please submit your comments in writing on or before **October 11, 2021**.

Address your submission to all of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

Deliver your comments only to the addresses listed below. Your comments will be distributed to the other participating CSA jurisdictions.

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514 864-6381
consultation-en-cours@lautorite.qc.ca

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Questions

If you have any questions, please contact any of the CSA staff listed below.

British Columbia Securities Commission

Allan Lim
Manager, Corporate Finance
604 899-6780
alim@bcsc.bc.ca

Larissa M. Streu
Senior Legal Counsel, Corporate Finance
604 899-6888
lstreu@bcsc.bc.ca

Alberta Securities Commission

Roger Persaud
Senior Securities Analyst
403 297-4324
roger.persaud@asc.ca

Bhawani Sankaranarayanan
Senior Securities Analyst
403 297-6263
bhawani.sankaranarayanan@asc.ca

Financial and Consumer Affairs Authority of Saskatchewan

Heather Kuchuran
Director, Corporate Finance
Securities Division
306 787-1009
heather.kuchuran@gov.sk.ca

Manitoba Securities Commission

Patrick Weeks
Corporate Finance Analyst
204 945-3326
patrick.weeks@gov.mb.ca

Ontario Securities Commission

Matthew Au
Senior Accountant, Corporate Finance
416 593-8132
mau@osc.gov.on.ca

Leslie Milroy
Senior Legal Counsel, Corporate Finance
416 596-4272
lmilroy@osc.gov.on.ca

Michael Rizzuto
Accountant, Corporate Finance
416 263-7663
mrizzuto@osc.gov.on.ca

Autorité des marchés financiers

Nadine Gamelin
Senior Analyst,
Direction de l'information financière
514 395-0337, ext. 4417
nadine.gamelin@lautorite.qc.ca

Carolyne Lassonde
Senior Policy Advisor,
Direction du financement des sociétés
514 395-0337, ext. 4373
carolyne.lassonde2@lautorite.qc.ca

Financial Consumer Services Commission New Brunswick

Joseph Adair
Senior Securities Analyst
506 643-7435
Joe.adair@fcnb.ca

Nova Scotia Securities Commission

Jack Jiang
Securities Analyst, Corporate Finance
902 424-7059
jack.jiang@novascotia.ca

ANNEX A

PROPOSED CHANGES TO COMPANION POLICY 41-101CP TO NATIONAL INSTRUMENT 41-101 *GENERAL PROSPECTUS REQUIREMENTS*

1. ***Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements is changed by this Document.***

2. **Section 5.1 is changed by replacing *"*Request for exemptions*" with "*Requests for exemptions*".***

3. ***First paragraph of Section 5.2 is changed by adding "*an*" immediately before "*interim financial report for periods that are more recent*".***

4. ***Section 5.3 is changed by replacing the text with the following:***

Interpretation of issuer – primary business

5.3 (1) An issuer is required to provide historical financial statements under Item 32 of Form 41-101F1 for a business or related businesses that a reasonable investor would regard as the primary business of the issuer. The issuer is also required to include the applicable MD&A for the primary business.

However, if the issuer is a reporting issuer whose principal assets are not cash, cash equivalents or an exchange listing, and the acquisition of the primary business represents a significant acquisition, the reporting issuer is subject to the requirements of Item 35 of Form 41-101F1, and not Item 32 of Form 41-101F1, in respect of the financial statements and other disclosure for that acquisition.

A reporting issuer cannot rely on the exemption in subsection 32.1(2) of Form 41-101F1 if the applicable transaction is a reverse takeover. In such circumstances, the reverse takeover acquirer would be considered the primary business under either paragraph 32.1(1)(a) or (b) of Form 41-101F1.

Examples of when a reasonable investor would regard the acquired business or related businesses to be the primary business of the issuer, thereby triggering the application of Item 32 of Form 41-101F1, are when the acquisition(s) was

(a) a reverse takeover,

(b) a qualifying transaction for a capital pool company under the policies of the TSX Venture Exchange,

(c) a qualifying acquisition or qualification transaction by a special purpose acquisition corporation under the policies of a recognized exchange,

(d) an acquisition that exceeds the 100% significance threshold calculated under subsection 35.1(4) of Form 41-101F1 (see example 1 below), or

(e) an acquisition that is less than the 100% significance threshold calculated under subsection 35.1(4) of Form 41-101F1 but still changes the primary business of the issuer, as disclosed in the prospectus (see example 2 below).

In addition to the above, the issuer should consider the facts of each situation, including the facts of the business or related businesses acquired or proposed to be acquired, and determine whether a reasonable investor would regard the primary business of the issuer to be the acquired business or related businesses. The disclosure in the prospectus, including financial statements and applicable MD&A, must satisfy the requirement that the long form prospectus contain full, true and plain disclosure of all material facts relating to the securities being distributed. If the issuer is uncertain as to whether this standard is met, the issuer should utilize the pre-filing procedures in NP 11-202 to determine whether additional disclosure is required for full, true and plain disclosure of all material facts relating to the securities being distributed.

Example 1: A non-venture issuer completed an acquisition exceeding the 100% significance threshold in the year prior to its most recently completed financial year

Facts:

- A non-venture issuer filed a preliminary IPO prospectus on April 1, 2021 that included audited annual financial statements for its financial year ended December 31, 2020.

- The issuer disclosed in the prospectus that it had completed Acquisition A on October 1, 2019.

- Both the issuer and Acquisition A have a December 31 year-end.

The initial determination of the significance of an acquisition would be calculated based on the financial statements of the issuer and the acquired business or related businesses for the most recently completed financial year of each that ended before the acquisition date. In this case, the test of significance would be based on the most recently completed financial year before the acquisition date (i.e., December 31, 2018) - applying paragraph 35.1(4)(b) of Form 41-101F1.

Initial test: Significance test results based on the most recently completed financial year before the acquisition date (i.e., December 31, 2018)

- The following is a summary of certain key information:

Entity	**Assets**	**Investments**	**Specified profit or loss**
Issuer	$ 100	n/a	$ 8
Acquisition A	$ 125	$ 80	$ 7
Significance test results	*125%*	*80%*	*87.5%*

In some circumstances, an issuer may have grown between the date on which the significance test is calculated and the date of the IPO such that the acquisition is no longer significant enough for a reasonable investor to regard the acquisition as the primary business of the issuer. An issuer could demonstrate this by testing significance using an optional test similar to the ones set out in subsection 8.3(4) of NI 51-102, for the periods set out in subparagraphs 35.1(4)(b)(iii) and (iv) of Form 41-101F1. In this specific example, the applicable time period for the optional test is the year-ended December 31, 2020 for both the issuer and Acquisition A.

We note that financial statements for the year ended December 31, 2020 for Acquisition A are required for the issuer to use the optional test, which can only be used by the issuer after the acquisition date if the business remained substantially intact and was not significantly reorganized, and no significant assets or liabilities were transferred to other entities, as set out in subsection 8.3(6) of NI 51-102.

Optional test: Significance test results based on the most recently completed financial year (i.e., as at December 31, 2020)

- The following is a summary of certain key information:

Entity	**Assets**	**Investments**	**Specified profit or loss**
Issuer (excluding Acquisition A)	$ 150	n/a	$ 15
Acquisition A	$ 117	$ 80	$ 7
Significance test results	*78.0%*	*53.3%*	*46.7%*

Application of paragraph 32.1(1)(b) of Form 41-101F1:

- Although Acquisition A is a significant acquisition using the initial significance test, by applying the optional test, the issuer may be able to demonstrate that a reasonable investor would not regard Acquisition A to be the primary business of the issuer.

- In this circumstance, the issuer experienced growth subsequent to acquiring Acquisition A such that Acquisition A no longer exceeds the 100% threshold. As a result, a reasonable investor would not regard Acquisition A to be the primary business of the issuer. Therefore, the issuer would not be required to provide historical financial statements of Acquisition A under Item 32 of Form 41-101F1.

- If the issuer applied the optional test and Acquisition A still exceeded the 100% threshold, the issuer would have been required to provide audited financial statements of Acquisition A for enough periods so that when those periods are added to the periods for which the issuer's financial statements are included in the prospectus, the results of the issuer and Acquisition A, either separately or on a consolidated basis, totals three years. This means that the issuer would have been required to include in the IPO prospectus:

    - its audited consolidated financial statements for each of the three years ended December 31, 2020, 2019 and 2018 which include the results of Acquisition A from October 1, 2019 onwards, and

    - the audited standalone financial statements of Acquisition A for the period from January 1, 2019 to September 30, 2019, and for the year-ended December 31, 2018.

Example 2: An issuer has recently changed its primary business through the acquisition of a new business and the acquisition does not meet the 100% significance threshold

Facts:

- An IPO venture issuer filed a preliminary IPO prospectus on April 1, 2021.

- The issuer was incorporated on January 1, 2015 to operate a mining exploration and development business.

- On December 19, 2020, the issuer acquired a cannabis cultivation property and announced its intention to convert its existing business to a cannabis cultivation business in 2021.

- The year end of the issuer and the acquired cannabis cultivation business is December 31.

Application of paragraph 32.1(1)(b) of Form 41-101F1:

- To meet the requirements of paragraph 32.1(1)(b) of Form 41-101F1, the issuer must include in the prospectus its audited financial statements for the years ended December 31, 2020 and 2019.

- In addition, given that the issuer has changed its primary business to cannabis cultivation activities, the pre-acquisition financial statements for the acquired cannabis cultivation business (along with the related management's discussion and analysis) must also be included in the prospectus.

- This is because a reasonable investor reading the prospectus would regard the primary business of the issuer to be the cannabis cultivation business, as referenced in paragraph 32.1(1)(b) of Form 41-101F1.

