

Canada Steps Up

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Research Study

**Filing and Delivery Requirements under
Canadian Securities Legislation**

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Maintaining a Competitive Capital Market in Canada

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1. Introduction

Securities legislation in Canada¹ is founded largely on the rationale that investors are capable of making their own investment decisions if provided with sufficient information about the issuer of the securities being purchased and the securities themselves. Crucial to the success of this model are mechanisms that permit the timely and adequate disclosure of material information by issuers to securities regulators and, most importantly, to the investing public. Disclosure is disseminated by way of filings with the applicable securities regulators and the delivery of documents to securityholders.

This paper is meant as a basic primer to highlight the types of filing and delivery requirements currently existing under Canadian securities legislation. As we will see, a relatively advanced system is in place to facilitate the filing of required documentation with securities regulators, as well as its deposit in a publicly accessible electronic forum. There has also been some progress made to move away from the requirement that documentation required to be delivered to securityholders be delivered in paper form only; there are now methods by which documents can be delivered to securityholders electronically. Nonetheless, actual delivery to securityholders is still required, despite the fact that all material disclosure documents (including prospectuses) may be accessed by securityholders and potential investors by electronic means.

This paper will start with a few words about the legal difference between the “filing” of a document and its “delivery”. From there we will examine the current mechanisms in place to facilitate the filing and delivery of documents electronically under securities legislation by providing an overview of the System for Electronic Document Analysis and Retrieval, the System for Electronic Disclosure and Insiders and National Policy 11-201 - *Delivery of Documents by Electronic Means*. We will then provide a number of examples of the types of documents that are required to be filed with securities regulators and/or delivered to securityholders by reviewing the hypothetical disclosure “life” of a reporting issuer from the time of its initial public offering through one full annual cycle of required disclosure.

¹ Securities regulation in Canada is a matter of provincial and territorial jurisdiction. Each of the Jurisdictions has its own securities laws, policies and rules that are administered by a securities regulatory authority or regulator (each a “Securities Commission”). In addition, the Securities Commissions have adopted National Policies that are applicable in all Canadian jurisdictions and Multilateral Instruments that are applicable in more than one, but not all, of the Canadian jurisdictions. Collectively, these securities laws, policies, rules and instruments are referred to in this memorandum as the “Canadian securities legislation”.

2. The Distinction between “Filing” and “Delivery” under Canadian Securities Legislation

The words “filed” and “delivered” are terms of art in Canadian securities legislation. There is a distinction between material that is required to be “filed” with a securities regulator and material that is required to be “delivered”. In Ontario, for example, section 140 of the *Securities Act* (Ontario)² requires that material filed pursuant to the OSA be made available by the Ontario Securities Commission for public inspection, unless the Ontario Securities Commission decides to hold the material in confidence because the material “discloses intimate financial, personal or other information,” and the desirability of avoiding disclosure in the interests of any person or company affected outweighs the desirability of adhering to the principle that material filed with the Ontario Securities Commission be available to the public for inspection.

The term “deliver” is generally used in Canadian securities law to describe the physical delivery of documents by a reporting issuer to its securityholders.³

3. The Current Mechanisms by which Documents are Filed or Delivered Electronically in Canada

Canadian securities legislation currently permits certain of the documents that must be filed with securities regulators to be filed using electronic means. In addition, certain documents required to be delivered to securityholders may also be delivered by electronic means. In this section we provide an overview of the various instruments and policies that permit electronic filing and delivery. Generally, unless a document is permitted to be filed or delivered electronically pursuant to an applicable instrument or policy, it must be filed or delivered in paper form.⁴

² *Securities Act*, R.S.O. 1990, c. S.5 [“OSA”].

³ As per section 1.1 of NI 11-201, “‘delivered’ means sent, delivered or otherwise communicated, and ‘deliver’, ‘delivery’ and similar words have corresponding meanings.” In addition, the articulated purpose of NI 11-201, which is entitled “Delivery of Documents by Electronic Means,” is to address the use of electronic means to disseminate documents to securityholders and investors in a more timely and cost-efficient manner than by use of paper-based methods. Case law, while not providing a clear definition of “delivered” or “delivery” does draw a distinction between “filing” requirements and “delivery” requirements. Specifically, “delivery” is referenced when documents are required to be provided to securityholders. See *Clarington Funds Inc. et. al., Re.*, (2005) 28 O.S.C.B. 7335 and *Barrick Gold Corporation, Re.*, 2003 ABSECCOM ORD - # 1163809.

⁴ An obvious example is the report that must be filed with securities regulators when securities are distributed pursuant to a prospectus exemption under National Instrument 45-106 – *Prospectus and Registration Exemptions*.

4. Overview of the System for Electronic Document Analysis and Retrieval (SEDAR)

On January 1, 1997, the securities regulatory authorities in Canada implemented the necessary legal framework establishing the System for Electronic Document Analysis and Retrieval (“SEDAR”) for the mandatory filing by electronic means of the majority of the documents that must be filed with securities regulators. In Appendix I we have provided a complete list of the securities filings that must be transmitted using SEDAR.

