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