

1.1.3 CSA Staff Notice 51-311 Frequently Asked Questions Regarding National Instrument 51-102 Continuous Disclosure Obligations

**CANADIAN SECURITIES ADMINISTRATORS
STAFF NOTICE 51-311**

**FREQUENTLY ASKED QUESTIONS REGARDING
NATIONAL INSTRUMENT 51-102 CONTINUOUS
DISCLOSURE OBLIGATIONS**

First published March 26, 2004,
revised April 23, 2004 and June 18, 2004

Background

On March 30, 2004, National Instrument 51-102 *Continuous Disclosure Obligations* came into force in each jurisdiction.

Frequently asked questions on NI 51-102

Users of NI 51-102 should first consult NI 51-102 itself, its companion policy, and the instructions to the forms for answers to their questions about NI 51-102. As is often the case with the introduction of a new rule, even after reviewing the instrument, users of NI 51-102 often find they have questions regarding its application and interpretation. To assist those persons and companies that will be using NI 51-102, we have compiled a list of frequently asked questions (FAQs). These FAQs have been updated on April 23, 2004 and June 18, 2004.

This list is not exhaustive, but does represent the types of inquiries we have received.

Some terms we have used in these FAQs are defined in NI 51-102 or in National Instrument 14-101 *Definitions*.

We have divided the FAQs into the following categories:

- A. Definitions
- B. Financial statements
- C. MD&A
- D. Annual information forms (AIFs)
- E. Business acquisition reports (BAR)
- F. Information circulars and proxy solicitations
- G. Filing material documents
- H. Transition
- I. Other

A. Definitions

A-1 **Q:** I am a scholarship plan. Am I an *investment fund*, and so not subject to NI 51-102?

A: A scholarship plan is an investment fund as defined in NI 51-102. As a result, you are not subject to NI 51-102.

A-2 **Q:** The definition of *non-redeemable investment fund* in NI 51-102 is different than the definition in OSC Rule 14-501. Does the term in NI 51-102 include different issuers than it does in OSC Rule 14-501?

A: No. Even though the wording of the two definitions is different, they are not intended to have different meanings. The definition in NI 51-102 was drafted to clarify that holding companies are generally not non-redeemable investment funds.

A-3 **Q:** I am a large debt issuer, but none of my securities are listed or quoted on a marketplace. Am I still a *venture issuer*?

A: Yes, any issuer without securities listed or quoted on a marketplace is a venture issuer.

A-4 **Q:** I have securities listed on the TSX Venture Exchange (TSXV), and quoted on the Over-the-Counter Bulletin Board in the United States. Am I still a *venture issuer*?

A: You are still a venture issuer. As long as none of the marketplaces on which you are listed or quoted are identified in the definition of *venture issuer*, you are a venture issuer, regardless of how many marketplaces your securities are listed or quoted on.

A-5 **Q:** If I have securities listed on a junior exchange in Europe, am I a *venture issuer*?

A: You are not a venture issuer if you have securities listed or quoted on any exchange outside of Canada and the United States, whether the listing was voluntary or involuntary. Some jurisdictions have issued blanket orders so that issuers that trade on the Regulated Unofficial Market of the Frankfurt Stock Exchange or the Unofficial Regulated Market of the Berlin-Bremen Stock Exchange will be treated as venture issuers for the purposes of NI 51-102. Some jurisdictions cannot issue blanket orders, so issuers will have to apply for that relief in those jurisdictions. [Amended April 23, 2004]

A-6 **Q:** According to the definition of *venture issuer*, if I am listed on an exchange registered as a "national securities exchange" under section 6 of the 1934 Act, I am not a *venture issuer*. How do I

find out what exchanges are registered as national securities exchanges?

A: The SEC publishes the names of the registered national securities exchanges in their annual report every year under the heading "Regulation of Securities Markets - Oversight of Self-Regulatory Organizations". The annual report is available on the SEC's web page at www.sec.gov.

A-7 **Q:** When do I make the determination of whether or not I am a *venture issuer* for the purposes of NI 51-102?

A: The definition of *venture issuer* sets out the times at which you determine if you are a venture issuer for the various requirements in NI 51-102. That time differs depending on the part of NI 51-102 you are applying.

