

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

August 12, 2021

Introduction

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

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

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

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

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

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

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

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

www.lautorite.qc.ca
www.bcsc.bc.ca
www.albertasecurities.com
www.osc.gov.on.ca
<https://nssc.novascotia.ca/>
www.fcaa.gov.sk.ca
www.fcnb.ca
www.mbsecurities.ca

Substance and Purpose of the Proposed Changes

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

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

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

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

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

Background

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

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

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

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

Summary of the Proposed Changes and Consequential Change

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

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

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

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

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

Local Matters

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

Request for Comments

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

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

Address your submission to all of the CSA as follows:

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

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

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

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Fax: 514 864-6381
consultation-en-cours@lautorite.qc.ca

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

Questions

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

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ANNEX A

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

1. *Companion Policy 41-101CP to National Instrument 41-101 General Prospectus Requirements is changed by this Document.*
2. **Section 5.1 is changed by replacing "Request for exemptions" with "Requests for exemptions".**
3. *First paragraph of Section 5.2 is changed by adding "an" immediately before "interim financial report for periods that are more recent"..*
4. *Section 5.3 is changed by replacing the text with the following:*

Interpretation of issuer – primary business

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

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

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

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

- (a) a reverse takeover,
- (b) a qualifying transaction for a capital pool company under the policies of the TSX Venture Exchange,
- (c) a qualifying acquisition or qualification transaction by a special purpose acquisition corporation under the policies of a recognized exchange,

- (d) an acquisition that exceeds the 100% significance threshold calculated under subsection 35.1(4) of Form 41-101F1 (see example 1 below), or
- (e) an acquisition that is less than the 100% significance threshold calculated under subsection 35.1(4) of Form 41-101F1 but still changes the primary business of the issuer, as disclosed in the prospectus (see example 2 below).

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

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

Facts:

- A non-venture issuer filed a preliminary IPO prospectus on April 1, 2021 that included audited annual financial statements for its financial year ended December 31, 2020.
- The issuer disclosed in the prospectus that it had completed Acquisition A on October 1, 2019.
- Both the issuer and Acquisition A have a December 31 year-end.

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

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

- The following is a summary of certain key information:

Entity	Assets	Investments	Specified profit or loss

Issuer	\$ 100	n/a	\$ 8
Acquisition A	\$ 125	\$ 80	\$ 7
<i>Significance test results</i>	<i>125%</i>	<i>80%</i>	<i>87.5%</i>

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

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

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

- The following is a summary of certain key information:

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

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

- Although Acquisition A is a significant acquisition using the initial significance test, by applying the optional test, the issuer may be able to demonstrate that a reasonable investor would not regard Acquisition A to be the primary business of the issuer.
- In this circumstance, the issuer experienced growth subsequent to acquiring Acquisition A such that Acquisition A no longer exceeds the 100% threshold.

As a result, a reasonable investor would not regard Acquisition A to be the primary business of the issuer. Therefore, the issuer would not be required to provide historical financial statements of Acquisition A under Item 32 of Form 41-101F1.

- If the issuer applied the optional test and Acquisition A still exceeded the 100% threshold, the issuer would have been required to provide audited financial statements of Acquisition A for enough periods so that when those periods are added to the periods for which the issuer's financial statements are included in the prospectus, the results of the issuer and Acquisition A, either separately or on a consolidated basis, totals three years. This means that the issuer would have been required to include in the IPO prospectus:
 - its audited consolidated financial statements for each of the three years ended December 31, 2020, 2019 and 2018 which include the results of Acquisition A from October 1, 2019 onwards, and
 - the audited standalone financial statements of Acquisition A for the period from January 1, 2019 to September 30, 2019, and for the year-ended December 31, 2018.

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

Facts:

- An IPO venture issuer filed a preliminary IPO prospectus on April 1, 2021.
- The issuer was incorporated on January 1, 2015 to operate a mining exploration and development business.
- On December 19, 2020, the issuer acquired a cannabis cultivation property and announced its intention to convert its existing business to a cannabis cultivation business in 2021.
- The year end of the issuer and the acquired cannabis cultivation business is December 31.

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

- To meet the requirements of paragraph 32.1(1)(b) of Form 41-101F1, the issuer must include in the prospectus its audited financial statements for the years ended December 31, 2020 and 2019.
- In addition, given that the issuer has changed its primary business to cannabis cultivation activities, the pre-acquisition financial statements for the acquired cannabis cultivation business (along with the related management's discussion

and analysis) must also be included in the prospectus.