(2) The periods for which the issuer must provide financial statements under Item 32 of Form 41-101F1 for an acquired business or related businesses that are regarded as the primary business of the issuer should be determined in reference to sections 32.2 and 32.3 of Form 41-101F1, and with the same exceptions, where applicable, set out in paragraphs 32.4(1)(a) through (e) of Form 41-101F1. For example, for an issuer that is a reporting issuer in at least one jurisdiction immediately before filing a long form prospectus, the reference to three years in paragraph 32.2(6)(a) of Form 41-101F1 should be read as two years under paragraphs 32.4(1)(a), (b), (d) and (e) of Form 41-101F1.

In addition, subsection 32.2(6) of Form 41-101F1 requires an issuer to include the financial statements for those entities or businesses set out in paragraphs 32.1(1)(a) and (b) of Form 41-101F1 for as many periods before the acquisition as may be necessary. This is so that when these periods are added to the periods for which the issuer's financial statements are included in the prospectus, the results of the entities or businesses, either separately or on a consolidated basis, total the required number of annual periods (two or three years). These financial statements must be audited.

The issuer must also consider the necessity of including pro forma financial statements pursuant to section 32.7 of Form 41-101F1 to illustrate the impact of the acquisition of the primary business on the issuer's financial position and results of operations. For additional guidance, an issuer should refer to section 5.10 of this Policy.

(3) Reporting issuers are reminded that an acquisition may constitute the acquisition of a business for securities legislation purposes, even if the acquired set of activities or assets does not meet the definition of a "business" for accounting purposes.**.**

5. ***Section 5.4 is changed by replacing the text with the following:***

Interpretation of issuer – predecessor entity

5.4 (1) An issuer that has not existed for 3 years is required under paragraph 32.1(1)(a) of Form 41-101F1 to provide historical financial statements of any predecessor entity that forms or will form the basis of the business of the issuer (see example 3 below). This may include financial statements of predecessor entities that have been, or are contemplated to be, put together to form the basis of the business of the issuer. If an issuer is not able to provide financial statements of certain predecessor entities that are required in the prospectus to meet the requirements in paragraph 32.1(1)(a) of Form 41-101F1, or if the financial statements for certain predecessor entities are not considered material for an investment decision or otherwise necessary for the prospectus to contain full, true and plain disclosure, the issuer should utilize the pre-filing procedures in NP 11-202.

Example 3: A newly incorporated non-venture issuer with minimal operations will acquire several real estate properties immediately prior to, or concurrently with, the closing of an IPO

Facts:

- A non-venture issuer is a real estate investment trust incorporated on December 21, 2020 for the purpose of acquiring an initial portfolio of four real estate properties in order to generate rental income from the properties. The issuer filed a preliminary IPO prospectus on April 1, 2021.

- Concurrent with the closing of the IPO, the issuer will complete the acquisition of four real estate properties, which were previously operated as rental properties by the vendors, generating rental income. The year end of the issuer and each of the acquired businesses is December 31.

Application of paragraph 32.1(1)(a) of Form 41-101F1:

- The issuer must include in the prospectus its audited financial statements for the period from December 21, 2020 (incorporation) to December 31, 2020.

- In addition, the issuer would need to include audited financial statements in accordance with Item 32 of Form 41-101F1 (and related management's discussion and analysis) for each of the real estate properties that form the basis of the business of the issuer.

- If either one or more of the rental properties is immaterial, or if the issuer is not able to provide financial statements for one or more of them, the issuer should utilize the pre-filing procedures in NP 11-202.**.**

6. **Section 5.5 is changed** ***by replacing subsection (3) with*** **"**[Lapsed]"**.**

7. ***Section 5.7 is changed by replacing the text with the following:***

Additional information that may be required

5.7 (1) In order to meet the requirement for full, true and plain disclosure contained in securities legislation, an issuer may be required to include certain additional financial information in its long form prospectus. For instance, in exceptional circumstances, we may require separate financial statements of a subsidiary of the issuer, even if that subsidiary is included in the consolidated financial statements of the issuer. This exception may be necessary to help explain the risk profile and nature of the operations of the subsidiary.

(2) There may be other exceptional scenarios where issuers may be required to include additional financial information, other than financial statements, in a prospectus in order for the prospectus to meet the requirement for full, true and plain disclosure. An example would be where an issuer incurred significant growth through one or more acquisitions prior to the IPO filing resulting in insufficient financial history of the primary business as disclosed in the prospectus and one of the following situations occurred:

- an IPO venture issuer acquired or proposes to acquire a business that would result in any applicable significance test, as calculated in section 8.3 of NI 51-102, close to exceeding the 100% threshold;
- the issuer made or proposed to make one or more acquisitions during the relevant period, but financial disclosure was not triggered by Items 32 or 35 of Form 41-101F1;
- the issuer completed a relatively large number of unrelated and individually immaterial acquisitions (that are not predecessor entities) in the relevant periods prior to filing the prospectus.

The types of additional financial information that might be necessary to meet the full, true and plain disclosure standard will vary on a case-by-case basis but may include:

- property or business valuation reports;
- forecasted cash flow information;
- additional disclosure about an acquired business, such as key financial information that explain the financial performance and operations of that business prior to its acquisition.

If an issuer thinks that it might fall into an exceptional circumstance where additional financial information might be required, it could utilize the pre-filing procedures in NP 11-202.

(3) If the issuer cannot provide sufficient financial history reflected in the financial statements in a prospectus or the prospectus does not otherwise contain information concerning the business conducted or to be conducted by the issuer that is sufficient to enable an investor to make an informed investment decision, we would consider this important when determining whether the prospectus provides full, true and plain disclosure of all material facts relating to the securities being distributed..

8. ***Subsection 5.8 (2) is changed by adding "***that***" immediately before "***an issuer's comparative financial statements be accompanied by an auditors' report***"..***

9. ***Subsection 5.9 (2) is changed by replacing the text with the following***:

Completed significant acquisitions and the obligation to provide business acquisition report level disclosure for a non-reporting issuer

(2) For an issuer that is not a reporting issuer in any jurisdiction immediately prior to filing the long form prospectus (a "non-reporting issuer"), the long form prospectus disclosure requirements for a significant acquisition are generally intended to mirror those for reporting issuers subject to Part 8 of NI 51-102. To determine whether an acquisition is significant, non-reporting issuers would first look to the guidance under section 8.3 of NI 51-102.

The initial test to determine significance of an acquisition would be calculated based on the financial statements of the issuer and the acquired business or related businesses for the most recently completed financial year of each that ended before the acquisition date.

To recognize the possible growth of an issuer between the date of its most recently completed financial year or interim period and the acquisition date, and the corresponding potential decline in significance of the acquisition relative to the issuer, issuers could perform an optional test similar to the ones set out in subsection 8.3(4) of NI 51-102, for the periods set out in subparagraphs 35.1(4)(b)(iii) and (iv) of Form 41-101F1. Specifically, for an issuer, the applicable time period for the optional test is the most recently completed interim period or financial year for which financial statements of the issuer are included in the prospectus and, for the acquired business or related businesses, is the most recently completed interim period or financial year ended before the date of the long form prospectus.

For more information, see Chart 2 of Appendix A – Financial Statement Disclosure Requirements for Significant Acquisitions of this Policy.

The significance thresholds for IPO venture issuers are identical to the significance thresholds for venture issuers. For any business or related businesses acquired by an IPO venture issuer or venture issuer within two years before the date of the prospectus, or proposed to be acquired, which exceed the significance threshold, the issuer is expected to include in a prospectus the financial statements referred to in subsection 5.3(1) of this Policy.

The timing of the disclosure requirements set out in subsection 35.3(1) of Form 41-101F1 are based on the principles under section 8.2 of NI 51-102. For reporting issuers, subsection 8.2(2) of NI 51-102 sets out the timing of disclosures for significant acquisitions where the acquisition occurs within 45 days after the year end of the acquired business. However, for IPO venture issuers, paragraph 35.3(1)(d) imposes a disclosure requirement for all significant acquisitions completed more than 90 days before the date of the long form prospectus, where the acquisition occurs within 45 days after the year end of the acquired business. This differs from the business acquisition report filing deadline for venture issuers under paragraph 8.2(2)(b) of NI 51-102 where the business acquisition report deadline for any significant acquisition where the acquisition occurs within 45 days after the year end of the acquired business is within 120 days after the acquisition date.**.**

10. **Part 5 is changed by adding the following section 5.11:**

5.11. Determination of what constitutes a business – mining assets

While certain acquisitions of mining assets may constitute acquisitions of a business for securities legislation purposes even if they do not meet the definition of a "business" for accounting purposes, we would not consider an acquisition of mining assets to be a business requiring financial statements under either Item 32 or Item 35 of Form 41-101F1 if all of the following apply:

(a) the acquisition of the mining assets was an arm's length transaction;

(b) no other assets were transferred and no other liabilities were assumed as part of the acquisition;

(c) there has been no exploration, development or production activity on the mining assets in the three years (two years for an IPO venture issuer or a venture issuer) before the date of the preliminary prospectus.**.**

11. These changes become effective on ●.

ANNEX B

PROPOSED CHANGES TO

COMPANION POLICY 51-102CP TO NATIONAL INSTRUMENT 51-102
CONTINUOUS DISCLOSURE OBLIGATIONS

1. ***Companion Policy 51-102CP to National Instrument 51-102 Respecting Continuous Disclosure Obligations is changed by this Document.***

2. **Section 8.1 is changed by adding the following paragraph 4.1:**

(4.1) Determination of what constitutes a business – mining assets

While certain acquisitions of mining assets may constitute acquisitions of a business for securities legislation purposes even if they do not meet the definition of a "business" for accounting purposes, we would not consider an acquisition of mining assets to be a business requiring a business acquisition report if all of the following apply:

(a) the acquisition of the mining assets was an arm's length transaction;

(b) no other assets were transferred and no other liabilities were assumed as part of the acquisition;

(c) there has been no exploration, development or production activity on the mining assets in the two years prior to the acquisition.