National Instrument 13-101 – *System for Electronic Document Analysis and Retrieval (SEDAR)* (“NI 13-101”) sets out the requirements governing electronic filings with the securities regulators. It also prescribes: (a) the categories of filers that are required to make electronic filings,⁵ (b) the specific types of filings that are required or permitted to be transmitted in electronic format (which includes all of the documents that form a reporting issuer’s continuous disclosure record, as discussed below), (c) the requirements for persons seeking to access the SEDAR system to make filings, and (d) the manner in which electronic filings are to be prepared and transmitted. SEDAR is operated by CDS Inc., a subsidiary of the Canadian Depository for Securities Limited, the central clearinghouse for securities in Canada.

SEDAR serves several functions. Electronic filings using SEDAR significantly reduce the time and effort required by issuers to file documents with securities regulators. Before SEDAR, filings were required to be made with each provincial securities regulator separately. SEDAR, as the central repository for filings with each of the Canadian securities regulators, allows issuers to now only have to make one filing of each document. Similarly, SEDAR facilitates the electronic payment of required filing fees and allows for “one stop” payment. Most importantly, filings made using SEDAR are posted under the reporting issuer’s profile on the SEDAR website⁶ thereby creating a publicly accessible full record of all of the public disclosure required to be made by a reporting issuer under Canadian securities laws.

⁵ Generally, the following entities are required to file documents electronically: 1. Every issuer, other than a foreign issuer (SEDAR) (as defined in NI 13-101), that is required or otherwise is proposing to file a document under securities legislation or securities directions, 2. Every foreign issuer (SEDAR)(as defined in NI 13-101), that files a notice of election to become an electronic filer, and 3. Every third party filer that makes a filing of a type to which this Instrument applies concerning an issuer that is required to comply with this Instrument.

⁶ Unless such a filing is made on a confidential basis as is permitted in certain limited circumstances.

5. **Overview of System for Electronic Data on Insiders (SEDI)**

Under Canadian securities law, an “insider”⁷ of a reporting issuer is required to file an “insider report” within ten days of becoming an insider⁸ and within ten days of each change in holdings.⁹ The System for Electronic Data on Insiders (“SEDI”) facilitates the filing and public dissemination of insider reports in electronic format through an internet web-site.

National Instrument 55-102 - *System for Electronic Data on Insiders (SEDI)* (“NI 55-102”) provides that insiders who are required by provincial securities laws to file insider reports must file such reports in electronic format through SEDI. NI 55-102 also sets out the principal requirements and procedures relating to electronic filing of insider reports and other related information. In particular, to file an insider report in SEDI, an insider is required to file an insider profile in electronic format containing information identifying the insider and the insider’s relationship to one or more SEDI issuers. Once an insider profile has been filed in SEDI, insider reports may be filed electronically by or on behalf of the profiled insider. The information to be included in an insider report filed electronically is prescribed in Form 55-102F2 of NI 55-102.

6. **National Policy 11-201 - Delivery of Documents by Electronic Means**

The development and utilization of SEDAR and SEDI are illustrative of the adoption of technology to facilitate the electronic filing of documents with securities regulators and the creation of publicly accessible internet locations for such documents. The development of National Policy 11-201 - *Delivery of Documents by Electronic Means* (“NP 11-201”) was a small step in the same direction with respect to document delivery to securityholders.¹⁰ It should be noted at the outset however that NP 11-201 is only a

⁷ An “insider” means: (a) every director or senior officer of a reporting issuer, (b) every director or senior officer of a company that is itself an insider or subsidiary of a reporting issuer, (c) any person or company who beneficially owns, directly or indirectly, voting securities of a reporting issuer or who exercises control or direction over voting securities of a reporting issuer or a combination of both carrying more than 10 per cent of the voting rights attached to all voting securities of the reporting issuer for the time being outstanding other than voting securities held by the person or company as underwriter in the course of a distribution, and (d) a reporting issuer where it has purchased, redeemed or otherwise acquired any of its securities, for so long as it holds any of its securities. *OSA*, *supra* note 2 at s. 1(1).

⁸ *Ibid.* at s. 107(1).

⁹ *Ibid.* at s. 107(2).

¹⁰ The United States Securities and Exchange Commission has adopted instruments of a similar nature. See, *Use of Electronic Media*, SEC Interpretive Release Nos. 33-7856, 34-42728, IC-24426; File No. S7-11-00 (April 25, 2000), Securities Act Release No. 7233 (Oct. 6, 1995) [60 FR 53458] and Securities Act Release No. 7288 (May 9, 1996)

policy statement of the securities regulators and therefore, unlike NI 13-101 or NI 55-102, cannot be used to require the electronic delivery of documents to securityholders.¹¹ NP 11-201 merely provides policy guidance on the methods of electronic delivery that are viewed as permissible by the securities regulators.

NP 11-201 provides guidance on the use of electronic means to deliver documents such as prospectuses, financial statements, trade confirmations, account statements and proxy solicitation materials, all of which are required to be delivered to a reporting issuer's securityholders.¹² Unless such documents (which are discussed in greater detail below) are delivered to securityholders electronically in compliance with NP 11-201, they are expected to be delivered in paper form.