- This is because a reasonable investor reading the prospectus would regard the primary business of the issuer to be the cannabis cultivation business, as referenced in paragraph 32.1(1)(b) of Form 41-101F1.
- (2) The periods for which the issuer must provide financial statements under Item 32 of Form 41-101F1 for an acquired business or related businesses that are regarded as the primary business of the issuer should be determined in reference to sections 32.2 and 32.3 of Form 41-101F1, and with the same exceptions, where applicable, set out in paragraphs 32.4(1)(a) through (e) of Form 41-101F1. For example, for an issuer that is a reporting issuer in at least one jurisdiction immediately before filing a long form prospectus, the reference to three years in paragraph 32.2(6)(a) of Form 41-101F1 should be read as two years under paragraphs 32.4(1)(a), (b), (d) and (e) of Form 41-101F1.

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

The issuer must also consider the necessity of including pro forma financial statements pursuant to section 32.7 of Form 41-101F1 to illustrate the impact of the acquisition of the primary business on the issuer's financial position and results of operations. For additional guidance, an issuer should refer to section A5.10 of this Policy.

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

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

Interpretation of issuer – predecessor entity

- 5.4 (1)** An issuer that has not existed for 3 years is required under paragraph 32.1(1)(a) of Form 41-101F1 to provide historical financial statements of any predecessor entity that forms or will form the basis of the business of the issuer (see example 3 below). This may include financial statements of predecessor entities that have been, or are contemplated to be, put together to form the basis of the business of the issuer. If an issuer is not able to provide financial statements of certain predecessor entities that are required in the prospectus to meet the requirements in paragraph 32.1(1)(a) of Form 41-101F1, or if the financial statements for certain predecessor entities are not considered material for an investment

decision or otherwise necessary for the prospectus to contain full, true and plain disclosure, the issuer should utilize the pre-filing procedures in NP 11-202.

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

Facts:

- A non-venture issuer is a real estate investment trust incorporated on December 21, 2020 for the purpose of acquiring an initial portfolio of four real estate properties in order to generate rental income from the properties. The issuer filed a preliminary IPO prospectus on April 1, 2021.
- Concurrent with the closing of the IPO, the issuer will complete the acquisition of four real estate properties, which were previously operated as rental properties by the vendors, generating rental income. The year end of the issuer and each of the acquired businesses is December 31.

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

- The issuer must include in the prospectus its audited financial statements for the period from December 21, 2020 (incorporation) to December 31, 2020.
- In addition, the issuer would need to include audited financial statements in accordance with Item 32 of Form 41-101F1 (and related management's discussion and analysis) for each of the real estate properties that form the basis of the business of the issuer.
- If either one or more of the rental properties is immaterial, or if the issuer is not able to provide financial statements for one or more of them, the issuer should utilize the pre-filing procedures in NP 11-202..

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

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

Additional information that may be required

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

(2) There may be other exceptional scenarios where issuers may be required to include additional financial information, other than financial statements, in a prospectus in order for the prospectus to meet the requirement for full, true and plain disclosure. An example would be where an issuer incurred significant

growth through one or more acquisitions prior to the IPO filing resulting in insufficient financial history of the primary business as disclosed in the prospectus and one of the following situations occurred:

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

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

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

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

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

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

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

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

- (2) For an issuer that is not a reporting issuer in any jurisdiction immediately prior to filing the long form prospectus (a "non-reporting issuer"), the long form

prospectus disclosure requirements for a significant acquisition are generally intended to mirror those for reporting issuers subject to Part 8 of NI 51-102. To determine whether an acquisition is significant, non-reporting issuers would first look to the guidance under section 8.3 of NI 51-102.

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

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

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

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

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

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

5.11. Determination of what constitutes a business – mining assets

While certain acquisitions of mining assets may constitute acquisitions of a business for securities legislation purposes even if they do not meet the definition of a “business” for accounting purposes, we would not consider an acquisition of mining

assets to be a business requiring financial statements under either Item 32 or Item 35 of Form 41-101F1 if all of the following apply:

- (a) the acquisition of the mining assets was an arm's length transaction;
- (b) no other assets were transferred and no other liabilities were assumed as part of the acquisition;
- (c) there has been no exploration, development or production activity on the mining assets in the three years (two years for an IPO venture issuer or a venture issuer) before the date of the preliminary prospectus..

11. These changes become effective on ●.

ANNEX B

PROPOSED CHANGES TO

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

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

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

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

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

- (a) the acquisition of the mining assets was an arm’s length transaction;
- (b) no other assets were transferred and no other liabilities were assumed as part of the acquisition;
- (c) there has been no exploration, development or production activity on the mining assets in the two years prior to the acquisition.

3. These changes become effective on ●.