3. These changes become effective on ●.

ANNEX C

LOCAL MATTERS

There are no local matters to consider at this time.

TMX THE FUTURE IS YOURS TO SEE.

October 18, 2021

VIA EMAIL

Canadian Securities Administrators
℅ The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Email: comments@osc.gov.on.ca

Me Philippe Lebel, Corporate Secretary and Executive Director, Legal
Affairs Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
E-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames,

Re: CSA Notice and Request for Comment - Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements

TMX Group Limited ("**TMX Group**" or "**we**") welcomes the opportunity to comment on behalf of its subsidiaries, Toronto Stock Exchange ("**TSX**") and TSX Venture Exchange ("**TSXV**") (each, an "**Exchange**" and collectively, the "**Exchanges**") on the notice and request for comment published by the Canadian Securities Administrators ("**CSA**") entitled *Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements* (the **"Request for Comments"**) that was published on August 12, 2021.

We appreciate the efforts taken by the CSA to introduce a harmonized approach to the interpretation of the Primary Business Requirements among CSA jurisdictions and to provide additional clarity regarding historical financial information required in an initial public offering prospectus.

TMX Group strongly supports the CSA's efforts to provide clear and consistent guidance to issuers regarding when financial statements of acquired businesses have to be included in long form prospectuses (the "**Amendments**"). The Exchanges believe that the harmonization of what is currently a piecemeal framework of formal and informal processes, will significantly reduce the regulatory burden on issuers by eliminating the inconsistent interpretation of the Primary Business Requirements and providing certainty for issuers and their counsel approaching CSA regulators across Canada without compromising investor protection.

We would like to offer the following specific comments regarding the Amendments:

1. The proposed new section 5.11 to 41-101CP is intended to apply specifically to mining assets. Consider whether similar guidance would be useful for oil and gas assets, as the business practices are similar to that of mining, particularly for exploration stage assets.

2. Similar to the point above, but more generally, consider whether it would be possible to expand the guidance in 41-101CP regarding the determination of what constitutes a business to other industry sectors. For instance, where an acquisition may involve the purchase of only intellectual property or intangible assets, and potentially no other processes, might the CSA be able to offer guidance on circumstances that would be considered in the determination of whether such an acquisition represented a business requiring financial statements.

3. The proposed paragraph 5.11(b) states that "*no other liabilities*" will be assumed as part of the acquisition. We question whether the use of "*other*" may lead to some confusion. For instance, are there certain liabilities that could be assumed while still satisfying this condition? Or is the "*other*" intended to refer to anything beyond the consideration to be paid for the acquisition?

4. The proposed paragraph 5.3(3) states that "*Reporting issuers are reminded that an acquisition may constitute the acquisition of a business for securities legislation purposes, even if the acquired set of activities or assets does not meet the definition of a "business" for accounting purposes*."

   We also note that paragraph 1.3(3) of the existing 41-101CP states that "*The Instrument uses accounting terms that are defined or used in Canadian GAAP applicable to publicly accountable enterprises. In certain cases, some of those terms are defined differently in securities legislation. In deciding which meaning applies, you should consider that NI 14-101 provides that a term used in the Instrument and defined in the securities statute of a local jurisdiction has the meaning given to it in the statute unless: (a) the definition in that statute is restricted to a specific portion of the statute that does not govern prospectuses; or (b) the context otherwise requires.*"

   While we recognize that the definition of "business" pursuant to IFRS 3 should not be used in the determination of what constitutes the acquisition of a business for securities legislation purposes, we note that there is no definition of the term "business" in NI 14-101 or NI 41-101. In order to further avoid confusion, and reinforce the reminder in 5.3(3), consider whether additional guidance would be useful regarding the meaning of the term "business" or "primary business" as applicable to NI 41-101 and Form 41-101F1.

We appreciate the opportunity to provide comments. Please do not hesitate to contact us if you have any questions regarding our comments.

Respectfully submitted,

'Loui Anastasopoulos'

Loui Anastasopoulos
President, Capital Formation and Enterprise Marketing Officer
TMX Group Limited

Goodmans LLP

Barristers & Solicitors

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Telephone: 416.979.2211
Facsimile: 416.979.1234
goodmans.ca

October 11, 2021

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

c/o The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-8122
Email: comments@osc.gov.on.ca

-and-

Me Philippe Lebel
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax: 514-864-6381
E-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comments – ***Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements Related to Financial Statement Requirements***

Goodmans LLP

We are writing in response to the Canadian Securities Administrators (the "**CSA**") Notice and Request for Comments – *Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements Related to Financial Statement Requirements* (the "**Notice**").

As partners of Goodmans LLP who practice corporate securities law, we work with numerous reporting issuers and other capital markets participants. We have played a leading role in assisting Canadian and non-Canadian companies in accessing the Canadian capital markets for many years and we support the CSA's initiative to reduce the regulatory burden on Canadian public companies to ensure Canada's public markets remain competitive with those in the United States and with private capital.

We are pleased to provide our views on certain of the proposed changes referenced in the Notice. These comments should not, however, be taken as the views of any of our clients or Goodmans LLP.

Set out below are our comments on certain proposed changes set out in the Notice (with the numbers corresponding accordingly).

(4) The significance test for "primary businesses" should be a two-part test.

While we strongly support the harmonization of the "primary business" test across all members of the CSA, we believe that further modifications are appropriate. Specifically, we believe that the significance test for "primary businesses" should be a two-part significance test, similar to what is done under the business acquisition report ("**BAR**")[1] rules in order to ensure that the "primary business" test is only triggered for truly significant acquisitions at the 100% level or higher.

A One-Part Test Will Lead to Anomalous Results.

We have seen numerous examples where the application of a one-part test and in particular, the profit or loss test, leads to anomalous results. For example, where an acquired business was closely held, the prior owner(s) may have taken certain steps to suppress net income, such as through the payment of abnormal management fees or salaries or by maintaining high leverage. If the issuer does not intend to replicate these arrangements following closing of an acquisition, the significance of the acquisition under the profit or loss may be understated. Alternatively, if a prior owner operated a business with minimal cost structure or no leverage the significance of the acquisition may be overstated.

We also see examples where non-cash deductions lead to anomalous results under the profit or loss test by exaggerating the significance of an acquisition in relation to its economic or operational significance on an objective basis. This is particularly true in the real estate industry where net income is often suppressed due to depreciation expense.

Issuers Will Be Subject to Unnecessary Additional Financial Statement Disclosure.

Utilizing a one-part test will lead to issuer-level historical financial disclosure being required for acquisitions that are not truly significant. Often these financial statements are not available and either cannot be prepared (therefore requiring a time consuming and expensive exemptive relief process if an IPO is to proceed) or can only be prepared at significant time and cost to the issuer.

Our Proposal

Given the shortcomings of a one-part significance test, the "primary business" test should be harmonized with the BAR significance test. In implementing the changes to the significance test for a BAR, the CSA concluded that a two-part test to determine significance would not compromise investor protection and would continue to provide investors with historical financial disclosure for acquisitions where appropriate. In our view, the same rationale applies to the "primary business" test.

[1] The BAR rules require that an issuer must disclose certain historical financial statements for an acquisition if at least two of the three significance tests (asset, investment and profit or loss) are exceeded.

(5) A materiality threshold or coverage ratio should be introduced for REITs or other roll-up issuers that have not existed for three years (two years for venture issuers) to address the inconsistency between the treatment of different types of IPO entities.

We feel strongly that the same principles that apply to an evaluation of the "primary business" test should also apply to the evaluation of the financial statement requirements for predecessor entities under paragraph 32.1(1)(a) of Form 41-101F1 (the "**Predecessor Entity Requirements**"). We see no regulatory basis to require 100% financial statement coverage for issuers subject to the Predecessor Entity Requirements when all other issuers conducting an initial public offering are not held to this standard. Requiring 100% financial statement coverage under the Predecessor Entity Requirements imposes a significant burden on issuers. Although the Notice indicates that pre-filing procedures under NI 41-101 are available in situations where financial statements cannot be provided or the business owned by a predecessor entity is immaterial, the pre-filing process imposes significant additional costs and delay and creates uncertainty for issuers. From an investor perspective, as has been recognized for other issuers conducting an IPO and has been approved following numerous pre-filing processes for REITs or other roll-up issuers, some level of missing financial statement disclosure is not prejudicial to the public interest.

The Predecessor Entity Requirements can lead to significant inequities among issuers going public. For example, a non-venture issuer going public in September 2021 that was initially formed in October of 2018 would be considered under the Predecessor Entity Requirements (being formed within three years of the IPO) and require 100% financial statement coverage for acquisitions completed in 2018, 2019, 2020 and 2021. In contrast, if that same issuer was formed in August of 2018 (more than three years before the IPO), it would be subject to the primary business test and, assuming none of the acquisitions constitutes the issuer's "primary business", would only require financial statement disclosure for acquisitions that are significant acquisitions under Item 35 of Form 41-101F1. Further, for any acquisitions that are significant under Item 35, the issuer would have the benefit of much less onerous disclosure requirements for those acquisitions under Item 35. We feel that this inequity should be addressed with a construct that permits a level of missing financial disclosure similar to the regime for the "primary business" test.

In particular, entities that go public as a REIT are not treated fairly under the Predecessor Entity Requirements as the issuer entity for REIT IPOs is a newly formed trust entity and under the guidance proposed in the Notice, would be subject to the Predecessor Entity Requirements. As a result of this structure, 100% financial statement coverage is the default for REITs conducting an IPO. This result puts REITs at a significant disadvantage in conducting and IPO and can greatly increase the time and cost associated with an IPO.

Our proposals

For REITs or other similar entities conducting an IPO through a newly formed entity, the financial statement requirements under item 32 of Form 41-101F1 should look through the newly formed entity and consider the financial statement requirements against the properties or business owned by the IPO sponsor that will be acquired by the newly formed issuer at the time of the IPO. The financial statement requirements under Item 32 would then be considered on the basis of the "primary business" requirements described above (assuming the business had been owned by the sponsor for more than three years prior to the IPO).

