# Chapter 6

# Request for Comments

### 6.1.1 CSA Notice and Request for Comment – Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Changes to Certain Policies Related to the Business Acquisition Report Requirements

CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

**CSA Notice and Request for Comment**

**Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations* and Changes to Certain Policies Related to the Business Acquisition Report Requirements**

**September 5, 2019**

**PART 1 – Introduction**

The Canadian Securities Administrators (**CSA** or **we**) are publishing for a 90-day comment period, proposed amendments and changes to:

- National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**);
- Companion Policy 51-102CP *Continuous Disclosure Obligations* (**Companion Policy 51-102CP**);
- Companion Policy 41-101CP to National Instrument 41-101 *General Prospectus Requirements* (**Companion Policy 41-101CP**);
- Companion Policy 44-101CP to National Instrument 44-101 *Short Form Prospectus Distributions* (**Companion Policy 44-101CP**);

(the **Proposed Amendments**).

We are issuing this Notice to solicit your comments on the Proposed Amendments.

The public comment period expires on December 4, 2019.

The text of the Proposed Amendments is published with this notice in the following annexes:

- Annex A – Proposed Amendments to NI 51-102
- Annex B – Proposed Changes to Companion Policy 51-102CP
- Annex C – Proposed Changes to Companion Policy 41-101CP
- Annex D – Proposed Changes to Companion Policy 44-101CP
- Annex E – Local Matters

This Notice is also available, as applicable, 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

**PART 2 – Substance and Purpose**

A reporting issuer that is not an investment fund is required to file a business acquisition report (**BAR**) after completing a significant acquisition. Part 8 of NI 51-102 sets out three significance tests: the asset test, the investment test and the profit or loss test. An acquisition of a business or related businesses is a significant acquisition that requires the filing of a BAR under Part 8 of NI 51-102:

- for a reporting issuer that is not a venture issuer, if the result from any one of the three significance tests exceeds 20%;
- for a venture issuer, if the result of either the asset test or investment test exceeds 100%

(collectively, the **BAR requirements**).

The BAR requirements were introduced in 2004[1] to provide investors with relatively timely access to historical financial information on a significant acquisition. They also require a reporting issuer that is not a venture issuer to prepare and file pro forma financial statements.

We have received feedback that in some cases the significance tests may produce anomalous results, that preparation of a BAR entails significant time and cost, and that the information necessary to comply with the BAR requirements may, in some instances, be difficult to obtain. In addition, some reporting issuers have applied for, and in appropriate circumstances were granted, exemptive relief from certain of the BAR requirements.

The Proposed Amendments are aimed at reducing the regulatory burden imposed by the BAR requirements in certain instances, without compromising investor protection.

**PART 3 – Background**

The Proposed Amendments are informed by comment letters and other stakeholder feedback received respecting the BAR requirements in response to CSA Consultation Paper 51-404 *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. 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*.

Comments received reflected a wide range of suggestions, such as eliminating the BAR requirements entirely, reconsidering certain aspects of the significance tests (definitional and thresholds) and the relevance of pro forma financial statements. Many commenters supported increasing the significance test threshold for reporting issuers that are not venture issuers for reasons including that BAR disclosure is of limited value to investors particularly given its lack of timeliness, the cost of preparation and the fact that it can impede the completion of a transaction. Specific criticism was expressed relating to the profit or loss test for reasons including that the test often produces anomalous results when compared to the asset test or investment test.

Other commenters indicated that the BAR contains relevant information that may not be provided elsewhere. Commenters noted that not all historical financial information, pertaining to the acquired business that is provided in a BAR, is available in the issuer's other disclosure documents. In addition, the identifiable assets acquired and the liabilities assumed are initially recognized at their acquisition-date fair values in the reporting issuer's financial statements.

Based on the feedback noted above and the number of applications for exemptive relief from the BAR requirements considered by CSA staff, it appears that the current BAR requirements may in certain instances impose burden on reporting issuers without providing investors with the associated benefit of relevant information for their decision-making purposes. The Proposed Amendments are also meant to address this issue.

[1] Certain aspects of these requirements were subsequently amended in 2015 as they apply to venture issuers.

