Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

CSA Notice of Publication

Financial Statement Requirements

Amendments to *Policy Statement to Regulation 41-101 respecting General Prospectus Requirements*

April 14, 2022

Introduction

The Canadian Securities Administrators (**CSA** or **we**) are making amendments to *Policy Statement to Regulation 41-101 respecting General Prospectus Requirements* (**Policy Statement 41-101**) (the **Amendments**).

We are also making a consequential amendment to *Policy Statement to Regulation 51-102 respecting Continuous Disclosure Obligations* (**Policy Statement 51-102**) (the **Consequential Amendment**).

Provided all necessary ministerial approvals are obtained, the Amendments and Consequential Amendment are effective on **April 14, 2022**.

Details of the Amendments and Consequential Amendment are outlined in related documents published with this notice and will also be available on websites of CSA jurisdictions, including:

www.lautorite.qc.ca
www.bcsc.bc.ca
www.albertasecurities.com
www.osc.ca
nssc.novascotia.ca
www.fcaa.gov.sk.ca
www.fcnb.ca
www.mbsecurities.ca

Substance and Purpose

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 financial statements 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 *Information Circular* 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 Amendments 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 3 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 Amendments 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*.

The Amendments are aimed at reducing the regulatory burden by harmonizing the approach taken by the CSA in assessing the Primary Business Requirements. We expect a reduction in the time, cost, and uncertainty of the many pre-file applications otherwise required in connection with the Primary Business Requirements, while maintaining investor protection.

In considering how best to address regulatory burden concerns related to the Primary Business Requirements without compromising investor protection, we considered a number of approaches to increase harmonization across the CSA, including amending the Primary Business Requirements. We also considered the implementation of a coverage model, whereby a certain percentage of an issuer's business would be required to have audited financial statements included

in the issuer's long form prospectus or other disclosure prepared in accordance with Form 41-101F1. We also monitored and conducted a comparative analysis of the amendments to the financial disclosure requirements of Regulation S-X issued by the U.S. Securities and Exchange Commission (**SEC**).

Ultimately, through the Amendments, the CSA was able to reach a consensus on a harmonized interpretation of the Primary Business Requirements. The Amendments provide additional clarification and guidance for both IPO venture and non-venture issuers.

On August 12, 2021, the CSA published a Notice of Consultation proposing the Amendments and the Consequential Amendment (the **Draft Amendments**). Based on the 7 comment letters responding to the Draft Amendments, the CSA is not making any material changes to the Amendments.

The CSA acknowledges that some commenters suggested amending the Primary Business Requirements. However, considering the consensus reached by the CSA and the fact that the harmonized interpretation of the Primary Business Requirements will bring a significant reduction in regulatory burden for issuers, we are not proposing to make amendments to the Primary Business Requirements at this time. We will continue to monitor the application and interpretation of the Primary Business Requirements.

Summary of Written Comments Received by the CSA

The comment period for the Draft Amendments ended on October 11, 2021. We considered all the comments received and thank the commenters for their input. The names of the commenters are contained in Annex A along with a summary of the comments received and our responses in Annex B.

The comment letters can be viewed on the website of each of:

- the Alberta Securities Commission at www.albertasecurities.com
- the Autorité des marchés financiers at https://lautorite.qc.ca/en/
- the Ontario Securities Commission at www.osc.ca

Summary of Amendments

We have revised the Amendments to make some non-material changes as further described in Annex B. As these changes are not material, we are not publishing the Amendments for a further comment period.

Local Matters

An annex to this notice outlines the consequential amendments 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 such an annex.

Contents of Annexes

This notice includes the following annexes:

- Annex A – List of Commenters
- Annex B – Summary of Comments and CSA Responses
- Annex C – Local Matters

Questions

Please refer your questions to any of the following:

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ANNEX A

LIST OF COMMENTERS

We received comment letters on the Draft Amendments from the following:

No.	Commenter	Date
1.	Fasken Martineau DuMoulin LLP	October 7, 2021
2.	PricewaterhouseCoopers LLP	October 7, 2021
3.	Torys LLP	October 8, 2021
4.	Osler, Hoskin & Harcourt LLP	October 11, 2021
5.	Stikeman Elliott LLP	October 11, 2021
6.	Goodmans LLP	October 11, 2021
7.	TMX Group Limited	October 18, 2021

ANNEX B

SUMMARY OF COMMENTS AND CSA RESPONSES

This annex summarizes the comment letters and our responses to these comments.

Introduction

The CSA acknowledge that some commenters suggested that we consider rule amendments related to the Primary Business Requirements such as revisiting Item 32 in Form 41-101F1. However, considering the consensus reached by the CSA and that the harmonized interpretation of the Primary Business Requirements will bring significant reduction of regulatory burden for issuers, we are not proposing to make amendments to the Primary Business Requirements at this time. We will continue to monitor the application and the interpretation of the Primary Business Requirements.