NP 11-201 sets out the way in which obligations imposed by provincial securities legislation to "deliver" documents can be satisfied by electronic means, but does not extend to deliveries where the method of delivery is specifically mandated by securities legislation. In particular, NP 11-201 requires the deliverer of a document to provide evidence that the document has been delivered or otherwise made available to the recipient, and to ensure that the recipient receives notice of the electronic delivery, has easy access to the document and, in fact, receives a document that is not different from that delivered by the deliverer. Under NP 11-201, a deliverer will generally satisfy the notice, evidence and access components of

[61 FR 24644].

¹¹ National Instruments are designed to be rules or regulations in jurisdictions that have been provided with rule-making authority pursuant to the applicable securities legislation, and policies in the other jurisdictions. A National Instrument is promulgated by the Canadian Securities Administrators ("CSA"), the umbrella organization that has no statutory basis, but to which all of Canada's provincial securities regulators belong. A National Instrument is intended to be legislative in nature. To have effect in a particular province, National Instruments normally must be adopted as a rule (or regulation) in that province. However, not every provincial regulator has been granted rule-making power. In addition, not all initiatives are adopted by every provincial regulator. Those instruments that have effect in some, but not all, provinces are designated Multilateral Instruments rather than National Instruments. Policy statements are intended to provide public guidance to issuers and market professionals with respect to the regulators' interpretation and proposed application of securities laws and with respect to the facts and circumstances that would most likely trigger regulatory intervention. Unlike rules, policies are not required to be submitted to the minister of finance before they are finally adopted. There are two basic types of policy statements: Local and National. National policy statements are issued by the CSA for adoption as policy statements in every province. Local policy statements are the initiatives of a provincial regulator only. For example, in Ontario, the OSA provides specific statutory recognition of policy statements and a procedure for their promulgation. In particular, Section 143.8 of the OSA defines a "policy" as a written statement of the Commission of, (a) principles, standards, criteria or factors that relate to a decision or exercise of a discretion by the Commission or the Director under this Act, the regulations or the rules, (b) the manner in which a provision of this Act, the regulations or the rules is interpreted or applied by the Commission or the Director, (c) the practices generally followed by the Commission or the Director in the performance of duties and responsibilities under this Act, and (d) something that is not of a legislative nature. Proposed policies must be published for comment. See, David Johnston and Kathleen Doyle Rockwell, *Canadian Securities Regulation*, 3rd ed. (Markham: LexisNexis Canada Inc., 2003) at 51 and Jeffrey MacIntosh and Christopher Nicholls, *Securities Law*, (Toronto: Irwin Law, 2002) at Chapter 3.

¹² Subsection 1.3(5) of NP 11-201 provides that: "This Policy does not apply to documents filed with or delivered by or to a securities regulatory authority or regulator."

electronic delivery by obtaining the informed consent of an intended recipient to the electronic delivery of a document and then delivering the document in accordance with the consent.

It is of note that, despite NP 11-201's potential for reducing the burden on reporting issuers with respect to paper document delivery, the securities regulators recommend that deliverers make a paper version of every document delivered by electronic means available at no cost to a recipient upon request by such recipient, regardless of the form in which the document was originally delivered. Moreover, with respect to the required form and content of electronic document, subsection 3.1 (2) of NP 11-201 requires the current paper version to be recreated in electronic format (instead of simply being scanned into electronic format). Both of these points tend to undercut the effectiveness of NP 11-201 for reducing the use of paper-based delivery by reporting issuers.

7. Deliveries and Filings in the Disclosure “Life” of a Reporting Issuer

Now that we have provided an overview of the various means by which documents can be filed and delivered electronically we will provide the context within which the filing and delivery requirements are triggered by exploring a number of examples of the types documents that are required to be filed with securities regulators and/or delivered to securityholders. We will do this by reviewing the hypothetical disclosure “life” of a reporting issuer from the time of its initial public offering through one full annual cycle of required disclosure.

8. The Initial Public Offering – Filing and Delivery of a Long-Form Prospectus

In general terms, the “life” of an issuer begins with the issuer's initial issuance of securities to the public (the “**Initial Public Offering**”) at which time the issuer becomes a “reporting issuer”¹³ under Canadian

¹³ The OSA defines a reporting issuer as an issuer,

(a) that has issued voting securities on or after the 1st day of May, 1967 in respect of which a prospectus was filed and a receipt therefore obtained under a predecessor of [the OSA] or in respect of which a securities exchange take-over bid circular was filed under a predecessor of [the OSA],

(b) that has filed a prospectus and has obtained a receipt for it under [the OSA],

(b.1) that has filed a securities exchange take-over bid circular under [the OSA] before December 14, 1999,

(c) any of whose securities have been at any time since the 15th day of September, 1979 listed and posted for trading on any stock exchange in Ontario recognized by the [OSC], regardless of when such listing and posting for trading commenced,

(d) to which the *Business Corporations Act* applies and which, for the purposes of that Act, is offering its securities to the public,

(e) that is the company whose existence continues following the exchange of securities of a company by or for the

securities laws. The Initial Public Offering is typically completed using a long-form prospectus prepared pursuant to National Instrument 41-101 - *Prospectus Disclosure Requirements* (“NI 41-101”) and OSC Rule 41-501 - *General Prospectus Requirements* (“41-501”)¹⁴. The long-form prospectus is intended to serve as the foundational disclosure document that is provided both to securities regulators and prospective investors. Based on the disclosure provided in the long-form prospectus regulators will judge the suitability¹⁵ of an issuer to access the public capital markets and potential investors will make their decision whether to invest in the securities of the issuer.