B. Financial statements

B-1 **Q:** My auditors did not review my interim financial statements. As a result, under NI 51-102 my interim financial statements must be accompanied by a notice. What form should this notice take?

A: NI 51-102 does not specify the form of notice that should accompany the financial statements. The notice accompanies, but does not form part of, the financial statements. We expect that the notice will normally be provided on a separate page appearing immediately before the financial statements, in a manner similar to an audit report that accompanies annual financial statements.

B-2 **Q:** Do I have to file a notice indicating that my interim financial statements have not been reviewed by my auditor, if a public accountant that is not my auditor, reviews them?

A: Yes. If your auditor does not review your interim financial statements, you must file the notice, even if a public accountant reviews the statement. Refer to subsection 3.4(3) of Companion Policy NI 51-102CP (NI 51-102CP) for a discussion of what is meant by "review" if your annual financial statements are audited in accordance with Canadian GAAS, or auditing standards other than Canadian GAAS. If your annual financial statements are audited in accordance with Canadian GAAS, the relevant requirements for a review of interim financial statements by the auditor are set out in the Handbook section 7050.

B-3 **Q:** Do I have to file a notice indicating that my interim financial statements have not been reviewed if only the current period, and not the comparative interim period, have been reviewed by my auditor?

A: Yes. The review of the interim financial statements must cover all periods presented in the statements.

B-4 **Q:** When does the annual request form under section 4.6 have to be sent?

A: Once a year – at any time during the year.

B-5 **Q:** If I send my annual financial statements to all my securityholders, do I still have to send a request form under subsection 4.6(1) in respect of my interim financial statements?

A: No. Subsection 4.6(5) is a complete exemption from having to send an annual request form, if you send your annual financial statements to all your securityholders. You will still have to send a copy of your interim financial statements to any securityholder that requests a copy.

B-6 **Q:** My current auditor does not intend to register with the Canadian Public Accountability Board. As a result, I am changing my auditor in order to comply with National Instrument 52-108 *Auditor Oversight*. Do I have to comply with the change of auditor requirements?

A: Yes, you must comply with the change of auditor requirements, even if the change in your auditor is only to comply with NI 52-108.

C. MD&A

General

C-1 **Q:** Since my MD&A is filed with my financial statements, do my auditors have to review my MD&A before I file it?

A: NI 51-102 does not include a direct requirement for MD&A to be reviewed by an issuer's auditor. However, under CICA Handbook section 7500 *Auditor association with annual reports, interim reports and other public documents*, an auditor is deemed to be associated with MD&A corresponding to annual financial statements on which the auditor has issued an auditor's report. Also, an auditor is deemed to be associated with interim MD&A if the auditor has been engaged to audit or review the corresponding interim financial statements.

If an auditor is deemed to be associated with MD&A, the auditor must perform the procedures specified in section 7500 of the Handbook. The auditor's specific aims when performing those procedures are to: (a) determine whether the financial statements, and when applicable, the report of the auditor, have been accurately reproduced; and (b) consider whether any of the other information in the document raises

questions regarding, or appears to be otherwise inconsistent with, the financial statements.

Handbook section 7500 specifies that the auditor should arrange to obtain the MD&A prior to its release and perform the procedures set out in the section. Further, when circumstances prevent the auditor from obtaining the MD&A prior to its release, the auditor should perform the procedures required by Handbook as soon as possible after its release, and consider advising the audit committee of the circumstances.

If the reporting issuer's annual financial statements are audited in accordance with auditing standards other than Canadian GAAS, then the auditor's association with, and the requirement for procedures relating to, annual and interim MD&A would be determined by those other auditing standards.

Form

C-2 **Q:** Do I have to duplicate in my MD&A information already included in the notes to the financial statements?

A: Information specifically required by Form 51-102F1 must be included in the MD&A, and simply cross-referencing to a note in the financial statements would not be sufficient. For example, although the various notes to the financial statements may include information about contractual obligations, Form 51-102F1 requires an issuer that is not a venture issuer to include in the MD&A a summary, in tabular form, of contractual obligations. In this example a cross-reference would not meet the Form 51-102F1 requirement.

Issuers should use their judgment to ensure the MD&A complements and supplements the financial statements. This may include a discussion and analysis, but not a repetition of details disclosed in notes to the financial statements that are not specifically required by Form 51-102F1.