For situations where the business going public has not existed for three years, we would propose that a sliding scale coverage ratio requiring a minimum level of financial statement coverage for each year leading up to the IPO be implemented. This approach would be similar to the approach taken by CSA members in evaluating applications for exemptive relief over the past decade.

The sliding scale would require higher levels of financial statement coverage for recent fiscal years and lower levels for older years. For example, the coverage ratio for a non-venture issuer[2] could be structured as follows:

- most recent fiscal year – minimum 70% coverage
- second most recent fiscal year – minimum 60% coverage
- third most recent fiscal year – minimum 50% coverage

We propose that the percentage of financial statement coverage in each year be calculated based on an asset test comparing the acquired business' assets as at the end of its most recent fiscal year prior to the date of the acquisition to the pro forma assets of the issuer at the time of closing the IPO. Other measures could be considered to calculate the percentage of financial statement coverage.

A 70% coverage ratio for the most recent fiscal year would align with the BAR requirements which trigger financial statement disclosure for completed or probable acquisitions that exceed the 30% significance test in Part 8 of NI 51-102. Further, a high level of coverage for the most recent fiscal year recognizes the importance of that information for investors. For the second and third fiscal years prior to the IPO, the sliding scale would allow a lower level of financial statement coverage recognizing that financial disclosure for acquisitions completed during those years has less relevance to investors.

We would also note that financial statements for those older years are often the most difficult for issuers to obtain or prepare and impose a significant burden on issuers conducting an IPO. As a result, a lower level of coverage for these years provides a significant benefit to issuers while not compromising investor protection.

We recognize that establishing a sliding scale test involves some complexity and would be happy to discuss further with members of the CSA to establish an approach on the Predecessor Entity

---

[2] We would propose that a similar sliding scale coverage ratio be adopted for venture issuers covering the two-year annual period prior to an IPO.

Goodmans LLP

Requirements that works for all interested parties.

Thank you for considering our comments. Please contact any of the undersigned if you would like to discuss the above.

Very truly yours,

Stephen Pincus spincus@goodmans.ca 416.597.4104	William (Bill) Gorman bgorman@goodmans.ca 416.597.4118	Brad Ross bross@goodmans.ca 416.849.6010
Brenda Gosselin bgosselin@goodmans.ca 416.597.4254	David Coll-Black dcollblack@goodmans.ca 416.597.4120	

Stikeman Elliott

Stikeman Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON Canada M5L 1B9

Main: 416 869 5500
Fax: 416 947 0866
www.stikeman.com

October 11, 2021

Without Prejudice
By E-mail

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-8381
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* Related to Financial Statement Requirements

We submit the following comments in response to the Notice and Request for Comment published by the Canadian Securities Administrators (the "**CSA**") on August 12, 2021 with respect to proposed changes (the "**Proposed Changes**") to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* ("**41-101CP**").

We have organized our comments below with reference to the specific Proposed Change to which the comments relate, where applicable. All references to parts and sections are to the relevant parts or sections of the 41-101CP. Capitalized terms used and not defined in this letter have the meanings attributed thereto in the Notice and Request for Comment.

Thank you for the opportunity to comment on the Proposed Changes. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

A. **General**

We applaud the CSA's effort to reduce regulatory burden and we welcome additional guidance with respect to the Primary Business Requirements. We believe this initiative is a positive step towards facilitating continued growth in capital markets activity in Canada. However, we are of the opinion that any new guidance would go further in its positive impact by providing more clarity regarding the current rules with the goal of ensuring that issuers can identify and are able to assess their compliance requirements well in advance of the initial public offering or other transaction, along with related costs and challenges. We submit that additional guidance should not be subject to significant CSA Staff discretion and interpretation which effectively reduces the benefit of any transparency and predictability to market participants. As such, a number of our comments included in this letter are with respect to places where additional guidance would be desirable.

B. **Section 5.3 Interpretation of issuer – primary business**

Illustrative Examples: We appreciate the CSA's attempt to provide examples of where a reasonable investor would regard an acquired business or related businesses to be the primary business of the issuer, thereby triggering the application of Item 32 of Form 41-101F1. However, we respectfully submit that the examples provided do not significantly enhance a current understanding of the Primary Business Requirements as the examples are very clear cut (i.e., Example 1 describes an acquisition that exceeds the 100% threshold and Example 2 is a clear change of business). In an effort to provide issuers with greater certainty as to the nature of the financial information required to be included in a long-form prospectus, additional examples and guidance with respect to the "grey area" are necessary. In particular, examples of acquisitions where the acquisition is less than the 100% significance threshold but still changes the primary business of the issuer in a way that would require financial disclosure of the acquired business would be greatly appreciated, particularly where the change of business is not as clear cut as a change from mining exploration and development to cannabis cultivation activities. For example, circumstances that may be subject to interpretation include tuck-in acquisitions of entities in similar (but not the same) businesses or vertical acquisitions in the same industry. From a practical perspective, acquisitions take place when opportunities present themselves and issuers do not necessarily have the opportunity to require target financial statements when negotiating an acquisition (or access to information necessary to construct such statements after the fact). The circumstances where this may be the case vary across a wide range, including where the acquisition is relatively insignificant, is subject to a competitive bidding process, represents the acquisition of assets obtained out of bankruptcy or restructuring, etc. In such cases, the financial statements or necessary financial information may not be available or accessible, and/or the cost of obtaining the target's financial statements may not be justified. In most cases, historical financial statements may also not be relevant to the issuer as the issuer will have satisfied itself through alternative diligence and other factors. Moreover, historical financial statements are often structured to address the unique circumstances of the operating entities, and will often reflect certain judgments and policies that may not be relevant to the acquiror (for example, acquisition of a small family business that has historically been structured for tax optimization in the hands of the vendor or acquisition of assets or operations that are insignificant to a large vendor and do not justify separate records, etc.). Furthermore, once acquired, the importance to investors may be further diminished due to the manner in which the acquisition is consolidated by the acquiror, including through significantly different costs structures, synergies, and in certain circumstances, changes to the revenue-producing character of the business. We respectfully submit that if the issuer itself does not require the target financial statements in order to make the acquisition in the first instance, such information is unlikely to be considered material to investors. Having to construct MD&A for such statements further exacerbates the regulatory burden imposed on issuers. We also think that it would be very useful if the CSA could provide some examples of when historical financial statements of an acquired business would not be required in a long-form prospectus.

Full, True and Plain Disclosure: We submit that additional guidance is required with respect to how issuers may satisfy the requirement that a long-form prospectus contain full, true and plain disclosure of all material facts relating to the securities being distributed. While the Proposed Changes do reference this requirement, where an issuer is uncertain as to whether the omission of financial information with respect to an acquired business would result in a failure to satisfy the "full, true and plain" standard, the issuer is still encouraged to use the pre-filings procedures set out in NP 11-202 to determine whether additional disclosure is required. Based on our experience, we respectfully submit that the pre-filing process does not always provide certainty or a timely process for issuers. Importantly, the pre-filing process can be costly and result in transaction delays as it often results in issuers being required to seek exemptive relief. In the Request for Comment the CSA is explicit that the intention of the Proposed Changes is to reduce regulatory burden, including by reducing the instances in which an issuer will have to incur costs associated with filing an application for exemptive relief. Without additional guidance, we have concerns that pre-filing applications and exemptive relief will still be necessary in a significant number of cases.

<u>*OSC Guidance:*</u> We respectfully suggest that the CSA consider including a statement in the Proposed Changes that the guidance published by the Ontario Securities Commission (the "**OSC**") in July 2015[1] (namely, that issuers must include the financial history of acquired businesses that are *in the same primary business as the issuer* in the three-year financial history included in an IPO prospectus) no longer apply. This OSC guidance has resulted in issuers being required to include financial information in a long-form prospectus filed in Ontario that would not otherwise be required in other jurisdictions. If the Proposed Changes are an effort to harmonize approach across Canada, explicit clarification to this effect would be greatly appreciated.

<u>*Acquisitions of Multiple Businesses and Related Businesses:*</u> In many cases, issues with respect to the Primary Business Requirements arise where an issuer has undertaken a number of acquisitions over the course of the three years leading up to the issuer's initial public offering. In many cases, issuers have at times been required to include historical financial information for each such acquisition in their long-form prospectuses, including those that were not individually significant or otherwise material to the issuer, having regard to the overall size and value of the issuer's business and operations. In addition, these types of acquisitions tend to be fully integrated into the issuer's operations through consolidation of operations, shared management, harmonized human resources, and coordinated sales and marketing strategies, among other things. Once incorporated into an issuer's business, the acquired businesses get the benefit of these types of organizational synergies and, as a result, the historical financial statements of such businesses as they had been individually operated cease to be relevant to investors. We respectfully submit that additional guidance in 41-101CP with respect to the treatment of multiple acquisitions and related businesses is warranted and would serve to reduce the regulatory burden faced by highly acquisitive issuers.