As the core initial disclosure document of a reporting issuer, the long-form prospectus is lengthy and detailed. The disclosure requirements for a long-form prospectus are articulated in NI 41-101 and 41-501¹⁶ and require detailed written disclosure on topics such as the corporate structure of the reporting issuer, the general development of the reporting issuer’s business, the use of proceeds of the issue, consolidated financial statements (interim and annual), management’s discussion and analysis of financial results, principal and selling securityholders, biographies and fees and salaries paid to directors and officers, the interest of management and others in material transactions of the reporting issuer and material contracts of the reporting issuer.

In Canada generally, the offering of securities by way of prospectus involves both the preparation

account of such company with another company or the holders of the securities of that other company in connection with, (i) a statutory amalgamation or arrangement, or (ii) a statutory procedure under which one company takes title to the assets of the other company that in turn loses its existence by operation of law, or under which the existing companies merge into a new company, where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months, or

(f) that the OSC has deemed to be a reporting issuer under section 83.1 [of the OSA]. *OSA, supra* note 2 at s. 1(1).

¹⁴ Other jurisdictions in Canada have similar applicable rules/regulations. For example, for the applicable requirements in British Columbia, see BC Policy 41-601 - *Prospectus Filing Requirements*.

¹⁵ Under s. 61(1) of the OSA, the Director can refuse to issue a receipt for a prospectus if it appears to the Director that it is “not in the public interest to do so”. The Regulators do not, however, pass on the merits of the securities being issued. Indeed, section 2.1 of National Instrument 41-101 requires that the following statement appear in italics at the top of the cover page of each prospectus: “*No securities regulatory authority has expressed an opinion about these securities and it is an offence to claim otherwise*”.

¹⁶ For a complete list of the information required to be presented in a long-form prospectus, see Form 41-501F1 of NI 41-501.

and filing of a preliminary prospectus¹⁷ as well as a final prospectus¹⁸ with the securities regulators¹⁹ along with a number of other filings and deliveries which we have outlined in Appendix II. Using Ontario as an example²⁰, upon the filing of a preliminary prospectus that substantially complies with the requirements of Ontario securities law respecting the form and content of a prospectus²¹, the Director of the OSC is required to issue a “receipt” for such preliminary prospectus.²² If it is intended that the preliminary prospectus be filed in the other provinces and territories of Canada, compliance with the prospectus requirements of the securities laws of those provinces will be required. In order to facilitate the review of the preliminary prospectus by multiple provincial securities regulators, the Canadian securities administrators have adopted a national policy for the review of documents filed in more than one province. In particular, National Policy 43-201 - *Mutual Reliance Review System for Prospectuses and Annual Information Forms* (“NP 43-201”) establishes the mutual reliance review system (“MRRS”) for prospectuses, prospectus amendments, waiver applications, pre-filing discussions and initial and renewal annual information forms. Under the MRRS, a designated securities regulatory authority or regulator acts as the principal regulator for all materials related to a filer. In most cases, the principal regulator of a filer is the regulator in the jurisdiction in which the head office of the filer is located.

A preliminary prospectus generally excludes information with respect to the price of the offered securities to the underwriter (or agent) and the offering price. It must, however, contain a certificate signed by the issuer indicating that the prospectus constitutes full, true and plain disclosure of all material facts relating to the securities being offered.²³ The underwriter (or agent) is required to provide a certificate to the same effect, except that the statement that the prospectus constitutes full, true and plain disclosure of all material facts relating to the securities being offered is qualified by the underwriter’s (or agent’s)

¹⁷ In addition to the filing of the preliminary long-form prospectus itself, an issuer is required to file along with the preliminary long-form prospectus mining reports or oil and gas reports (as applicable) and reports of any valuations of its securities. An issuer is required to deliver to the securities regulators, concurrently with the filing of the preliminary long-form prospectus, applicable personal information regarding the directors and officers of the issuer and promoter, an authorization to collect, use and disclose personal information, calculation of earnings coverage (for debt securities), material contracts, reports and valuations, a comfort letter regarding foreign auditor’s report (if applicable) and, where a financial statement included in the preliminary long-form prospectus is accompanied by an unsigned audit report, an auditor’s comfort letter.

¹⁸ At the time of filing a final long-form prospectus, an issuer is required to file experts’ consents and credit supporters’ consents (if applicable), material contracts, mining reports or oil and gas reports (if applicable) and other applicable reports and valuations. The issuer is also required to deliver an auditor’s comfort letter regarding unaudited financial statements.

¹⁹ See for example, *OSA, supra* note 2 at ss. 53(1) and 54(1). Section 63(1) of the OSA provides for the filing of a short form prospectus in certain situations.