In this annex, we consolidated and summarized the comments received and our responses by the general themes of the comments. We have included section references to the Draft Amendments for convenience. We thank the commenters for their input.

Responses to Comments Received on the Draft Amendments

No.	Subject	Summarized Comment	CSA Response
1	General Support	All seven commenters indicated some level of support for the Draft Amendments.	We thank the commenters for their views.
2	General commentary on changes to guidance and rule amendments	One commenter recommended that the CSA revisit Items 32 and 35 of Form 41-101F1 and the related guidance (and not make changes solely to Policy Statement 41-101), with a view to streamlining, consolidating, harmonizing (where appropriate) and clarifying these requirements. One commenter suggested that additional guidance should not be subject to significant CSA staff discretion and interpretation which effectively reduces the benefit of any transparency and predictability to market participants.	At this time, considering the consensus reached by the CSA and that the harmonized interpretation of the Primary Business Requirements will bring a significant reduction in regulatory burden for issuers, we are not proposing to make amendments to the Primary Business Requirements. The intention of the Amendments is to create and set out in Policy Statement 41-101 a harmonized interpretation of the Primary Business Requirements across the CSA. We expect the Amendments to eliminate any variation in the interpretation of the Primary Business Requirements.

No.	Subject	Summarized Comment	CSA Response
		One commenter proposed the inclusion of a flowchart and certain additional examples to be incorporated into the draft subsection 5.3(1) of Policy Statement 41-101.	We note that the examples in the Amendments represent the most common scenarios that staff encounter in prospectus reviews. Therefore, we do not propose to include a flowchart or additional examples at this time.
3	Align disclosure requirements with the SEC	One commenter encouraged the CSA to consider revising Regulation 41-101 and Form 41-101F1 to include certain other changes to the disclosure regime for acquired businesses to align with the SEC's recently adopted amendments to the financial disclosure requirements for business acquisitions and dispositions. One commenter also encouraged the CSA to reduce the number of audited and interim periods for which historical financial statements must be presented if an acquisition is determined to be significant to a maximum of the two most recent fiscal years, similar to the SEC.	We think that the Amendments appropriately address regulatory burden concerns identified relating to the interpretation of the Primary Business Requirements without compromising investor protection. The CSA also monitored and conducted a comparative analysis of requirements of Regulation S-X issued by the SEC and the Draft Amendments. We think we have reached the right balance of CSA harmonization on the interpretation of the Primary Business Requirements, which in some cases, resulted in less regulatory burden than Regulation S-X on our reporting issuer population. We will continue to monitor the application of the Amendments.
4	Remove or modify the "exceptional circumstances guidance" in section 5.7 of Policy Statement 41-101	Four commenters requested either the removal or the modification of the draft guidance as to what would constitute an "exceptional circumstance" and require additional disclosure (other than financial statements) and/or a pre-file discussion with CSA staff.	We note that each prospectus filing encompasses unique facts and circumstances, and therefore it is not possible to provide guidance that will address all "exceptional circumstances" that issuers may experience when filing a prospectus. It is our expectation that these circumstances will be rare. The guidance provided in the Amendments represents certain

No.	Subject	Summarized Comment	CSA Response
			exceptional circumstances that we have encountered to date. Depending on the specific circumstances of a prospectus filing, these "exceptional circumstances" may require further financial information disclosure, other than financial statements, in the prospectus, such as property or business valuation reports, forecasted cash flow information, or additional disclosure about an acquired business.
5	Align the 100% trigger in section 5.3 of Policy Statement 41-101 with the two-test Business Acquisition Report (**BAR**) rules	Three commenters recommended that the 100% trigger which is based on whether the acquisition meets *any* of the BAR significance tests[1] at the 100% or greater level, be aligned with the two-test trigger of the BAR rules.	The 100% trigger is meant to identify the primary business of the issuer and therefore we think that the single trigger test is appropriate. In the Changes we have clarified that the 100% trigger is based on whether the acquisition meets *any* of the BAR significance tests.
6	Modify or clarify the predecessor entity guidance in section 5.4 of Policy Statement 41-101 and/or consider rule amendments related to predecessor entities	One commenter recommended clarifying when a predecessor entity would not be considered material. One commenter recommended aligning the predecessor entity rules with the Draft Amendments related to the guidance for primary business. One commenter recommended guidance for REITs and other roll-up issuers.	We refer the commenter to the general instructions of Form 41-101F1, which has additional clarity on materiality in the context of a long form prospectus. We note that requirements for financial statements of any predecessor entity within a prospectus are outlined in Item 32 of Form 41-101F1 and are not an interpretation of the CSA. Any changes relating to requirements for predecessor entities would require rule amendments and considering the consensus reached by the CSA on the interpretation of the Primary Business Requirements and the significant reduction of regulatory burden for

[1] As outlined in *Regulation 51-102 respecting Continuous Disclosure Obligations*.