**PART 4 – Summary of the Proposed Amendments**

The Proposed Amendments:

- alter the determination of significance for reporting issuers that are not venture issuers such that an acquisition of a business or related businesses is a significant acquisition only if at least two of the existing significance tests are triggered; and

- increase the significance test threshold for reporting issuers that are not venture issuers from 20% to 30%.

The proposed two-trigger test aligns with the consultation feedback to modify the criteria to file a BAR. Our proposal to move towards a two-trigger test was informed by considering the feedback from the consultation and by considering data (including analyzing in each jurisdiction the BARs filed and the BAR relief granted over an approximate three-year period) to assess the impact of this change on a look back basis. Many commenters supported removing the profit or loss test for reasons including that the test often produces anomalous results when compared to the asset test or the investment test. Our analysis of the data indicates that the two-trigger test is more effective in dealing with the anomalous results than most of the other suggestions, such as removing the profit or loss test, introducing a revenue test etc., and captures significant acquisitions.

Additionally, the Proposed Amendments increase the significance test threshold that applies to a reporting issuer that is not a venture issuer. The increase in the significance test threshold from 20% to 30% is consistent with the feedback we received in the consultation to increase the significance thresholds as a way to reduce regulatory burden.

In addition to the Proposed Amendments, we considered other options to alter the BAR requirements, but determined that they either did not align with our policy objectives or that the reduction in burden did not justify a potential significant loss of information to investors.

We are not, at this time, proposing any further changes to the BAR requirements as they relate to venture issuers. The CSA already reduced regulatory burden for venture issuers in 2015 by increasing the significance test threshold from 40% to 100% and by removing the requirement that BARs filed by venture issuers contain pro forma financial statements.

We will continue to monitor international developments, including the recent proposal by the U.S. Securities and Exchange Commission,[2] to further inform our approach to reducing regulatory burden for reporting issuers that are not venture issuers without compromising investor protection.

**PART 5 – Request for Comments**

We welcome comments on the Proposed Amendments.

Please submit your comments in writing on or before December 4, 2019.

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
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

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

[2] Amendments to Financial Disclosures about Acquired and Disposed Businesses, Release No. 33-10635; 34-85765; IC-33465; File No. S7-05-19.

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**Comments Received will be Publicly Available**

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 https://lautorite.qc.ca/grand-public 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.

**PART 6 – Questions**

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

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## ANNEX A

## PROPOSED AMENDMENTS TO NATIONAL INSTRUMENT 51-102 *CONTINUOUS DISCLOSURE OBLIGATIONS*

***1. National Instrument 51-102 Continuous Disclosure Obligations is amended by this Instrument.***

***2. Subsection 8.3(1) is amended by replacing*** "subsection (3) and subsections 8.10(1) and 8.10(2)" ***with*** "subsection (5) and subsections 8.10(1) and (2)**".**

***3. Paragraph 8.3(1)(a) is amended by replacing*** "any of the three" ***with*** "two or more of the***".***

***4. In the following provisions, "***20***" is replaced with "***30**":*

***(a) paragraph (b) of subsection 8.3(1);***

***(b) paragraphs (a), (b) and (c) of subsection 8.3(2);***

***(c) paragraph (b) of subsection 8.3(3);***

***(d) paragraphs (a), (b) and (c) of subsection 8.3(4).***

***5. Subsection 8.3(5) is replaced with the following:***

***"(5)*** Despite subsection (1) and for the purposes of subsection (3), an acquisition of a business or related businesses is not a significant acquisition,

(a) for a reporting issuer that is not a venture issuer, if the acquisition does not satisfy at least two of the optional significance tests under subsection (4); or

(b) for a venture issuer, if the acquisition does not satisfy the optional significance tests set out in paragraphs (4) (a) and (b) if "30 percent" is read as "100 percent".***"***

6. This Instrument comes into force on ●.

## ANNEX B

## PROPOSED CHANGES TO COMPANION POLICY 51-102CP CONTINUOUS DISCLOSURE OBLIGATIONS

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

***2. Subsection 8.1(4) is changed by adding the following at the end of the subsection:***

***"***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.***".***

***3. Subsection 8.2(1) is replaced by the following:***

***"*8.2 Significance Tests**

**(1) Application of Significance Tests –** Subsection 8.3(2) of the Instrument sets out the required significance tests for determining whether an acquisition of a business by a reporting issuer is a "significant acquisition". The application of the significance tests depends on the status of the reporting issuer such that if the reporting issuer is:

(a) not a venture issuer, then an acquisition is significant if it satisfies two or more of the significance tests at a 30% threshold; or

(b) a venture issuer, then an acquisition is significant if it satisfies either of the asset or investment test at a 100% threshold.