C-3 **Q:** The MD&A form says that, if the first MD&A I file in Form 51-102F1 is an interim MD&A, the interim MD&A must include all the disclosure called for in the annual MD&A. Does that mean that my interim MD&A must include a discussion of my annual financial statements **and** my interim financial statements?

A: No. It means that all the disclosure elements set out in Item 1 of Part 2 of the Form 51-102F1, such as a discussion of critical accounting estimates and changes in accounting policies, must be provided for in the first interim MD&A. Except for Item 1.3, the discussion is still focussed on your interim financial statements. As a result,

you do not have to provide discussion of a one-year plus three month period – just the three-month interim period. As the disclosure in Item 1.3 does not have to be updated in the interim MD&A, when that disclosure is provided in the interim MD&A, it should still be based on the annual financial statements.

C-4 **Q:** The first MD&A I am filing in Form 51-102F1 is an interim MD&A. However, my annual MD&A from my previous financial year contains many of the same elements of the Form 51-102F1. Can my first interim MD&A just update the information from my annual MD&A that is consistent with the requirements in Form 51-102F1, and supplement it with the disclosure that is missing?

A: No, the first MD&A you file in Form 51-102F1 must contain **all** the elements set out in Item 1 of Part 2 of Form 51-102F1. This ensures there is a comprehensive platform that will be the basis for future MD&A that you file.

C-5 **Q:** When I update the disclosure for Item 1.5 in my interim MD&A, should I provide summary information for the eight most recently completed quarters, or can I simply provide summary information for the completed quarters subsequent to my last completed year?

A: You should provide summary information for the eight most recently completed quarters. The requirement in Item 1.5 is for a rolling eight quarters. [Added June 18, 2004]

C-6 **Q:** I was a venture issuer as at the end of my last financial year and was exempt from having to provide certain disclosure in my annual MD&A in Form 51-102F1. Since my last financial year-end, I have ceased to be a venture issuer. How do I update items in my interim MD&A that I was not previously required to discuss in my annual MD&A?

A: You do not have to restate any MD&A you filed for periods in which you were a venture issuer. When you complete your interim MD&A for the period during which you ceased to be a venture issuer, you must provide the disclosure for the items you did not have to previously provide in your MD&A. The disclosure will be focused on that interim period. [Added June 18, 2004]

D. Annual information forms (AIFs)

General

D-1 **Q:** Are there situations when a venture issuer may have to file an AIF?

A: Venture issuers do not have to file an AIF under NI 51-102. There are other policies or rules that require the filing of an AIF to benefit from

those instruments. For example, to use the short form prospectus system under National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44-101), an issuer must file an AIF, regardless of whether the issuer is a venture issuer or not. Similarly, if a TSXV listed issuer intends to complete a public offering by short form offering document under TSXV Policy 4.6, or an issuer wants to use the offering memorandum for qualifying issuers under Multilateral Instrument 45-103 *Capital Raising Exemptions*, the issuer must file an AIF.

D-2 **Q:** I am required to file an AIF under NI 51-102. I also intend to rely on that AIF for the purposes of NI 44-101. Where do I file the AIF on SEDAR? Do I have to file it twice?

A: All issuers filing an AIF must file it under the filing type "Annual Information Form (NI 51-102)" on SEDAR. If you also intend to rely on that AIF for the purposes of NI 44-101, you do not have to file the AIF twice. Instead, you should file a notice under the filing type "Annual Information Form (NI 44-101)" indicating you are relying on your NI 51-102 AIF as your AIF under NI 44-101, and giving the SEDAR project number the AIF was filed under.

Form

D-3 **Q:** Can I use my information circular in connection with an arrangement or reverse takeover as an alternative form of AIF?

A: No. The acceptable alternative forms of annual information forms are set out in the definition of AIF. They include a Form 10-K, Form 10-KSB or Form 20-F for SEC issuers, as defined in NI 51-102. Information circulars are not acceptable alternative forms of AIFs.

E. Business acquisition reports (BAR)

E-1 **Q:** The optional significance tests in section 8.3(4) are based on financial information relating to my most recently completed interim period. In calculating the optional significance tests, can I use financial information relating to financial statements for a completed interim period that have not yet been approved by my board of directors or audit committee, and have not yet been filed?