²⁰ Similar procedures exist in other Canadian jurisdictions.

²¹ *OSA, supra* note 2 at s. 54(1).

²² *Ibid.* at s. 55.

²³ *Ibid.* at s. 58(1).

knowledge, information and belief.²⁴ These certificates must also be given on the filing of the (final) prospectus.

The issuance of a “receipt” for a preliminary prospectus commences what is known as the “waiting period,” which concludes upon the issuance by the Director of a receipt for the (final) prospectus.²⁵ During the so-called waiting period, it is permissible to distribute the preliminary prospectus and to solicit “expressions of interest” from prospective purchasers provided that a copy of the preliminary prospectus is delivered to each prospective purchaser forthwith after an interest in purchasing the subject securities is indicated.²⁶ Any dealer distributing the subject securities must maintain a record of the names and addresses of all persons and companies to whom the preliminary prospectus has been forwarded.

After the receipt is issued for the preliminary prospectus,²⁷ the principal regulator under MRRS undertakes a comprehensive review of the preliminary prospectus to ensure that the issuer has complied with the statutory prospectus requirements and provides a comment letter to the issuer outlining any “deficiencies” within ten working days from the date of the filing of the preliminary prospectus. The other jurisdictions advise the principal jurisdiction of any additional comments within five working days of receipt of the first comment letter from the principal jurisdiction. On the basis of these additional comments, the principal jurisdiction prepares and sends a second comment letter to the issuer which should identify the jurisdictions issuing the comments contained in it. The issuer (with the assistance of the underwriters, the issuer’s auditors and legal counsel for the issuer and the underwriters) responds in writing to the comment letters. In these response letters, the issuer typically either agrees to make changes to the disclosure in the preliminary prospectus suggested by the principal regulator or explains to the principal regulator why such changes are inappropriate or unnecessary. The response letter typically commences a negotiation exercise with respect to any disclosure issues in the preliminary prospectus.

Once discussions with the securities regulators reach a satisfactory resolution, required changes to the preliminary prospectus are made by the issuer and a (final) prospectus (together with a black-lined copy showing changes from the preliminary prospectus) is filed with the securities regulators. In Ontario,

²⁴ *Ibid.* at s. 59(1).

²⁵ *Ibid.* at s. 65(1).

²⁶ *Ibid.* at ss. 65(2) and 66.

²⁷ If a material adverse change occurs: (1) after a receipt is obtained for a preliminary prospectus filed and before the receipt for the prospectus is obtained, or (2) where a material change occurs after the receipt for the prospectus is obtained but prior to the completion of the distribution under such prospectus, an amendment to the preliminary prospectus must be filed (see *ibid.* at s. 57(1)) Moreover, upon the occurrence of such a change, an amendment to the applicable prospectus must be delivered to each recipient of the preliminary prospectus (see *ibid.* at s. 56(3)).

unless it appears to the Director that it is not in the public interest to do so, the Director is required to issue a receipt for the (final) prospectus.²⁸ A copy of the (final) prospectus must then be delivered to each person who received the preliminary prospectus. There is then a “cooling off period” whereby each prospective purchaser who has received a copy of the (final) prospectus has two days (exclusive of Saturdays, Sundays and holidays) to rescind any offer to purchase the securities offered under a prospectus.²⁹

9. The Filing and Delivery Requirements for a Reporting Issuer

Following an Initial Public Offering of securities using a long-form prospectus, the issuer becomes a reporting issuer under Canadian securities laws and is subject to the continuous disclosure requirements provided for in National Instrument 51-102, *Continuous Disclosure Obligations* (“**NI 51-102**”).³⁰ The documents that are required to be filed or delivered pursuant to NI 51-102 build upon the disclosure provided in the long-form prospectus and create the disclosure record of the reporting issuer (the “**Disclosure Record**”). As time progresses, securities regulators and the investing public have a more fulsome track record on which to assess the activities of a reporting issuer and measure the value of its securities. Moreover, the Disclosure Record is intended to serve as the foundation for subsequent issuances of securities by the Reporting Issuer.

Most Reporting Issuers can access the Canadian capital markets and issue securities by filing a short form prospectus as provided by National Instrument 44-101 – *Short Form Prospectus Distributions* (“**NI 44-101**”). Eligibility for filing a short form prospectus applies to all issuers listed on the TSX, Tier 1 and Tier 2 of the TSX-V and the Canadian Trading and Quotation System. In addition, to be eligible to file a short form prospectus, an issuer must satisfy the following conditions:³¹

- (a) the issuer must be an electronic filer under NI 13-101;
- (b) the issuer must be a reporting issuer in at least one jurisdiction of Canada;
- (c) the issuer must have filed, with the securities regulatory authority in each jurisdiction in which it is a reporting issuer, all periodic and timely disclosure documents that it is required to have filed in that jurisdiction;

²⁸ *Ibid.* at s. 61(1).

²⁹ *Ibid.* at s. 71(2).

³⁰ The requirements of NI 51-102 continue until the issuer ceases to be a Reporting Issuer.

³¹ In certain narrow circumstances, NI 44-101 also provides that the requirements to have a current AIF and current annual financial statements do not apply.