The test must be applied as at the acquisition date using the most recent audited annual financial statements of the reporting issuer and the business.***".***

***4.*** These changes become effective on ●.

## ANNEX C

## 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.*** ***Subsection 5.9(5) is changed by replacing the text of the first bullet with:***

***"***if the indirect acquisition would be considered a significant acquisition under subsection 35.1(4) of Form 41-101F1 if the issuer applies those provisions to its proportionate interest in the indirect acquisition of the business;***".***

***3.*** This change becomes effective on ●.

## ANNEX D

## PROPOSED CHANGES TO COMPANION POLICY 44-101CP TO NATIONAL INSTRUMENT 44-101 SHORT FORM PROSPECTUS DISTRIBUTIONS

***1. Companion Policy 44-101CP to National Instrument 44-101 Short Form Prospectus Distributions is changed by this Document.***

***2. Subsection 4.9(3) is changed by replacing the text of the first bullet with:***

"if the indirect acquisition would be considered a significant acquisition under Part 8 of NI 51-102 if the issuer applies those provisions to its proportionate interest in the indirect acquisition of the business;".

***3.*** This change becomes effective on ●.

## ANNEX E

## LOCAL MATTERS

## ONTARIO SECURITIES COMMISSION

As set out in the main body of this Notice, the CSA are proposing the following amendments and changes:

- proposed amendments to NI 51-102;
- proposed changes to Companion Policy 51-102CP;
- proposed changes to Companion Policy 41-101CP; and
- proposed changes to Companion Policy 44-101CP.

Please refer to the main body of this Notice.

1. Overview

The proposed amendments to NI 51-102 have been informed by comments received in response to CSA Consultation Paper 51-404. They are aimed at reducing the regulatory burden that may be currently imposed by the Business Acquisition Report (**BAR**) requirements in certain instances, without compromising investor protection.

The proposed changes to Companion Policy 51-102CP, Companion Policy 41-101CP and Companion Policy 44-101CP are intended to update those companion policies to reflect the proposed amendments to NI 51-102.

Investor protection is not expected to be compromised, as the proposed amendments will continue to provide investors with timely access to historical financial information of a significant acquisition where appropriate.

2. Affected Stakeholders

*2.1 Reporting Issuers*

Non-venture reporting issuers will benefit from the proposed amendments because an acquisition of a business or related business(es) will only be considered to be a significant acquisition if at least two of the existing significance tests are triggered at a 30% threshold (i.e., instead of one of the existing significance tests being triggered at a 20% threshold as under the current BAR requirements).

*2.2 Investors*

The impact of the proposed amendments to NI 51-102 on investors (both institutional and retail), has also been considered. The proposed amendments have been informed by stakeholder comments received as a result of CSA Consultation Paper 51-404, including from investor advocacy groups.

While the proposed amendments are expected to result in fewer BARs being filed overall, we expect that investors will continue to have appropriate, relevant information for purposes of making investment decisions following a significant acquisition. In this regard, we will assess comments received from investors and advocates during the comment letter process on the proposed amendments.

3. Qualitative and Quantitative Analysis of the Anticipated Costs and Benefits of the Proposed Amendments

*3.1 Qualitative Analysis*

The proposed amendments will amend the current criteria for a non-venture issuer to file a BAR so that an acquisition of a business or related business(es) will be considered a significant acquisition only if at least two of the existing significance tests are triggered at a 30% threshold (i.e., instead of one of the existing significance tests being triggered at a 20% threshold). This will reduce the regulatory burden for issuers since they will no longer have to incur costs associated with:

- complying with BAR requirements and filing a BAR to the extent that the proposed amendments contemplate higher thresholds, and

- filing an application for relief from the BAR requirements in cases where the existing significance tests produce anomalous results.