A: Yes. However, you run the risk that adjustments to the financial statements from subsequent review by your external auditors, audit committee or board of directors may change the results of the calculation. For example, the acquisition may be a significant acquisition based on the adjusted financial statements, when it initially did not meet the significance thresholds, in

which case you may be in default of the BAR requirements.

E-2 **Q:** If I am acquiring a business, there are no financial statements, and confidentiality provisions prevent disclosure of certain information about the business, how do I file a BAR?

A: Paragraph 8.1(4) of NI 51-102CP discusses the term "business" and indicates that whether or not the business previously prepared financial statements, an acquisition may be considered a business and trigger the requirement for financial statements in a BAR. As well, section 8.6 of NI 51-102CP provides guidance on the preparation of divisional and carve-out financial statements. If an issuer is considering the acquisition of a business, it must consider its obligations under NI 51-102 to file a BAR and the issuer must plan its acquisition in a manner that will ensure it can meet those obligations.

E-2.1 **Q:** Is an investment in equity securities of another company that is accounted for by the issuer using the cost method considered an acquisition of a business under subsection 8.1(1) of NI 51-102?

A: No. An investment accounted for by the cost method is not considered an acquisition of a business under subsection 8.1(1) of NI 51-102. However, investments that are consolidated or are accounted for by the equity method or by proportionate consolidation are considered acquisitions of a business as discussed in subsection 8.1(1). [Added June 18, 2004]

E-3 **Q:** If I acquire a business that will be accounted for by the equity method and the acquisition qualifies for the exemption in section 8.6, does my BAR have to name the auditor of the investee and indicate that the auditor of the investee has not consented?

A: Section 8.6 of the NI 51-102 does not require an issuer to name the auditor of the financial information or underlying financial statements or to include the auditor's report on the financial information or underlying financial statements. As a result, the issuer does not have to disclose the absence of consent from the auditor of the investee.

E-4 **Q:** If an issuer's subsidiary acquires shares in itself from interests outside the consolidated group, is that acquisition subject to the "step-by-step" provisions in Part 8 of NI 51-102?

A: Yes, the acquisition by the subsidiary of shares in itself increases the issuer's proportionate interest in the subsidiary and so should be considered a step acquisition by the issuer. The provisions in section 8.11 for step-by-step

acquisitions apply if the acquisition is a significant acquisition. [Added June 18, 2004]

F. Information circulars and proxy solicitations

F-1 **Q:** If I send out materials on May 1, 2004 for my meeting scheduled for June 15, 2004, do I have to use the new form of information circular?

A: If you have mailed the materials before June 1, 2004, your information circular must include the information prescribed in the old form of information circular. Some jurisdictions, such as Alberta and British Columbia, have issued blanket orders that permit issuers to use the new form of information circular (Form 51-102F5) between March 30 and June 1, 2004. [Amended April 23, 2004]

G. Filing material documents

G-1 **Q:** Do material documents, such as constating documents or material contracts, dated before March 30, 2004 have to be filed under the new filing requirements? When do they have to be filed?

A: Any constating documents, including articles of incorporation, that are dated before March 30, 2004 do have to be filed under the new filing requirements, as long as they are still effective. The documents must be filed no later than when you first file an AIF under NI 51-102, if you are not a venture issuer. If you are a venture issuer, you must file the document within 120 days of the end of your first financial year beginning on or after January 1, 2004. However, if the making of the document constitutes a material change for the issuer, the document must be filed no later than the time of filing a material change report.

G-2 **Q:** Do the original forms of constating documents or material contracts that have been amended before March 30, 2004 have to be filed under the new filing requirements?

A: Only the current versions of documents have to be filed - that is, the documents, as amended, not the original forms that are no longer applicable.

G-3 **Q:** Will material contracts be public documents?

A: Yes.

H. Transition

Financial statements

H-1 **Q:** My current financial year began July 1, 2003. Do I have to follow the new filing deadlines for my March 31, 2004 third quarter interim statements?

A: No. The new filing deadlines apply to interim periods in financial years **beginning on or after January 1, 2004**. In this case, that is your financial year beginning July 1, 2004. As a result, the new deadlines will first apply to your first quarter ending September 30, 2004.