- (d) the issuer must have, in at least one jurisdiction in which it is a reporting issuer, current annual financial statements³² and a current annual information form,³³ and
- (e) the issuer's equity securities must be listed and posted for trading on a short form eligible exchange and the issuer may not be an issuer whose operations have ceased, or whose principal asset is cash, cash equivalents, or its exchange listing.

The short form prospectus, as its name suggests, is intended to be a short document that incorporates by reference the reporting issuer's Disclosure Record and provides any update regarding the business, affairs and financial position of the Reporting Issuer since the date of its last continuous disclosure filing. The rationale is that certain disclosure, which is already publicly accessible by prospective purchasers on SEDAR need not be repeated in the short form prospectus.

10. Overview of Continuous Disclosure Related Filing and Delivery Requirements

A detailed chart illustrating the filing and delivery requirements of NI 51-102 is included as Appendix III. The significant disclosure documents mandated by NI 51-102 include the following, each of which will be dealt with in more detail below:

- (a) annual audited financial statements, interim unaudited financial statements for three, six and nine month periods in a financial year with an auditor's report;
- (b) management's discussion and analysis on both annual and interim financial statements (an "MD&A");
- (c) an annual information form (an "AIF");
- (d) disclosure of material changes on a timely basis, and the filing of material change reports in respect thereof;

³² Current annual financial statements are similarly defined as: 1. the issuer's comparative annual financial statements filed in accordance with the applicable continuous disclosure rule for its most recently completed financial year, together with the auditor's report accompanying the financial statements and, if there has been a change of auditors since the comparative period, an auditor's report on the financial statements for the comparative period, or 2. the issuer's comparative annual financial statements filed for the financial year immediately preceding its most recently completed financial year, together with the auditor's report accompanying the financial statements and, if there has been a change of auditors since the comparative period, an auditor's report on the financial statements for the comparative period if: a) the issuer has not filed its comparative annual financial statements for its most recently completed financial year, and b) the issuer is not yet required under the applicable continuous disclosure rule to have filed its annual financial statements for its most recently completed financial year.

³³ A "current" AIF is the issuer's AIF filed in respect of its most recently completed financial year, or its immediately preceding financial year if an AIF for the most recently completed financial year has not been filed and the issuer is not required to have filed its annual financial statements for its most recently completed financial year.

- (e) “business acquisition reports” including pro forma financial statements in connection with any significant business acquisitions;
- (f) proxies and information circulars;
- (g) documents affecting the rights of securityholders; and
- (h) material contracts.

Annual and Interim Financial Statements and Auditor’s Report

Pursuant to NI 51-102 and subject to specified timelines, a reporting issuer must file a copy of its annual and interim (quarterly) financial statements with the applicable securities regulator. The filed financial statements must be accompanied by a report which details the type of audit review completed. Moreover, the financial statements cannot be filed until the board of directors or the reporting issuer’s audit committee has approved them.

In addition to having to be filed on SEDAR, NI 51-102 requires that the financial statements and MD&A (discussed below) of a reporting issuer must be delivered to securityholders, but only upon request. Applying the procedures set out in National Instrument 54-101 – *Communications with Beneficial Owners of Securities of a Reporting Issuer* (“NI 54-101”)³⁴, the reporting issuer must send a request form to the beneficial owners of its securities who are identified under that instrument as having chosen to receive securityholder materials. Securityholders requesting financial statements and MD&A must be sent a copy of the requested materials without charge, by the later of the filing deadline for the financial statements requested and 10 calendar days after the reporting issuer receives the request.

MD&A

MD&A is a supplemental analysis and explanation which accompanies but does not form part of the issuer’s financial statements. It is a narrative description of its current financial situation and future prospects and is intended to give a reader the ability to look at the issuer through the eyes of management by providing both a historical and prospective analysis of the business of the issuer.

³⁴ NI 54-101 allows a reporting issuer to communicate directly with beneficial securityholders who have not objected (i) to their ownership being disclosed by the intermediary through which the securities are held, and (ii) receiving the materials directly.

A reporting issuer is required to file its MD&A in respect of its annual and interim financial statements. As with financial statements, the board of directors of each reporting issuer is required to approve the MD&A accompanying both interim and annual financial statements prior to their release.

AIF

The AIF is intended to provide the public with relevant background material essential to a proper understanding of the reporting issuer, its operations and prospects for the future. The prescribed contents of an AIF include information regarding the incorporation or organization of the issuer, its subsidiaries, the general development of its business, a narrative description of its business, selected consolidated financial information, MD&A, the market for its securities, directors and officers, and certain additional information. The AIF must describe any contract that the reporting issuer's business is substantially dependent on (other than those entered into in the ordinary course of business).³⁵ Social and environmental policies of the reporting issuers must also be described in the issuer's description of their business if such policies are "fundamental to the issuer's operations." In short, an AIF very much resembles a long form prospectus and, indeed, forms the foundation for a short form prospectus as described above.

The AIF must be filed shortly after the end of the reporting issuer's most recently completed financial year. There is no requirement to deliver an AIF to securityholders.