We are of the view that there will be minimal compliance costs associated with the proposed amendments in the form of time spent by issuers to review and familiarize themselves with new requirements.

*3.2 Quantitative Analysis*

The tables below set out the estimated cost reductions (subject to the assumptions below) that may arise as a result of the proposed amendments to the BAR requirements in Part 8 of NI 51-102. The estimated cost reductions fall broadly into two categories:

(i) estimated costs associated with filing an application for relief from the BAR requirements (Table 1), and

(ii) estimated costs associated with complying with BAR requirements (i.e., filing a BAR) (Table 2).

As part of our research, we conducted analysis on the following:

(i) historical applications filed by issuers requesting relief from certain requirements of the BAR or from the requirement to file a BAR in its entirety, and

(ii) applying the proposed two-test trigger at a 30% threshold to historical BARs filed.

Based on this analysis and using the estimated cost information in Tables 1 and 2 noted above, we have estimated the cost savings to the issuer of our Proposed Amendments (Tables 3 and 4).

| **TABLE 1** | | | |
|---|---|---|---|
| | **Application for BAR Relief** | | **Total** |
| **Legal** | *Time (# hours)*[1] | *Weighted average hourly costs ($xx/hour)*[2] | |
| How many hours, on average, is required for legal counsel to prepare, file and engage with regulators and issuer on the application process? | 20-30 hours | $312 | $6,240-$9,360 |
| **Issuer** | | | |
| How many hours, on average, is required by the issuer's management to assist with the preparation and review of the application, correspondence with the regulators, etc.? | 10 hours | $117 | $1,170 |
| **Auditor** | | | |
| How many hours, on average, is required by the issuer's auditors to assist or review the application, if any? | 6-10 hours | $344 | $2,064-$3,440 |
| **Regulatory Cost** | | | |
| Cost of application | N/A | $4,800[3] | $4,800 |
| **Total estimated time and costs associated with each relief application** | **36-50 hours** | | **$14,274-$18,770** |

[1] In order to develop an estimate of the number of hours required for an issuer and its advisors to file an application for BAR relief, we have relied on data derived from staff's consultations with a small number of advisors and/or consultants involved in the preparation of the applications for BAR relief.

[2] For the purposes of this analysis, we use weighted average hourly costs to account for the fact that staff of different levels of seniority and skill may be involved in each activity. Thus, the weighted average costs for different activities will depend on the proportion of time spent by staff with

different seniority levels. These estimates are based on information found in published fee surveys and compensation guides subject to certain adjustments (e.g., application of local market adjustments). We consulted the following sources: Canadian Lawyer's 2018 Legal Fees Survey, Robert Half 2018 Salary Guide for Accounting and Finance Professionals, Payscale Compensation Research.

[3] Application fee paid to the OSC in accordance with OSC Rule 13-502 *Fees.*

| **TABLE 2** | | | |
|---|---|---|---|
| | **Filing of BAR** | | **Totals** |
| **Auditors** | *Time(# of hours)* | *Weighted average hourly costs ($xx/hour)* | *Total Estimated Costs* |
| What is estimated time and cost of preparing audited financial statements to be included in a BAR? | 300[4] | $204[5] | $61,200 |
| **Issuer** | | | |
| How many estimated hours are required for the issuer to obtain and/or negotiate with vendor, review, etc. financial statements of the acquired company for inclusion in the BAR? | 15-20 hours | $117 | $1,755-$2,340 |
| **Legal** | | | |
| How many hours required to assist with filing of the BAR? (may need to include various assumptions: i.e. Counsel involved in negotiating F/S, does counsel have any other involvement in preparation and/or filing of the BAR)? | 9-13 hours | $310 | $2,790-$4,030 |
| **Total estimated time and costs associated with each BAR filing** | **324-333 hours** | | **$65,745-$67,570** |