H-2 **Q:** I am not a venture issuer. Because I still have 140 days to file my 2003 annual financial statements, my first quarter interim financial statements are due a few days before my annual financial statements. What do I do?

A: You do still have 140 days to file your annual financial statements; however, you will want to ensure your annual numbers are finalized before you file your first interim statements. You may wish to file your annual financial statements on or before the deadline for the interim statements.

H-3 **Q:** Do I have to deliver my 2003 annual financial statements to my shareholders?

A: Yes, you must deliver your 2003 annual financial statements in accordance with pre-NI 51-102 continuous disclosure (CD) requirements.

H-4 **Q:** I have filed and delivered my 2003 annual financial statements in accordance with pre-NI 51-102 CD requirements. During this transition year, do I have to send a request form with my proxy materials relating to the interim financial statements I will be filing for my 2004 financial year?

A: You do not have to send a request form until 2005. You will still have to deliver a copy of your interim financial statements for your 2004 financial year to any securityholder that asks for a copy.

H-5 **Q:** How do the financial statement delivery requirements in NI 51-102 interact with National Instrument 54-102 *Interim Financial Statement and Report Exemption* (NI 54-102)?

A: We expect NI 54-102 will be repealed when proposed National Instrument 81-106 *Investment Fund Continuous Disclosure* is implemented. Until then, NI 54-102 will be irrelevant for issuers that are subject to NI 51-102, as the exemption in NI 54-102 from having to send interim financial statements is not necessary given that NI 51-102 only requires issuers to send those statements on request. The request form system established under NI 51-102 effectively replaces the supplemental mailing list system under NI 54-102.

MD&A

H-6 **Q:** I am required under the securities laws in some jurisdictions to file annual MD&A for my financial year that began before January 1, 2004. I am intending to file that MD&A before March 30,

2004. The form of MD&A is based on Form 44-101F2. Instead, I would like to use Form 51-102F1 MD&A for my 2003 annual MD&A, so that, for my first interim MD&A, I can simply provide information that updates my annual MD&A. Can I use the new form of MD&A before March 30, 2004?

A: We believe that the disclosure requirements in Form 51-102F1 meet the current MD&A disclosure requirements that are based on Form 44-101F2. As a result, an issuer that files MD&A in Form 51-102F1 for financial years beginning before January 1, 2004 will satisfy the current MD&A requirements that are based on Form 44-101F2.

H-7 **Q:** What will happen to the BC Securities Commission's current Quarterly Report in Form 51-901F? Will it be revoked?

A: Yes, after a transition period, the Form 51-901F will be revoked. In the meantime, issuers that file an MD&A in Form 51-102F1 will be exempt from having to file the Quarterly Report.

H-7.1 **Q:** I am a reporting issuer in Alberta and Ontario. I have a decision from the Alberta and Ontario Securities Commissions from before NI 51-102 came into effect exempting me from the requirement to file financial statements in both provinces and MD&A in Ontario. Under section 13.2, I can rely on that exemption from filing financial statements under NI 51-102 in both provinces, but, since Alberta did not have a "substantially similar provision" to the MD&A requirement before NI 51-102 came into effect, I do not have a pre-existing exemption in Alberta from filing MD&A. Do I now have to apply to get relief from having to file MD&A under NI 51-102 in Alberta?

A: The requirement to file MD&A under section 5.1(1) of NI 51-102 only applies if you are required to file annual and interim financial statements under Part 4. Since you have an exemption from filing financial statements in Alberta, and you can continue to rely on that exemption under section 13.2, the requirement to file MD&A in Alberta is never triggered. As a result, you do not have to apply in Alberta for relief from the MD&A requirement. [Added April 23, 2004]

AIFs

H-8 **Q:** I am a reporting issuer in British Columbia, Alberta, Saskatchewan, Ontario and Québec, listed on the TSXV. Do I still have to file an AIF for my 2003 financial year under the pre-NI 51-102 CD requirements in Saskatchewan, Ontario and Québec?

A: The AIF requirements in NI 51-102 apply to financial years beginning on or after January 1,

2004. As a result, for financial years beginning before then, you must continue to comply with your pre-NI 51-102 CD requirements including any requirement to file an AIF.

H-9 **Q:** I have a December 31, 2003 financial year-end. Can I file my annual information form in the new Form 51-102F2?

