



THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

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December 19, 2003

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

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RE: Canadian Securities Administrators ("CSA") Request for Comment - Proposed Amendments to National Instrument 54-101 Communication with Beneficial Owners of Securities of a Reporting Issuer ("NI 54-101")

1. General

The Investment Funds Institute of Canada (“IFIC”) is the Member association of the investment funds industry in Canada and its Membership includes 67 fund management companies sponsoring 1,893 mutual funds, 85 dealer firms selling mutual funds, and 57 affiliates representing law, accounting and other professional firms.

IFIC Members currently manage assets representing almost 100% of all open-end mutual funds in the country. IFIC Member funds manage \$423.6 billion in assets (representing nearly 95 per cent of the industry) in over 51 million unitholder accounts.¹

We are writing to provide you with our comments on the proposed amendments to NI 54-101. There is significant uncertainty regarding the application of NI 54-101 to mutual funds and mutual fund dealers and these problems are exacerbated by the conflicting delivery requirements imposed by proposed National Instrument 81-106 - Investment Funds Continuous Disclosure (“NI 81-106”).

We appreciate the time that you have taken to meet and consult with representatives of IFIC's NI 54-101 Implementation Issues Working Group in trying to work towards a resolution of these problems for the mutual funds industry. We also appreciate this additional opportunity to offer comments on behalf of our Members.

2. Application of NI 54-101 and Analysis

Mutual Fund Dealers

NI 54-101 defines an “intermediary” as “a person or company that, in connection with its business *holds* [securities] on behalf of another person or company...”² Among the obligations imposed on intermediaries is the obligation to obtain from new clients instructions on the matters to which the client response form (“CRF”) pertains.³ Intermediaries are required to obtain these instructions before holding securities on behalf of the client.

“Client name” Dealers

Both investment and mutual fund dealers transact on behalf of clients in client name. However, unlike investment dealers, the majority of the business conducted by mutual fund dealers is in “client name”. Transacting business in client name means that the client is the registered owner of their mutual fund securities. Under this method of operating, a dealer does not “hold” mutual fund securities on behalf of its clients but is entitled to transact with a fund

¹ As at November 30/2003.

² Emphasis added

³ NI 54-101, s. 3.2.

on the client's behalf pursuant to individual written instructions or pursuant to a form of limited trading authorization.⁴ Accordingly, dealers who transact in client name are not "intermediaries" for the purposes of NI 54-101 and are not required to obtain the CRF instructions.

"Nominee name" Dealers

Mutual fund and investment dealers who transact in "nominee name" are themselves the registered owners of mutual fund securities which they *hold* on behalf of their clients. While these dealers would, therefore, be "intermediaries" for the purposes of NI 54-101, we are of the view that the instructions on the CRF are unnecessary with respect to mutual funds for the following reasons.

OBO/NOBO Election

In our view, the requirement to obtain instructions from investors as to whether they do or do not object to their beneficial ownership information being disclosed to issuers or third parties who request this information ("OBO/NOBO⁵ election") is unnecessary and possibly misleading in the context of mutual fund purchases since client information is provided by dealers to mutual fund managers, for securities held in both client and nominee name. Intermediaries forward this information to mutual fund managers because of tax reporting obligations that are fulfilled by fund managers on behalf of all clients irrespective of how the account has been registered.

Election regarding Financial Statements

In our view, the CRF election regarding the receipt of financial statements⁶ will be unnecessary in light of the requirements that will be imposed on mutual funds under NI 81-106.⁷

⁴ Limited trading authorizations used for this purpose still require clients to explicitly authorize all transactions in advance. However, clients that provide limited trading authorizations to their mutual fund dealers have the convenience of being able to provide the requisite approval verbally.