[4] In order to develop an estimate of the number of hours required for an issuer and its advisors to file a BAR, we have relied on data derived from staff's consultations with a small number of advisors and/or consultants involved in the preparation of the applications for BAR relief. We note that determining the cost of an audit is highly subjective as it depends on a number of factors including the following:

- Size of the audit firm conducting the audit (small, medium, large)
- Whether the acquired company is public or private
- Size of the company
- Complexity of the company
- Complexity of the industry in which the acquired company operates
- Preparation of full historical financial statements vs carve out financial statements (carve out financial statements normally require significantly more audit time)
- Whether it is a first-time audit of the company
- Whether the audit firm has an existing relationship with the issuer/acquired company
- Complexity of the transaction, which may impact preparation of pro-forma financial statements

[5] As outlined in footnote 2, weighted average hourly costs for different activities will depend on the proportion of time spent by staff with different seniority levels. The weighted average cost associated with the preparation of the financial statements is lower than that associated with the preparation of the exemptive relief application because the proportion of time spent by staff with lower seniority on each activity is different.

Estimated Cost Savings

Estimated cost savings to the Issuer of filing an application for BAR relief (based on historical research) (average/year):

| TABLE 3 | | | |
|---|---|---|---|
| **Number of applications filed requesting relief from filing BAR[6] (average/year)** | **Number of applications for relief that would no longer be filed had we applied the proposed two-test trigger at 30% (average/year)** | **Total reduction of time spent on preparing, filing and completing BAR application with regulator** | **Total cost reduction from filing an application for BAR relief. (# of applications that would no longer be filed x average cost of preparing and completing a BAR application – see Table 1 above)** |
| 9 | 5 | 180-250 hours | **$71,370-$93,850** |

[6] This number is the average annual number of applications filed with the CSA over a three-year period. Regardless of the location of the issuer's head office, issuers must file applications for BAR relief and pay fees in Ontario. Note that the five applications that would no longer need to be filed are those only requesting relief from BAR requirements in their entirety. Other applications may be requesting relief from other requirements of the BAR, including content relief. Assuming that costs would have grown at the average annual Ontario rate of inflation in the most recent 10-year period and applying a 2.5% discount rate, we estimate that approximate cost savings over a 10-year period would range between $680,000 and $890,000.

Estimated cost savings of filing a BAR (based on historical research):

| TABLE 4 | | | |
|---|---|---|---|
| **Number of BARs filed using the existing triggers in Part 8 of NI 51-102 (average/year)[7]** | **Number of BARs that would no longer be filed had we applied the proposed two-test trigger at 30% (average/year)** | **Total reduction of time spent on preparing, filing a BAR (# of BARs that no longer be filed * # hours above)** | **Total cost reduction if the BARs were not filed (# of BARs that would no longer be filed x average cost of preparing a BAR – see Table 2 above)** |
| 56 | 24 | 7,992 hours | **$1,577,880-$1,620,000** |

[7] This number is the average annual number of BAR filings across the CSA, regardless of head office, over a three-year period. Assuming that costs would have grown at the average annual Ontario rate of inflation in the most recent 10-year period and applying a 2.5% discount rate, we estimate that approximate cost savings over a 10-year period would range between $15,000,000 and $15,400,000.

**Rule-making authority**

In Ontario, the following provisions of the *Securities Act* (the **Act**) provide the Commission with authority to make the proposed amendments:

Paragraphs 22 and 24 of subsection 143(1) of the Act authorize the Commission to make rules:

- prescribing requirements in respect of the preparation and dissemination and other use, by reporting issuers, of documents providing for continuous disclosure that are in addition to the requirements under the Act, and
- requiring issuers or other persons or companies to comply, in whole or in part, with Part XVIII (Continuous Disclosure), or rules made under paragraph 22 of subsection 143(1) of the Act.

**Alternatives Considered**

No alternatives to rule-making were considered.

**Reliance on Unpublished Studies**

In developing the proposed amendments and the proposed changes to the companion policies, we are not relying on any significant unpublished study, report or other written material.

We welcome comments on all aspects of the Proposed Amendments, including the estimated costs associated with filing an application for relief from the BAR requirements and complying with BAR requirements.