Material Change Reporting

Securities legislation in Canada requires the immediate disclosure of material information concerning a company's business and affairs that is known to management.³⁶ To this end, a news release disclosing the nature and substance of the change must be issued and filed "forthwith" after the change occurs. Material change reports must be filed as soon as practicable and, in any event, within 10 days of the date on which the material change occurs.³⁷ Both the material change report and the news release are filed on SEDAR but are not required to be delivered to securityholders.

³⁵ The CSA appears to view the "ordinary course of business" concept quite broadly.

³⁶ "Material" is typically defined as any information relating to the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer's listed securities

³⁷ A material change is a change in the business, operations or capital of the Reporting Issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the Reporting Issuer.

A confidential material change report may be filed by a reporting issuer if, in the reasonable opinion of the issuer, the disclosure would be unduly detrimental to the interests of the issuer.³⁸ However, after a confidential material change report is filed, an issuer is required to promptly disclose a material change if the issuer becomes aware, or has reasonable grounds to believe, that persons are trading with knowledge of that material change.

Business Acquisition Reports

If a Reporting Issuer completes a “significant acquisition”, it is required to file a Business Acquisition Report (“**BAR**”) within 75 days after the date of acquisition. The BAR describes the significant businesses acquired by the Reporting Issuer and their effect on the Reporting Issuer. Unless an exemption from inclusion is available, the BAR must also include annual and interim financial statements of the acquired business, together with pro forma financial statements. A BAR must be filed on SEDAR but does not have to be delivered to securityholders.

Proxy Rules

NI 51-102 requires the filing of information circulars and proxy-related material with securities regulators. Exemptions from these requirements exist for issuers that comply with the requirements of the laws of the jurisdiction in which they are incorporated or organized, provided such requirements are “substantially similar” to the requirements contained in the Instrument.

NI 54-101 works in conjunction with NI 51-102 to facilitate delivery of the pertinent proxy documents to securityholders. In particular, the purpose of NI 54-101 is to ensure that beneficial owners of securities receive proxy-related and other securityholder materials and are given the opportunity to vote the securities they own.

NI 54-101 permits direct communication between reporting issuers and beneficial owners of securities and between third parties, such as bidders and opponents in a proxy battle, and beneficial owners of securities. Under NI 54-101, intermediaries provide lists (“**NOBO lists**”) to Reporting Issuers containing the names, addresses, email addresses and holdings of beneficial owners of securities who have not objected to the release of this information (NI 54-101 calls these beneficial owners “non-objecting

³⁸ This filing, as a result of the implicit confidentiality concerns, is made in paper form to the Commission.

beneficial owners” or “**NOBOs**”). It is of note that NI 54-101 permits communication by electronic means, such as by email, if consent is first obtained.

Under NI 54-101, beneficial owners of securities can decline to receive materials relating to routine business (such as the election of directors and the appointment of auditors) and non-mandated materials (such as voluntary corporate communications) but are required to receive special meeting materials. Moreover, if a Reporting Issuer agrees to pay the cost of sending materials to the beneficial owner, it can require the intermediary to override the beneficial owner’s decision not to receive materials relating to routine business and non-mandated materials.

NI 54-101 does not mandate a delivery method for communication with beneficial owners of securities. However, NP 11-201 (discussed above) is applicable and permits reporting issuers to satisfy their document delivery obligations by electronic means. As such, reporting issuers can use the email addresses obtained from the NOBO list to send proxy related and other documents to beneficial owners of securities, provided prior consent from the beneficial owner is obtained.

Filing of Documents Affecting the Rights of Securityholders

A reporting issuer must file copies of the following documents, including any amendments, on SEDAR (paper copies may be filed if the document is dated prior to March 30, 2004 or if it does not exist in an acceptable electronic format for SEDAR filing) but does not have to deliver them to securityholders:

- (a) articles of incorporation or other constating or establishing documents of the issuer;
- (b) by-laws currently in effect;
- (c) securityholder or voting trust agreements that are accessible by the reporting issuer and that can be reasonably regarded as material to an investor;
- (d) securityholders’ rights plans (i.e. “poison pills”); and
- (e) any other contract of the reporting issuer (or a subsidiary of the reporting issuer) that creates or can reasonably be regarded as materially affecting the rights or obligations of its securityholders generally.

Filing of Material Contracts

A reporting issuer must also file a copy of any contract entered into, other than in the ordinary course of business, that is material to the issuer and was entered into within the last financial year, or before the last financial year but is still in effect. There is an exception for any contract entered into before January 1, 2002. Contracts may be filed with certain provisions omitted or marked so as to be unreadable if the issuer believes that disclosure of such provisions would be seriously prejudicial to the interests of the issuer or would violate confidentiality provisions.³⁹

* * * *

11. Conclusion

The advent of SEDAR and SEDI permit most documents that are to be filed with securities regulators to be filed electronically. This has significantly reduced the burden placed on reporting issuers with respect to securities filings. Similarly, documents required to be delivered to securityholders may be delivered using electronic means pursuant to NP 11-201, although it is perhaps debateable whether this necessarily reduces the time and expense for reporting issuers as NP 11-201 has potentially burdensome administrative requirements such as the need for reporting issuers to make a paper version of every document delivered by electronic means available at no cost to a recipient upon request by such recipient. Indeed, anecdotal evidence suggests that few reporting issuers make use of NP 11-201.