<u>*SPACs*</u>: We request that additional guidance be included in 41-101CP with respect to the treatment of SPACs, and in particular, with respect to how acquisitions that are supplemental to the main qualifying transaction, or were previously completed within the past three years by the target company, are to be assessed. It is our position that supplemental acquisitions in a similar business alongside the main acquisition should be assessed in the same manner as any other prior acquisition in the context of an initial public offering. Namely, if the supplemental acquisition does not cross the 100% significance threshold, historical financial statements should not be required. Similarly, it has been our experience that issues with respect to the Primary Business Requirements frequently arise where the target of an issuer's prior acquisition had previously acquired another business (i.e., a "target of a target"). In such cases, it is particularly difficult and costly for issuers to obtain historical audited financial information for the target of the target as the issuer was not involved in the initial acquisition. We respectfully request that additional guidance be provided as to the financial statements that would be required in such circumstances, and when financial statements would not be required. The OSC has treated SPAC

---

[1] OSC staff Notice 51-725 *Corporate Finance Branch 2014-2015 Annual Report* (July 14, 2015) ("**Staff Notice 51-725**"), page 13.

qualifying transactions as akin to an initial public offering and so we believe that the same principles should be applied

C. Section 5.7 Additional information that may be required

Consistent with our desire to increase regulatory transparency, we are concerned that the new guidance captured in section 5.7(2) of the Proposed Changes, may result in in uncertainty for issuers. Proposed section 5.7(2) provides that "[t]here may be other exceptional scenarios where issuers may be required to include additional financial information, other than financial statements, in a prospectus in order for the prospectus to meet the requirement for full, true and plain disclosure". The examples provided include (i) an acquisition where an acquisition or proposed acquisition does not exceed any significance test at the 100% threshold but is close to doing so, or (ii) where an issuer has completed a relatively large number of unrelated and individually immaterial acquisitions (that are not predecessor entities) in the relevant periods prior to the prospectus filing. If an issuer is uncertain as to whether additional financial disclosure is necessary, the CSA guidance recommends that an issuer use the pre-filing procedures in NP 11-202. Not only can the pre-filing process be costly and result in transactional delays, the issuer may not have the opportunity after the fact to obtain or construct the type of information that is deemed necessary by the regulators. If the goal of the Proposed Changes is to provide clarity for issuers and reduce regulatory burden, the enhanced guidance should aim to provide bright-line thresholds for issuers rather than broad statements about where additional disclosure may be required. Given the proposed threshold has been determined to be 100%, similar to the significant acquisition test, it should not be relevant that the calculation falls a few percentage points below the threshold. While this may appear arbitrary to some, in our view, the certainly of a bright-lines threshold is much more beneficial to capital markets participants than being subject to application of discretionary rules.

D. Pre-Filing Applications

To the extent that pre-filing applications are necessary with respect to the Primary Business Requirements, we request that the CSA consider providing additional guidance in 41-101CP with respect to the type of information that would be expected to be included in a pre-filing application, including any spreadsheet or financial information requirements. We submit that this guidance would assist issuers in providing consistent information that is relevant to the CSA's decision making process and would reduce the volume of correspondence required to file a long-form prospectus.

* * * * *

Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

Laura Levine,

on my own behalf and on behalf of

Ramandeep K. Grewal
Jeff Hershenfield
Simon A. Romano

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

Toronto
Montréal
Calgary
Ottawa
Vancouver
New York

OSLER

October 11, 2021

SENT BY ELECTRONIC MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut

c/o
The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H3S8
comments@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: (514) 864-8381
E-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Request for Comment – CSA Notice and Request for Comment – Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 – *General Prospectus Requirements Related to Financial Statement Requirements*

This letter is provided to you in response to the CSA Notice and Request for Comment in respect of proposed changes to Companion Policy 41-101CP ("**41-101CP**") to National Instrument 41-101 – *General Prospectus Requirements Related to Financial Statement Requirements*.

We appreciate the opportunity to provide this comment letter and hope that our submissions will be of assistance.

We are highly supportive of the CSA's proposed amendments to 41-101CP. If adopted, we believe the amendments would be one of the most impactful initiatives of the CSA to date to reduce the regulatory burden on issuers seeking to become reporting issuers by way of a long form prospectus. Inconsistent interpretation of the primary business requirements set out in NI 41-101 and of the CSA guidance set out in 41-101CP has resulted in uncertainty, an unlevel playing field and increased costs for issuers when additional financial statements and MD&A are required as a result of the primary business requirements. We believe the CSA's proposal will remove a significant burden on Ontario-based issuers seeking to pursue an initial public offering and facilitate greater harmonization with the interpretation of the primary business requirements in jurisdictions outside of Ontario.

We support the confirmation by the CSA of the circumstances set forth in Section 5.3(1) of 41-101CP for which the primary business requirements are considered to be triggered. We also support the confirmation by the CSA of the circumstances set out in example 1 where a reasonable investor would not regard Acquisition A to be the primary business of the issuer.

Given the significant burden that issuers face when complying with the primary business requirements, we strongly support the implementation of the proposed changes to 41-101CP as soon as possible.

At the same time, however, we note that the proposed amendments to 41-101CP create a small number of ambiguities that could continue to impose additional burden upon issuers seeking to conduct an initial public offering which could continue to result in the need to engage in discussions with Staff. We believe that limited revisions to address the issues below should not result in a material delay in the adoption of the changes to 41-101CP by the CSA.

Section 5.3(1)

We have concerns regarding the change in current section 5.3(1)(c) to its new formulation in 5.3(1)(d). In particular, the removal of the reference to "significant acquisition" in the new formulation potentially creates a different standard for the application of the rules for financial statement inclusion. We suggest that the CSA consider reinserting reference in section 5.3(1)(d) to "significant acquisition" and further that the CSA make clear that the application of section 5.3(1)(d) is relevant only to a transaction that constitutes a "significant acquisition" under National Instrument 51-102 (i.e. that it must exceed at least two of the three significance tests set out in NI 51-102 in order to potentially be considered an acquisition that could engage the requirements of section 5.3(1)(d).

Further, while we appreciate the CSA may be seeking to create a "catch-all" clause through the inclusion of new section 5.3(1)(e) to allow the CSA to apply the primary business requirements in appropriate cases, we have questions as to how this section should and will be interpreted given its potentially broad scope. Although new example 2 is a helpful fact pattern with respect to the CSA's views regarding the application of section 5.3(1)(e), there is no clear guidance as to how "changes the primary business of the issuer" may be interpreted by staff, particularly in light of the reference to a transaction that is "less than the 100% significance threshold....". We do not believe that the CSA was seeking to create a "backdoor" primary business trigger with the inclusion of section 5.3(1)(e), but do suggest that 41-101CP would benefit from further clarification as to what changes may trigger the application of the primary business requirements at a percentage below 100%. For example, at a minimum, we recommend that the CSA apply a "fundamental change" standard in this new language to ensure that acquisitions or changes that modify or supplement the primary business not be inadvertently captured.

We also submit that the paragraph immediately following the enumerated examples in section 5.3(1) creates the potential for further uncertainty. We understand that one of the principal benefits of the proposed amendments to 41-101CP is to reduce the burden on issuers and CSA staff of engaging in pre-filing discussions. The reference in the paragraph following the enumerated examples (with several other references in the proposed 41-101CP to such discussions) suggests that there may be ambiguity in the rules. While it may be challenging to provide additional guidance with respect to the areas of concern that the CSA may be seeking to address through the inclusion of the paragraph, we suggest that both the CSA and issuer community are better served with more explicit guidance.

Section 5.7

We are concerned with the expansion of section 5.7 of 41-101CP and the change in tone of the language (for example, changing references from "an issuer may find it necessary" to "an issuer may be required" and "we may require") and suggest that the section be reverted with respect to the formulation of these expressions to put the onus on an issuer to make applicable determinations. However, more concerning, notwithstanding the references to "in exceptional circumstances" are the new obligations in section 5.7(2), which could require the inclusion of additional financial information in order to meet the full, true and plain disclosure standard. The inclusion of this new section also has the potential to create, rather than reduce, uncertainty for issuers, particularly given that the examples provided are not uncommon. We encourage the CSA to review the enumerated

OSLER

list carefully with a view to narrowing the scope of the examples, or potentially removing section 5.7(2) altogether. In the alternative, we believe that the CSA should provide clear guidance as to the interpretation of these requirements and when the CSA believes they could be triggered.

We are very supportive of the CSA's efforts to harmonize the approach to the interpretation of the primary business requirements, and strongly encourage the CSA to implement changes to 41-101CP as soon as possible. We believe the changes can be implemented in an expeditious manner while also addressing the limited issues noted above.

We would be happy to discuss our comments with you; please direct any inquiries to James R. Brown (jbrown@osler.com or 416.862.6647) or Desmond Lee (dlee@osler.com or 416.862.5945).

Yours very truly,

Osler, Hoskin & Harcourt LLP

Osler, Hoskin & Harcourt LLP

TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

October 8, 2021

By email:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Re: Proposed Changes to Companion Policy 41-101CP *General Prospectus Requirements* (41-101CP) Related to Financial Statement Requirements and to Companion Policy 51-102CP *Continuous Disclosure Obligations* (51-102CP)

Dear Staff:

We are writing in response to your request for comment dated August 12, 2021 regarding proposed changes to 41-101CP and 51-102CP intended to clarify and harmonize the interpretation of the financial statement requirements for a long form prospectus where an issuer has acquired a business, or proposes to acquire a business, that a reasonable investor would regard as being the primary business of the issuer (Primary Business Requirements).

These comments are provided by the lawyers of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Canadian Securities Administrators (CSA) to reduce the regulatory burden for issuers resulting from uncertainty about the interpretation of the Primary Business Requirements. However, it is not clear to us that the proposed changes, on their own, will meaningfully reduce the uncertainty for market participants or the need for consultation with Staff in connection with the interpretation and application of the Primary Business Requirements, and/or the need for exemptive relief. As we discuss in more detail below, we recommend that the CSA consider additional changes to the regulatory framework to reduce the unnecessary regulatory burden that can increase costs and/or lead to uncertainty regarding financial information requirements for certain issuers seeking to access Canadian capital markets or, in some situations, motivate issuers to avoid raising capital in Canadian public markets.