A: Effective March 30, 2004, at the earliest, NI 44-101 and the local CD requirements in Saskatchewan, Ontario and Québec will be amended to permit you to use either the new form of AIF (Form 51-102F2), or the old form (Form 44-101F1), for financial years beginning before January 1, 2004. You must use the new Form 51-102F2 for financial years beginning on or after January 1, 2004.

General

H-10 **Q:** Will SEDAR be updated to reflect the new filing requirements in NI 51-102?

A: Yes, SEDAR was updated to reflect the new filing requirements in NI 51-102. A SEDAR subscriber update was issued in March 2004 advising filers of the changes. [Amended June 18, 2004]

H-11 **Q:** Before NI 51-102 was implemented, I obtained relief from my CD obligations in all the provinces that had CD requirements. NI 51-102 has been now been adopted as a policy in Prince Edward Island, New Brunswick, the Northwest Territories, the Yukon Territory and Nunavut. None of those jurisdictions previously had any CD policies or requirements. Do I now have to apply for relief from NI 51-102 in those jurisdictions?

A: No. You do not have to get relief from NI 51-102 where it has been adopted as a policy, not a rule. An issuer that does not comply with NI 51-102 in those jurisdictions will not be considered in default of their requirements. You will have to seek relief in the future, if NI 51-102 is later adopted in one of those jurisdictions as a rule. [Added April 23, 2004]

H-12 **Q:** Effective June 1, 2004, NI 51-102 has replaced the current form of executive compensation disclosure in Ontario – Form 40 – with Form 51-102F6. However, Item 17.1 of the Ontario long form prospectus – Form 41-501F1 – requires executive compensation disclosure in Form 40. What form of executive compensation disclosure do I give in my Ontario long form prospectuses after June 1, 2004?

A: After June 1, 2004, you should provide disclosure of executive compensation in your Form 41-501F1 using Form 51-102F6. [Added June 18, 2004]

I. Other

I-1 **Q:** Under paragraph 11.1(1)(b) of NI 51-102, I have to file a copy of any disclosure material I file with the SEC, if the material contains information that has not been included in disclosure already filed. Do I have to file copies of my filings under the 1933 Act, or just the 1934 Act?

A: We do not expect you to file any materials or documents filed solely under the 1933 Act. The use of the term "disclosure material" in subsection 11.1(1) is intended to refer to continuous disclosure materials. You must file all materials or documents filed under the 1934 Act, such as reports filed on Forms 10-K, 10-Q, 8-K, and 20-F. [Added June 18, 2004]

I-2 **Q:** To rely on the exemptions for exchangeable share issuers or credit support issuers, under paragraphs 13.3(2)(d) and 13.4(2)(d) I have to file copies of all documents my parent issuer or credit supporter is required to file with the SEC. Do I have to file copies of their filings under the 1933 Act, or just the 1934 Act?

A: We do not expect you to file any materials or documents filed solely under the 1933 Act. The references to "documents" in paragraphs 13.3(2)(d) and 13.4(2)(d) are intended to refer to continuous disclosure materials. You must file all materials or documents filed under the 1934 Act, such as reports filed on Forms 10-K, 10-Q, 8-K, and 20-F. [Added June 18, 2004]

I-3 **Q:** To rely on the exemption in subsection 13.4(2), if I have operations, other than minimal operations, that are independent of my credit supporter, I have to file certain financial information under paragraph 13.4(2)(g). When does that information have to be filed?

A: We expect you to file that financial information no later than the deadlines that would apply for filing your financial statements under Part 4 of NI 51-102 if you were not able to rely on the exemption in subsection 13.4(2). [Added June 18, 2004]

I-4 **Q:** I have filed a notice under section 13.2 of NI 51-102 that I intend to rely on an existing exemption. Since I have not received any comments from the regulator or securities regulatory authority concerning the notice, can I assume that the regulator agrees with my conclusions regarding substantially similar requirements?

A: When we receive a notice under section 13.2, we will not approve the notice or otherwise provide any confirmation that the provisions in NI 51-102 are substantially similar to the requirements that existed before NI 51-102 came

into effect. It is the issuer's responsibility to make this determination. We may question an issuer's conclusions about substantially similar requirements during a CD review of the issuer's filings. [Added June 18, 2004]

June 18, 2004.