No.	Subject	Summarized Comment	CSA Response
			issuers that it will bring, we are not proposing rule amendments at this time. We are not proposing guidance related to specific entities and/or industries in the context of the Primary Business Requirements as based on our experience, each prospectus filing encompasses unique facts and circumstances, and therefore it is not possible to provide guidance that will address all specific scenarios.
7	Modify or clarify the guidance for acquired business(es) in section 5.3 of Policy Statement 41-101	One commenter recommended illustrative examples of when historical financial statements of an acquired business would not be required in an IPO prospectus and additional guidance in Policy Statement 41-101 with respect to the treatment of multiple acquisitions and related businesses. One commenter requested clarity that the disclosure requirements in Item 32 of Form 41-101F1 should apply only in respect of a proposed acquisition when it has progressed to a state where a reasonable person would believe that the likelihood of the issuer completing the acquisition is high. One commenter recommended clarification that the July 2015 Ontario Securities Commission (**OSC**) guidance[2] no longer applies (that issuers must include the financial history of acquired businesses that are in the same	An issuer is required to provide historical financial statements under the Primary Business Requirements for a business, or related businesses that a reasonable investor would regard as the primary business of the issuer. We note that subsection 5.3(1) of the Amendments outlines 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 the Primary Business Requirements. The examples provided are common scenarios that the CSA have encountered on past prospectus reviews. We do not propose to include additional examples at this time. The Primary Business Requirements apply to businesses proposed to be acquired "where a reasonable person would believe that the likelihood of the acquisition being completed is high", as determined by the factors outlined in subsection 5.9(3) of Policy Statement 41-101. We have revised section 5.3 to

[2] OSC Staff Notice 51-725 *Corporate Finance Branch 2014-2015 Annual Report* (July 14, 2015) at page 13.

No.	Subject	Summarized Comment	CSA Response
		primary business as the issuer in the three-year financial history included in an IPO prospectus).	refer to the guidance in subsection 5.9(3). As a result of the Amendments, the OSC will withdraw certain guidance related to Primary Business Requirements.
8	Provide more guidance as to what is required to satisfy the requirement for full, true and plain disclosure in section 5.3 of Policy Statement 41-101	Three commenters requested additional guidance with respect to how issuers may satisfy the requirement that a long form prospectus contain full, true and plain disclosure to reduce the instances in which an issuer will have to incur costs associated with a pre-filing application.	We note that subsection 5.3(1) of the Amendments sets out the key examples where a reasonable investor would regard the acquired business or related businesses to be the primary business of the issuer. We expect scenarios requiring a pre-file application will be rare and, therefore, we have removed references in section 5.3 to utilizing the pre-filing procedures in *Policy Statement 11-202 respecting Process for Prospectus Reviews in Multiple Jurisdictions* (**Policy Statement 11-202**). We also note that we have not made any changes to the interpretation of what constitutes "full, true, and plain disclosure" within securities legislation.
9	Provide more guidance as to what would constitute a *change* in the primary business of the issuer in section 5.3 of Policy Statement 41-101	Three commenters requested additional clarity on what would constitute a change in the primary business of an issuer. Commenters recommended that this guidance should only apply to a fundamental change, size, or other factors to determine whether primary business disclosure is warranted. One commenter requested additional clarity that, when an acquisition does not change the issuer's historic business, the	In the Amendments we have clarified that this guidance only applies to a "fundamental" change of the issuer's primary business, as further referenced within subsection 5.6(3) of Policy Statement 41-101. We confirm that when an acquisition does not change the issuer's historic business, the acquired business would not be considered the "primary business" unless the acquisition triggered any of the other factors