1. Revisit Items 32 and 35 of Form 41-101F1

We recommend that the CSA revisit Items 32 and 35 of Form 41-101F1 *Information Required in a Prospectus* (Form 41-101F1) and the related guidance (and not make changes solely to 41-101CP), with a view to streamlining, consolidating, harmonizing (where appropriate) and clarifying these requirements. For example:

A. The incorporation by reference of requirements from other instruments, which are then modified for use as prospectus disclosure requirements,[1] makes these provisions unnecessarily complex and difficult to interpret. Given the complexity of Form 41-101F1 and its significance as a core instrument specifying disclosure requirements for long-form prospectus offerings, and indeed, primarily for initial public offerings (IPOs), we believe that it should be as self-contained as possible, with incorporation by reference from other instruments limited mainly to definitions and avoiding any incorporation by reference of provisions that must be read in conjunction with adapting language in Form 41-101F1.

B. 41-101CP should include a flow chart or similar diagram[2] to assist users in determining which types of issuers, and in which circumstances, are required to apply which tests or are subject to which requirements with respect to the financial information that must be included in their prospectuses. For example, if a reporting issuer to which Item 35 applies has completed one or more acquisitions and none of the acquisitions (individually or collectively) triggers any of the significance tests, does that issuer still need to consider whether a reasonable investor would consider the acquisition or acquisitions to be the issuer's primary business, so that the issuer would be expected to provide the disclosures outlined in Item 32?

C. It would be helpful to have more guidance on when the CSA is likely to believe that "a reasonable investor would regard the primary business of the issuer to be the acquired business or related businesses".

   - When an issuer acquires a business in an industry unrelated to its historic business, it can be difficult to determine whether the acquisition amounts to a change in the primary business of the issuer. Many acquisitions, such as acquisitions of complementary or related businesses or diversifications of asset portfolios, will be more challenging to evaluate than the example given in the proposed amendments to 41-101CP of a mining company effecting a wholesale transition to a cannabis business. Also, beyond clear examples of "immaterial acquisitions" (discussed further below), if an issuer acquires a business that differs to some extent from its historic business, we would encourage the CSA to consider providing additional guidance about the size of, or any other factors relating to, the acquired business (or acquired businesses) that, absent exceptional circumstances, would not be considered a primary business of the issuer.

---

[1] For example, the definition of "significant acquisition" in paragraph (4)(b) of Item 35.1 (which applies to an issuer that was not a reporting issuer on the acquisition date) includes seven modifications to the definition of "significant acquisition" in section 8.3 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102).

[2] See, for example, the decision tree flow chart included in Appendix A to Commentary in National Instrument 81-107 *Independent Review Committee for Investment Funds*.

- It would be helpful for the CSA to clarify that, when an acquisition does not change the issuer's historic business (e.g. a mining company buying a mining business), the acquired business would not be considered the "primary business" unless the acquisition triggered the 100% significance test.
- Finally, it would be helpful for the CSA to clarify that if an issuer already has a variety of businesses, it can be comfortable concluding that an acquisition will not be considered a "primary business" if it becomes one of many businesses owned by the issuer and does not trip the significance test at the 100% level.

D. Items 32 and 35 refer to businesses that have been acquired or are proposed to be acquired, but Item 35 and the related sections in 41-101CP use the term "probable acquisition". We recommend that the CSA clarify that the disclosure requirements in Item 32 (including those arising from a determination that a business is a primary business) apply only in respect of a proposed acquisition when the proposed acquisition has progressed to a state where a reasonable person would believe that the likelihood of the issuer completing the acquisition is high.

E. When a business acquired, or to be acquired, is considered to be part of the "primary business" of an issuer within the meaning of Item 32.1(1)(b) of Form 41-101F1, the disclosure requirements in a prospectus are more onerous than for an acquisition that falls within the definition of "significant acquisition" within the meaning of Item 35 of Form 41-101F1. Consistent with the feedback the CSA received on CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*, we submit that two full years of audited financial statements plus the most recent comparative interim financial statements, along with *pro forma* financial information, are sufficient to enable a potential investor to understand the issuer's financial position. Unless the issuer would be left without any financial statements for the third most recent year, the third year of financial statements of an acquired business should not be required in the circumstances set out in Item 32.1(1)(b). The requirement to prepare, and obtain an audit of, pre-acquisition financial statements for the third most recent year can add significant, incremental cost and time to the preparation of disclosure, with little to no benefit to a potential investor since these financial statements will be stale and not reflective of the consolidated financial position of the issuer's business going forward. These burdens are exacerbated if there has been a change in the acquired business's management or a change in its independent auditor. These burdens can have a significant adverse effect on an issuer's ability to access capital markets on a timely basis – or at all. These are some of the reasons why, after extensive consultation with market participants, the U.S. Securities and Exchange Commission (SEC) recently adopted amendments (SEC Amendments)[3] to the financial disclosure requirements for business acquisitions and dispositions that, among other things, reduce the number of audited and interim periods for which historical financial statements must be presented if an acquisition is determined to be significant to a maximum of the two most recent fiscal years.

F. We also encourage the CSA to consider revising National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) and Form 41-101F1 to include certain other changes to the disclosure regime for acquired businesses along the lines of the SEC Amendments, such as permitting

[3] See SEC, *Final Rule - Amendments to Financial Disclosures about Acquired and Disposed Businesses* (File No. S7–05–19).

abbreviated financial statements for a target business carved out of a broader entity that did not maintain separate financial statements of the target business.

G. We recommend that the CSA reconsider the requirements in Item 8.2 of Form 41-101F1 that MD&A be provided in respect of any acquired business whose financial statements the issuer is required under Item 32 to include the prospectus.

- Since the issuer did not own the business during the pre-acquisition period, management of the issuer may not be in a position to discuss the performance of the acquired business during the pre-acquisition period, and it may not be feasible to have management of the acquired business (who may no longer be involved in the business) prepare the MD&A for the pre-acquisition period. If MD&A in respect of a business for a period prior to the acquisition of the business is deemed necessary for readers to be able to understand the financial statements of the acquired business, we recommend that the requirements be streamlined (e.g. to focus on a comparison of financial results for the periods presented).
- If a third year of financial statements continues to be required in the circumstances set out in Item 32.1(1)(b), we recommend that the CSA consider either (a) deleting the requirement in Item 8.2(2) for issuers to provide MD&A in respect of that third year for financial statements included as a result of the primary business determination or (b) limiting the application of this requirement to exceptional situations that the CSA specifies in the Form 41-101F1.

H. Section 3.11 of National Instrument 52-107 *Accounting Principles and Auditing Standards* (NI 52-107) permits "acquisition statements" to be prepared in accordance with specified accounting principles (including U.S. GAAP), subject to certain conditions. Section 1.1 of NI 52-107 defines "acquisition statements" to include the financial statements of an acquired business or a business to be acquired that are included in a prospectus pursuant to Item 35, <u>but not</u> Item 32, of Form 41-101F1. We would encourage the CSA to consider whether there is a principled basis to distinguish between the requirements for acquisition statements included in a prospectus under Item 32.1(1)(b) of Form 41-101F1 and acquisition statements included in a prospectus under Item 35 of Form 41-101F1.

2. Optional Significance Test

We support the CSA's proposal to include an optional test for determining the significance of an acquisition and appreciate the CSA's acknowledgment that many companies grow during the three-year look-back period prior to filing a prospectus under NI 41-101. As drafted, however, the proposed optional test is impractical and insufficient because it would apply only if the acquired business remains substantially intact and is not significantly reorganized, and if no significant assets or liabilities are transferred to other entities. Most issuers that acquire businesses do not leave these businesses intact or maintain stand-alone financial statements. We recommend instead that the optional test permit significance to be measured based on either: (i) the most recent annual or interim financial data for the acquired business and the issuer based on internal books and records of the issuer (this assumes that the acquired business is a separate division or segment); or (ii) the most recent annual or interim financial statements of the acquired business prior to the date of the acquisition and the most recent *pro forma* annual or interim financial statements of the issuer on a *pro forma* basis contained in the prospectus.

3. Subsection 5.7(2) of 41-101CP – Exceptional Scenarios

Proposed subsection 5.7(2) of 41-101CP states that there may be exceptional scenarios where issuers may be required to include additional financial information, other than financial statements, in order for the prospectus to meet the requirement for full, true and plain disclosure. Subsection 5.7(2) goes on to indicate that additional disclosure might be needed and that an issuer should use the pre-filing procedures to determine what information will be required if, for example, the issuer has incurred significant growth through one or more acquisitions prior to its IPO filing resulting in "insufficient financial history of the primary business as disclosed in the prospectus" and:

- it was an IPO venture issuer that had acquired or proposed to acquire a business that result in any applicable significance test coming close to exceeding the 100% threshold in section 5.3 of NI 51-102;
- it was an issuer that had made or was proposing to make one or more acquisitions during the relevant period but financial disclosure was not triggered by Items 32 or 35 of Form 41-101F1; or
- it was an issuer that had completed a relatively large number of unrelated and individually immaterial acquisitions (that were not predecessor entities) in the relevant period prior to filing the prospectus.

We recognize that the over-arching requirement for a prospectus to meet the requirement for full, true and plain disclosure means that there may be situations where additional disclosure is required beyond what is specified in NI 41-101 and Form 41-101F1. Proposed subsection 5.7(2) (including the phrase "insufficient financial history"), however, has the potential to generate uncertainty as well as inconsistent interpretations of the requirements to provide historical financial information for acquired businesses.

4. Multiple Transactions prior to an IPO

Item 32 of Form 41-101F1 requires that financial statements and interim reports include certain financial statements of any business or businesses acquired by the issuer within three years before the date of the prospectus, or proposed to be acquired, that a reasonable investor would regard as being the "primary business" of the issuer. Although some of the examples in the proposed revisions to section 5.3 of 41-101CP are helpful, the optional test for evaluating the significance of an acquisition where an issuer has grown between the date of an acquisition and the IPO does not clearly address situations where an issuer has made multiple acquisitions within the three years before its IPO or has completed a pre-IPO acquisition and has a pending acquisition. We have set out below additional examples that we recommend the CSA address in proposed subsection 5.3(1) of 41-101CP:

- How should an issuer assess the significance of two unrelated acquisitions in different financial years, where each acquisition would meet the 100% significance threshold on its own, based on the completed financial year before the relevant acquisition, but the second acquisition would not meet the 100% significance threshold if significance is measured using more recent financial statements of the issuer or on a *pro forma* basis giving effect to the first acquisition?
- An issuer acquired two businesses prior to the IPO and, based on the most recent audited financial statements, each business represented exactly 50% of the assets of the issuer's business. Would each business be considered a primary business for purposes of the IPO prospectus (because each acquisition would trip the 100% significance test)? What if neither business represented 50% or more of the issuer's business based on the most recent financial statements

(because the issuer has other operations and neither acquired business would trip the 100% significance test)? Would neither business be considered a primary business?