⁵ OBO - Objecting Beneficial Owner / NOBO - Non-Objecting Beneficial Owner

⁶ The CSA have proposed deleting Part 2 of the "Client Response Form" portion of Form 54-101F1 and replacing it with a new Part 2 that gives beneficial owners the following three choices:

- (a) receive all securityholder materials sent to beneficial owners;
- (b) receive no securityholder materials sent to beneficial owners; or
- (c) receive only proxy-related materials sent in connection with a special meeting,

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

Election regarding Meeting Materials

We also believe the CRF election regarding the receipt of meeting materials is unnecessary in the mutual fund context since Part 5 of National Instrument 81-102 (“NI 81-102”) sets out the circumstances in which a mutual fund securityholder meeting must be held. While the matters contemplated by NI 81-102 would meet the existing NI 54-101 definition of “non-routine business”, they are not matters which require a special resolution and, accordingly, a securityholder meeting called to consider these matters would not meet the proposed NI 54-101 definition of “special meeting”.⁸ However, because the matters contemplated by NI 81-

⁷ See sections 2.2 (Delivery of Annual Financial Statements) and 3.2 (Delivery of Interim Financial Statements) below as set out in the September 20, 2002 publication of Proposed NI 81-106.

2.2 Delivery of Annual Financial Statements

(1) An investment fund shall send annually, for each of its financial years, a request form to each registered holder and beneficial owner of its securities under which the securityholder may request, at no cost to the securityholder, to receive the investment fund's annual financial statements for that financial year.

(2) An investment fund shall send the request form referred to in subsection (1) to the beneficial owners of its securities in accordance with the requirements of National Instrument 54-101.

(3) An investment fund shall maintain, for each of its financial years, a supplemental mailing list that sets out the registered holders and beneficial owners of its securities who have requested to receive the investment fund's annual financial statements for that financial year by returning a completed request to the investment fund.

(4) An investment fund shall send its annual financial statements to the registered holders and beneficial owners of its securities on the supplemental mailing list required by subsection (3) concurrently with the filing of those annual financial statements.

(5) An investment fund that complies with subsections (1) to (4) is exempt from the requirements of securities legislation to send its annual financial statements for a financial year to registered holders of its securities.

3.2 Delivery of Interim Financial Statements

(1) An investment fund shall annually follow the same procedures in connection with its interim financial statements and a supplemental mailing list as is required by section 2.2 in connection with its annual financial statements and a supplemental mailing list and shall send its interim financial statements to registered and beneficial owners of its securities on the supplemental mailing list concurrently with the filing of those interim financial statements.

(2) An investment fund that complies with subsection (1) is exempt from the requirements of securities legislation to send its interim financial statements for a financial year to registered holders of its securities.

⁸ The proposed amendments to NI 54-101 include adding the definitions of "special resolution" and "special meeting" to section 1.1:

"Special resolution" for a meeting,

(a) has the same meaning given to the term “special resolution” under corporate law, or

102 are considered to be fundamental to the operation of a mutual fund, the practice of mutual fund managers has been to directly provide *all* securityholders whose accounts are held in client name with meeting materials. However, notwithstanding the clarification published by the CSA in section A.5 of Staff Notice 54-301 - Frequently Asked Questions About NI 54-101 ("Staff Notice 54-301")⁹, we believe that it remains unclear as to whether mutual funds are entitled to send materials directly to securityholders, rather than through intermediaries. In addition, we believe that the "Important note"¹⁰ that accompanies the proposed amendment to Part 2 of the CRF does not sufficiently clarify the interaction between NI 54-101 and NI 81-106. With respect to securityholder accounts held in nominee name, the practice of fund managers has been to deliver meeting materials to *all registered* securityholders and to beneficial owners as instructed by intermediaries, although in doing so many fund managers do not strictly follow the procedures set out in NI 54-101.¹¹

In our view, the CSA should recognize and, if necessary, codify the existing practices of mutual funds to deliver meeting materials to *all* securityholders in either NI 81-102 or NI 81-106. We would not object to this existing industry practice being codified as a requirement pursuant to either section 5.2 or 5.4 of NI 81-102.

3. Recommendations

(b) if no such term exists under corporate law, means a resolution that is required to be passed by at least two-thirds of the votes cast.