No.	Subject	Summarized Comment	CSA Response
		acquired business would not be considered the "primary business" unless the acquisition triggered the 100% significance test. One commenter requested additional clarity that if an issuer already has a variety of businesses, it can be comfortable concluding that an acquisition will not be considered a "primary business" if it becomes one of many businesses owned by the issuer and does not trip the significance test at the 100% level.	identified in section 5.3 of the Amendments. We also confirm that if an issuer already has a variety of businesses, an acquisition will not be considered a "primary business" if it becomes one of many businesses owned by the issuer and does not trigger any of the 100% significance tests unless the acquisition triggered any of the other factors identified in section 5.3 of the Amendments.
10	Broaden the use of the optional tests	Two commenters suggested that issuers should be allowed to *not* apply subsection 8.3(6) of *Regulation 51-102 respecting Continuous Disclosure Obligations* (which requires that the business acquired must remain substantially intact) when calculating the significance of an acquisition under the optional tests.	At this time, we are not proposing any changes to how any of the significance tests, including optional tests, are applied in connection with the interpretation of the Primary Business Requirements. It is our view that the business(es) acquired must be substantially intact in order to apply the optional tests.
11	Broaden the mining assets guidance in section 5.11 of Policy Statement 41-101 and expand the guidance in Policy Statement 41-101 regarding the determination of what constitutes a	One commenter recommended not limiting an issuer's ability to utilize this guidance by allowing assets and liabilities directly related to the mining assets to be acquired. One commenter suggested the deletion of paragraph 5.11(a) of the Draft Amendments and questioned the relevance of whether the party from whom mining assets were acquired was non-arm's length to the issuer. The commenter is of the view that the key driver is whether the acquired	In scenarios where assets and liabilities directly relate to mining assets that are acquired, we are of the view that audited financial statements contain useful and relevant information to investors in making investment decisions. Furthermore, we are of the view that paragraph 5.11(a) of the Amendments is necessary, and we expect that the issuer would have access through the related party to the information necessary to prepare and audit financial statements for the mining assets.

No.	Subject	Summarized Comment	CSA Response
	business to other industry sectors	mining assets had ongoing activities during the relevant period, and not based on whether those assets were acquired in an arm's length transaction or from a related party. One commenter suggested that paragraph 5.11(b) is an unnecessary condition in situations where there has been no recent exploration, development or activity on the mining assets acquired. Another commenter recommended applying the mining assets guidance to the acquisition of oil and gas assets and to consider whether it would be possible to expand the guidance in Policy Statement 41-101 regarding the determination of what constitutes a business to other industry sectors.	We are of the view that paragraph 5.11(b) of the Amendments is necessary for the acquisition of mining assets. For example, a mining claim may have had no exploration, development or production activity in the last three years; however, it may have a significant asset retirement obligation outstanding. We think this is relevant information to investors in making investment decisions. We are not expanding the guidance in Policy Statement 41-101 regarding the determination of what constitutes a business within the oil and gas industry, as section 1.3 of *Regulation 41-101 respecting General Prospectus Requirements* (**Regulation 41-101**) already includes these properties within the definition of "business". Staff refer you to the guidance contained in section 8.1(4) of Policy Statement 51-102 regarding the determination of what constitutes the acquisition of a business.
12	Clarify the guidance on the pre-filings procedure	One commenter requested clarity on the type of information that would be expected to be included in a pre-filing, in the event that a pre-filing is necessary.	We note that each prospectus encompasses unique facts and circumstances, and therefore we cannot provide guidance on the type of information that would be expected to be included in connection with a pre-filing beyond what is set out in Part 8 of Policy Statement 11-202.
13	Clarify the meaning of certain terminology	One commenter recommended we consider whether additional guidance would be useful regarding the meaning of the terms "other liabilities", "business" or	For additional clarity on the term "primary business", we refer to Item 32 of Form 41-101F1, as well as section 5.3 of the Amendments.

No.	Subject	Summarized Comment	CSA Response
		"primary business" as applicable to Regulation 41-101 and Form 41-101F1. One commenter recommended we consider whether additional guidance would be useful regarding the meaning of the term "immaterial".	For additional clarity on the interpretation of what constitutes an acquired "business", we refer to subsection 8.1(4) of Policy Statement 51-102. Furthermore, for additional clarity on the term "materiality", we refer to the general instructions of Form 41-101F1.
14	Remove or modify the MD&A requirements	One commenter recommended that the CSA reconsider the requirements in Item 8.2 of Form 41-101F1 that MD&A be provided in respect of any acquired business whose financial statements the issuer is required to include in the prospectus under Item 32.	At this time, we are not proposing any changes to the MD&A requirements outlined in Item 8.2 of Form 41-101F1 because we are of the view that the MD&A enhances a readers' understanding of the financial performance and financial condition of an acquisition that constitutes the issuer's primary business.
15	Permit further use of foreign GAAP/GAAS	Two commenters suggested that foreign GAAP/ GAAS should be permitted in financial statements that are provided for primary business acquisitions.	At this time, we are not proposing amendments to any requirements in *Regulation 52-107 respecting Acceptable Accounting Principles and Auditing Standards*, because it would be beyond the scope of this project.

ANNEX C

LOCAL MATTERS

Withdrawal of a Notice

In Québec, if the Changes are implemented, we will proceed to withdraw the *Notice relating to Financial Statement Requirements for IPO Issuers Acquiring Mining Claims*, as the circumstances where an acquisition of mining assets would not be considered an acquisition of a business will be included in Policy Statement 41-101.