5. Meaning of the Term "Immaterial"

The proposed amendments to 41-101CP use the term "immaterial" in two of the examples[4] without explanation. We recommend that the CSA provide guidance about the meaning of the term "immaterial" and its relationship to other terms in Form 41-101F1 and 41-101CP that classify transactions in terms of their significance. For example, if CSA Staff have established thresholds or parameters in the context of prior applications for exemptive relief concerning the Primary Business Requirements that they consider representative of "immaterial" acquisitions, it would be helpful to reflect these thresholds or parameters in 41-101CP or establish exclusions in Form 41-101F1 from the Primary Business Requirements in respect of past or pending acquisitions falling below these thresholds.

***

Once again, we appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

Janet Holmes
Glen R. Johnson
Daniel Masliyah
Karrin Powys-Lybbe
Rima Ramchandani

[4] Example 3 in proposed subsection 5.4(1) of 41-101CP describes a situation where an issuer that expected to acquire four real estate properties concurrent with the closing of its IPO would be expected to include audited financial statements (and related MD&A) for each of those properties but if one or more of the properties was "immaterial", the issuer should use the pre-filing procedures in National Policy 11-202 *Process for Prospectus Reviews in Multiple Jurisdictions*. Subsection 5.7(2) of 41-101CP indicates that additional financial information may be required if, for example, an issuer completed a relatively large number of unrelated and individually immaterial acquisitions (that are not predecessor entities) in the relevant periods prior to filing the prospectus.

October 7, 2021

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Care of:

The Secretary Ontario Securities Commission
comment@osc.gov.on.ca

Me Philippe Lebel Corporate Secretary and Executive Director, Legal Affairs, Autorité des marchés financiers
consultation-en-cours@lautorite.qc.ca

Re: CSA Notice and Request for Comment – Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements Related to Financial Statement Requirements

We would like to thank the Canadian Securities Administrators (CSA) for their work to date on the project to reduce regulatory burden. We believe that the proposed amendments generally provide additional clarity over the requirements for primary business financial statements to be included in a long-form prospectus and other offering documents where prospectus level disclosure is required. However, we would encourage the CSA to consider providing additional clarity on the requirements for predecessor business financial statements.

Our observations and recommendations are based on our experiences in working with Canadian reporting issuers on securities filings, as their auditors. Our specific comments are as follows:

We support the proposed clarification in the Companion Policy relating to when mining assets would meet the definition of a "business" for the purposes of applying National Instruments 41-101 and 51-102. We agree that where there has been no exploration, development or production activity in the relevant 2- or 3-year period prior to the prospectus or acquisition date (the "relevant period"), financial statements

PricewaterhouseCoopers LLP
PwC Tower, 18 York Street, Suite 2600, Toronto, Ontario, Canada M5J 0B2
T: +1 416 863 1133, F: +1 416 365 8215, www.pwc.com/ca

relating to the mining assets should not be required to be included in a prospectus or business acquisition report. However, we are concerned that the proposed language will be unduly limiting.

In our experience, it is not uncommon for acquired mining concessions to also include assets or liabilities that are directly related to the concession, but that are accounted for as separate assets or liabilities under International Financial Reporting Standards (IFRS), even when there is no exploration, development or production activity in the relevant period. Common examples include asset retirement obligations (AROs), reclamation bond deposits, or similar assets that are required to be set aside to fund AROs or other reclamation expenses, and in-place leases or other contracts that relate to accessing the mining concession but are separately recognized as assets and/or liabilities under IFRS. A further example is property, plant and equipment, such as mining or exploration equipment on site that is also acquired in conjunction with a mining concession, even though operations have been dormant. Under the proposed wording, we believe that such situations would still require financial statements for the mining concession, absent any exemptive relief granted. We suggest that the language in 5.11 (b) is an unnecessary condition in situations where there has been no recent exploration, development or activity on the mining assets acquired. However, if staff are concerned that mining concessions acquired may include both dormant mining properties, and other operating activities for which financial information should otherwise be required, we suggest the following clarifying language be considered:

(b) other than assets and liabilities directly related to the mining assets acquired, no other assets were transferred and no other liabilities were assumed as part of the acquisition.

In addition, we question the relevance of the party from which the mining assets were acquired, when evaluating the need to include financial statements in a prospectus or business acquisition report. We believe the key driver is whether the acquired mining assets had ongoing activities during the relevant period, and not based on whether those assets were acquired in an arm's length transaction or from a related party. Therefore, we suggest that condition (a) in proposed 5.11 be deleted.

Should you have any questions regarding our response please contact Michael Walke (416-815-5011) or Lucy Durocher (416-869-2311).

Yours truly,

PricewaterhouseCoopers LLP

Chartered Professional Accountants

FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

800 Victoria Square, Suite 3500
P.O. Box 242
Montréal, Quebec H4Z 1E9
Canada

T +1 514 397 7400
+1 800 361 6266
F +1 514 397 7600

fasken.com

October 7, 2021

BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Service NL
Northwest Territories Office of the Superintendent of Securities
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Nunavut
(the "**CSA**")

c/o

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Email:consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd floor
Toronto, Ontario M5H 3S8
Email: comment@osc.gov.on.ca

Dear Mesdames/Sirs:

Re: CSA Notice and Request for Comment - Proposed Changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* Related to Financial Statement Requirements

[1] Thank you for providing us with the opportunity to comment on the proposed changes to Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* Related to Financial Statement Requirements dated August 12, 2021 (the "**Proposed Changes**").

[2] Our comments below address some of the Proposed Changes, and more particularly from the perspective of initial public offerings by non-venture issuers**.** These comments represent the views of certain individual members of our securities and mergers & acquisitions practice group, and not those of the firm generally or any client thereof; they are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any of its clients.

[3] Our comments below reflect our professional experience in advising issuers and investment bankers in connection with numerous capital markets transactions, including non-venture issuers engaging in initial public offerings.

1. **Summary of our most significant comments**

[4] Our most significant comments are the following:

(a) we welcome the CSA decision to release a proposed common approach on the "primary business" question, a common approach which we believe is essential to ensure an efficient process for issuers intending to complete an initial public offering;

(b) we invite the CSA to provide additional meaningful guidance that could effectively be relied upon in determining the applicability of some of the Proposed Changes. We provide examples in our comments below. Additional meaningful guidance would assist in reducing the time devoted to, and costs associated with, pre-filing discussions and applications with CSA staff, thereby decreasing the corresponding regulatory burden of issuers. Additional guidance might be provided in the final text of the Proposed Changes or in the CSA final notice announcing their adoption.

(c) we invite the CSA to consider aligning the primary business trigger consisting in an acquisition exceeding the 100% significance threshold with the recent changes for the determination of a significant acquisition under Part 8 of NI 51-102 by requiring that a second significance threshold be exceeded for the primary business trigger to apply. We believe that the same rationale justifying that two or more of the tests be satisfied to constitute a significant acquisition also applies in the context of determining if an acquired business constitutes the primary business of an issuer;

(d) although not specifically part of the Proposed Changes, we invite the CSA to consider making certain changes relating to the required audit standards and accounting principles that would facilitate the initial public offering process for issuers that have made acquisitions of foreign entities, and align them with those applicable to significant acquisitions. More specifically, we would suggest allowing issuers to include financial statements for an acquired business forming part of the primary business of the issuer prepared using the same accounting principles and auditing standards as those allowed for significant acquisitions.

2. Review of some Proposed Changes

[5] We will focus our comments on the following Proposed Changes: 1) proposed clause (d) of subsection 5.3(1); 2) proposed clause (e) of subsection 5.3(1); 3) subsection 5.4(1); and 4) subsections 5.7(1) and (2). We also provide suggestions on the reliance on accounting principles for foreign acquisitions.

General

[6] We generally welcome the CSA decision to release a proposed common approach on the "primary business" question, a common approach which we believe is essential to ensure an efficient process for issuers intending to complete an initial public offering. Our support is premised on our interpretation of the new guidance described below, particularly for clause (e) of subsection 5.3(1). We consequently invite the CSA to provide additional meaningful guidance that could effectively be relied upon in determining the applicability of some of the Proposed Changes. Additional meaningful guidance would assist in reducing the time devoted to, and costs associated with, pre-filing discussions and applications with CSA staff, thereby decreasing the corresponding regulatory burden of issuers.

Proposed clause (d) of subsection 5.3(1), example 1 and optional significance test

[7] Proposed clause (d) of subsection 5.3(1) indicates that an acquisition exceeding the 100% significance threshold calculated under subsection 35.1(4) of Form 41-101F1 is an example of a situation where a reasonable investor would regard the acquired business or related businesses to be the primary business of the issuer. This language is slightly different from the current one, as it no longer specifically refers to the acquisition to be a significant acquisition. The level of percentage remains the same.

[8] We note that example 1 provides key information on each of the three tests applicable to determine significance under the revised requirements governing BAR disclosure contained in Part 8 of NI 51-102. We further note that all of the three tests (assets, investments and specified profit or loss) are above the thresholds set forth under these revised requirements, and that only the asset test is set at a percentage higher that 100%. There is consequently no practical change from the current situation on this aspect.