"**Special meeting**" means a meeting at which a special resolution is being submitted to the securityholders of a reporting issuer;

⁹ Staff Notice 54-301, section A.5:

Question: Mutual funds (or their managers) have historically sent meeting materials directly to unitholders under NP 41. Does section 10.3 prevent mutual funds from continuing to send materials directly to their unitholders who hold through mutual fund dealers or investment dealers?

CSA Staff Response: Despite section 10.3, a mutual fund can continue, as a person or company designated by the intermediary under section 2.12(2), to send unitholder meeting materials directly to unitholders who hold through mutual fund dealers or investment dealers.

¹⁰ (**Important note:** These instructions do not apply to any specific request you give or may have given to a reporting issuer concerning the sending of interim financial statements of the reporting issuer. In addition, in some circumstances, the instructions you give in this client response form will not apply to annual reports or financial statements of an investment fund that are *not* part of proxy-related materials. An investment fund is entitled to obtain specific instructions from you on whether you wish to receive its annual report or financial statements).

¹¹ Mutual fund managers are able to provide securityholders with meeting materials as they already have the necessary information about investors in their funds regardless of the type of ownership registration.

Because of the unique business and legal arrangements that apply to the mutual funds industry, we believe that mutual funds, mutual fund securities and mutual fund dealers should be explicitly carved out of the application of NI 54-101.

We suggest that the simplest way to achieve this would be to include an “Application” section in NI 54-101 which would read “This Instrument does not apply to a reporting issuer or to the securities or securityholders of a reporting issuer which is a mutual fund that distributes its securities under a simplified prospectus and annual information form prepared in accordance with National Instrument 81-101 and that collects sufficient information to allow the reporting issuer to communicate, either directly or indirectly, with all of the beneficial owners of its securities”.

If the CSA were to adopt these recommendations, the following results would obtain:

1. Mutual fund dealers would not be required to collect the CRF if they deal only in mutual funds.
2. The CRF information collected by investment dealers would not apply with respect to mutual fund securities held in client accounts.
3. Mutual funds would not be required to follow the processes set out in NI 54-101 with respect to the delivery of financial statements or meeting materials.

We do not believe this change would negatively impact mutual fund investors because:

1. Mutual funds would be required to comply with NI 81-106 in order to identify which clients wish to receive annual and interim financial statements
2. Mutual funds would continue to follow existing practices with respect to the delivery of meeting materials and the CSA could, if deemed necessary, make amendments to NI 81-102 to ensure that all beneficial owners of mutual fund securities receive meeting materials.
3. There would be no change with respect to how client information is currently dealt with as between dealers and mutual fund managers.

4. In Closing

We believe that our recommendations offer a simple and streamlined solution that will result in one set of obligations that are easy to understand and administer. We are of the view that our recommendations efficiently capitalize on existing information flows in our industry while remaining consistent with the intent of the CSA and the fundamental principles articulated in section 1.2 of NI 54-101CP¹² while also avoiding the introduction of obligations that would conflict with NI 81-106.

¹² **NI 54-101CP 1.2: Fundamental Principles** - The following fundamental principles have guided the preparation of the Instrument:

- (a) all securityholders of a reporting issuer, whether registered holders or beneficial owners, should have the opportunity to be treated alike as far as is practicable;

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We encourage you to give serious consideration to our proposals. Our working group has been pleased to be of assistance to you in trying to come to a workable resolution of NI 54-101 implementation issues and we remain available to you, should you require our assistance.

Please feel free to direct your questions or comments to Mark Pratt - Senior Counsel, RBC Funds Inc. (and Chair of IFIC's NI 54-101 Implementation Issues Working Group) at (416) 955-2888 / mark.pratt@rbc.com or Aamir Mirza - Legal Counsel at (416) 363-2150 x 295 / amirza@ific.ca .

Yours truly,

ORIGINAL SIGNED BY THOMAS A. HOCKIN

Thomas A. Hockin
President and Chief Executive Officer

(b) efficiency should be encouraged; and

(c) the obligations of each party in the securityholder communication process should be equitable and clearly defined.