[9] In light of the revised requirements governing BAR disclosure, we invite the CSA to consider revising clause (d) and the associated example 1 to provide for the need to exceed not only the 100% significance for one of the tests (in the case of example 1, the asset one), but also one of the other two tests, and set the level of percentage that will need to be exceeded for clause (d) to apply. We submit that there is no paramount policy reason that warrant references to only one of the three tests in light of the reasons that supported the introduction of the revised requirements governing BAR disclosure summarized in the CSA Notice and Request for Comment dated September 5, 2019, in which the BAR changes were proposed.

[10] In addition to the above, we note the revised and enhanced option for an issuer to rely on an optional calculation similar to that set out in subsection 8.3(4) of NI 51-102.

[11] Despite this revision, we note that such subsection is primarily addressing situations where a reporting issuer is making an acquisition, and is required to determine if BAR disclosure must be made. In this context, the requirements of subsection 8.3(6) that the business or related businesses had remained substantially intact and were not significantly reorganized, and that no significant assets or liabilities were transferred to other entities, may be viewed as relevant for the optional significance calculation to apply.

[12] In the context of acquisitions completed prior to an IPO, we question the need to incorporate the restrictive conditions contained in subsection 8.3(6) which, if maintained as proposed, might seriously impair the ability of issuers to take advantage of the optional significance test. We invite the CSA to reconsider and relax the conditions allowing optional significance to apply.

Proposed clause (e) of subsection 5.3(1) and additional analysis required for the determination of primary business

[13] We welcome the CSA comments following example 1, where the CSA acknowledge that the application of the optional test leading to an acquisition no longer exceeding the 100% threshold (in this case the asset one) would not be regarded by a reasonable investor to be the primary business of the issuer, and share a similar view. Subject to our previous comments above, we believe that this statement provides better clarity and certainty to issuers and their advisors.

[14] Despite the above, we note that as currently drafted, clause (e) of subsection 5.3(1) appears fairly wide in scope. We further note the paragraph following clause (e), in which the issuer is invited, in addition to the examples described in clauses (a) to (e), to make an additional analysis of the relevant facts to determine whether a reasonable investor would regard the primary business of the issuer to be the acquired business or related businesses. This paragraph goes on to state that in the event of uncertainty, the issuer should utilize the pre-filing procedures in NP 11-201.

[15] When clause (e) is read together with the above CSA comments in example 1, a plausible interpretation of such clause (e) and the paragraph that follows is that an acquisition that is less than the 100% significance would not be considered changing the primary business of the issuer unless such acquisition fundamentally changes the nature of the issuer's business and its risk profile. For example, the mere addition of a new line of business complementary to the issuer's existing business would not meet the criteria. This is indeed what example 2 is about. The other types of transactions mentioned in clauses (a) to (c) of subsection 5.3(1) provide additional examples supporting such an interpretation. However, since the above is only a plausible interpretation, among other plausible interpretations which may lead to different conclusions, we invite the CSA to provide additional language and guidance confirming the CSA intents in this regard. From our perspective, such additional guidance might be derived from the above reference to a fundamental change in the nature of the issuer's business and its risk profile for an acquisition to change the primary business of the issuer. Clause (e) should further be revised in light of our comments above on clause (d) of subsection 5.3(1).

[16] From our perspective, the criteria in clauses (a) to (e) should be the driving factors considered when determining if an acquired business forms part of the issuer's primary business, and the paragraph following clause (e) should not be used by CSA staff to apply other internal and unpublished criteria in the classification of acquisitions made by an issuer.

[17] We submit that the additional guidance proposed above would effectively reduce the potentially fairly wide scope of clause (e) and the paragraph that follows. It would also constitute a meaningful and positive change compared to some of the IPO situations we have been involved in over the recent years, and would indeed reduce the number of future pre-filing discussions and consequently reduce the regulatory burden of issuers. It would also represent an attempt to better define what could constitute a change in the primary business of an issuer. Guidance may be added to the text of subsection 5.3(1), or could be contained in the notice announcing the adoption of the Proposed Changes in final form.

[18] We further note that the paragraph following clause (e) refers to the need for the prospectus to contain full, true and plain disclosure of all material facts. Such determination lies in the hands of issuers and their underwriters, who bear statutory liability should a material fact be characterized as a misrepresentation under applicable securities legislation. Although we acknowledge that issuers might be asked by CSA staff to provide support for their determination of the above, we submit that pre-filing discussions and procedures under NP 11-202 should not constitute a forum where the materiality of a fact is ultimately determined by CSA staff.

[19] We also understand that the above is to be read in conjunction with subsection 5.7(2), which we further discuss below.

Subsection 5.4(1) - Predecessor entity of issuers of less than 3 years of existence

[20] We welcome the revision of subparagraph 5.4(1) and in particular the deletion of the reference to the need to include financial statements of acquired businesses that are unrelated and not otherwise individually significant and that form the basis of the business of the issuer. We are of the view that this change will indeed contribute to reducing the regulatory burden of issuers.

[21] We note, however, that financial statements of predecessor entities that are considered material or necessary for the prospectus to contain true, full and plain disclosure, might need to be provided, and that pre-filing discussions or applications might be required in these circumstances. We further note the CSA comment on financial statements put together to form the basis of the business of the issuer.

[22] We invite the CSA to provide additional meaningful guidance on which issuers and their advisors could rely to better identify criteria to be considered to determine when a predecessor entity would not be considered material, and the nature of the situations that would so qualify. As we indicated above, we submit that pre-filing discussions and procedures under NP 11-202 should not constitute a forum where the materiality of a fact is ultimately determined by CSA staff.

Subsections 5.7(1) and (2) - Additional information that may be required

[23] We welcome the change in drafting to subsection 5.7(1) by the addition of the exceptional circumstances qualifier. However, what should be understood by exceptional circumstances remains unclear, and the Proposed Changes do not provide guidance to assist issuers and their advisors to better appreciate on what basis an exceptional circumstance may be determined or identified. We are inclined to believe that they would differ from those situations referred to in subsection 5.3(1) discussed above.

[24] We are also preoccupied by the far-reaching scope of subsection 5.7(2), and the situations described in the first three bullets thereof, as they indicate situations where the significance threshold referred to in subsection 5.3(1) is not met. This additional discretion conferred to CSA staff, with little guidance allowing issuers and their advisors to better identify when pre-filing discussions and applications might be required, is of concern to us.

[25] For example, it is particularly difficult and unclear to adequately identify what should be understood by "close to exceeding the 100% threshold". It is even more problematic to identify the kind of situations that would entail CSA staff to require additional financial information in the situations described in the second and third bullets. We appreciate that this subsection is not designed to allow CSA staff to require historical financial statements, but remain concerned by the lack of meaningful guidance in the implementation of this new provision.

[26] In addition to the above, the combined reading of subsections 5.7(2) and (3) will likely be the source of significant uncertainty by issuers and their advisors given the potential consequences deriving from differences in views between CSA staff and issuers. This level of uncertainty will in itself warrant initiating pre-filing discussions or procedures under NP 11-202.

[27] We consequently invite the CSA to provide meaningful guidance providing better visibility on the scope of application of theses new subsections. Providing meaningful guidance will also contribute to reducing the regulatory burden of issuers associated with the compliance with these new requirements.

Reliance on accounting principles for foreign acquisitions

[28] We believe it is important to make the CSA aware of a particular practical issue we have faced in the preparation of financial statements relating to the acquisition of a foreign business that is considered to form part of the issuer's primary business.

[29] Essentially, for an acquired foreign business that constitutes a significant acquisition under Item 35 of NI 41-101, an issuer is allowed to include financial statements prepared in accordance with accounting principles and auditing standards permitted for "acquisition statements" under NI 52-107, including IFRS and IAS, while those relating to an acquired foreign business that forms part of the issuer's primary business need to be prepared using Canadian GAAP and Canadian GAAS.

[30] This requirement is adding serious and significant impediments in terms of time and costs for issuers seeking to complete an initial public offering. For example, in many instances the acquired foreign business will be a privately held entity which has used an acceptable local auditing firm that will often be reluctant to, and will often decline the task of, re-auditing and re-certify the financial statements under Canadian GAAS. The reasons typically range from unfamiliarity with the Canadian standards to fear of potential liability under a legal framework in which they do not operate. This has the practical effect of requiring the issuer to hire other external auditors licenced to operate in Canada to assist or complete the work. From our perspective, we see no policy reason that would warrant a distinction between foreign acquisitions that are significant acquisitions and those that form part of the issuer's primary business.

[31] This question is even more compelling when considering an acquired foreign business that uses IFRS and IAS, as Canadian GAAP for public issuers refer to IFRS and Canadian GAAS closely follow IAS.

[32] We note in particular that for existing reporting issuers, the fact that a significant acquisition exceeds any one or more of the significance threshold by 100% does not require the preparation of financial statements under Canadian GAAP and Canadian GAAS.

[33] From our perspective, if the accounting principles and auditing standards allowed for "acquisition statements" under NI 52-107 are adequate for investors in making an investment decision involving a significant acquisition, they should also be adequate in making an investment decision involving an acquisition meeting the "primary business" criteria.

[34] An approach CSA may consider in the future is the addition of a reference to "Item 32" in paragraph (b) of the definition of "acquisition statements" in NI 52-107. Alternatively, either a blanket ruling or guidance indicating a receptiveness to a relief application allowing the issuer to treat financial statements required under Item 23 of NI 41-101 as acquisition statements pursuant to NI 52-107 would in our view represent a valuable and welcomed addition.

**** **** ****

We trust that the foregoing comments will be of assistance to the CSA. We would be pleased to elaborate upon our comments at your request. If you would like to discuss our comments further, please do not hesitate to directly contact any of Jean-Pierre Chamberland at (514) 397 5186, or jchamberland@fasken.com, and the undersigned at (514) 397 4347 or gleclerc@fasken.com.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

"Gilles Leclerc"

Gilles Leclerc