Of course, with the increasing pervasiveness of the internet it is becoming questionable whether documents need be delivered to securityholders and potential investors at all. Arguably the next step in the evolution of Canadian securities legislation in this area is to require securityholders and investors to obtain all of the information necessary to make an informed investment decisions from the electronically accessible public disclosure record of a reporting issuer available on SEDAR and SEDI.

³⁹ The CSA has noted that they expect only a limited number of contracts to be filed by issuers as issuers are not expected to enter into contracts that are unusual in their businesses on a regular basis.

APPENDIX I

Documents that are required to be filed electronically pursuant to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)*⁴⁰.

Document	Applicable Jurisdiction (applies to all jurisdictions if blank)
SECURITIES OFFERINGS	
General Filings	
Initial Annual Information Form – Prompt Offering Qualification System (“POP” System ⁴⁰)	
Revised Annual Information Form – POP System	
Renewal Annual Information Form – POP System	
Preliminary Short Form Prospectus – POP System	
Final Short Form Prospectus – POP System	
Supplemented Short Form PREP Prospectus	
Preliminary Short Form Prospectus – Shelf	
Final Short Form Prospectus – Shelf	
Prospectus Supplement – Shelf	
Preliminary Prospectus – Multijurisdictional Disclosure System (“MJDS”)	
Final Prospectus – MJDS	
Prospectus Supplement – MJDS	
Preliminary Long Form Prospectus	
Pro Forma Long Form Prospectus	
Final Long Form Prospectus	
Supplemented Long Form PREP Prospectus	
Initial Rights Offering Circular	
Final Rights Offering Circular	
British Columbia Filings	
Preliminary Prospectus (Local Filing)	BC
Final Prospectus (Local Filing)	BC
Preliminary Exchange Offering Prospectus (Local Filing)	BC
Final Exchange Offering Prospectus (Local Filing)	BC
Rights Offering Circular (Local Filing)	BC
Quebec Filings	
Prospectus – Distribution outside Québec (QC sec. 12 Act)	Que
Exchange of Securities – Merger or Reorganization (QC sec. 50 Act)	Que
Alberta Filings	
Preliminary Prospectus (Local Filing)	Alta
Final Prospectus (Local Filing)	Alta
Preliminary Exchange Offering Prospectus (Local Filing)	Alta
Final Exchange Offering Prospectus (Local Filing)	Alta
CONTINUOUS DISCLOSURE	
General Filings	
News Release	BC, Alta, Sask, Ont, Que, NS & Nfld
Material Change Report	
Annual Financial Statements	
Interim Financial Statements	
Annual Report	Que
Annual Information Form (Non-POP System)	
Management’s Discussion & Analysis	BC, Ont & Que
Annual Management Report of Fund Performance	
Interim Management Report of Fund Performance	
Notice of Securityholders’ Meeting and Record Date	
Management Proxy Circular/Information Circular	

⁴⁰ Mutual Fund Issuer related documents have omitted.

Document	Applicable Jurisdiction (applies to all jurisdictions if blank)
Report of Finance Company (Form 29 – British Columbia, Alberta, and Ontario, Form 27 – Saskatchewan)	BC, Alta, Sask & Ont
Change of Auditor Filings	
Future Oriented Financial Information Filings	
Change in Year End Filings	
Form 1 (Resale Rule)	
Oil and Gas Annual Disclosure (NI 51-101)	
Change in Corporate/Legal Structure Filings	
Material Documents/Contracts	
Ontario Filings	
Junior Natural Resource Issuer Filings	Ont
Securities Acquisition	
Issuer Bid Circular	
Notice of Change or Variation	
Issuer Bid Reports	Ont & Que
Going Private Filers	
Going Private Transaction Filings	Ont & Que
Related Party Transaction Filings	Ont & Que
THIRD PARTY FILINGS	
Take-over Bid Circular	
Notice of Change or Variation	
Directors' Circular	
Director's or Officer's Circular	
Take-over Bid Reports	Ont & Que
Securities Acquisition (Early Warnings)	BC, Alta, Sask, & Man
Press Release and Report	Ont, Que, NS & Nfld
Proxy Solicitation Materials	

APPENDIX II

Filing and Delivery Requirements pursuant to OSC Rule 41-501 - *General Prospectus Requirements.*

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
DOCUMENTS REQUIRED TO BE FILED			
Documents filed in conjunction with a Preliminary Long-Form Prospectus			
Signed copy of short form preliminary prospectus (English and French)	Filed	Electronic	Commission
Mining reports (as applicable)	Filed	Electronic	Commission
Oil and gas reports (as applicable)	Filed	Electronic	Commission
Certificate of related credit supporter (is applicable)	Filed	Electronic	Commission
The Commission may request the filing of advertising or sales literature used in connection with the prospectus	Filed	Paper	Commission
Documents filed in conjunction with a Final Long Form Prospectus			
Signed copy of short form prospectus (English and French)	Filed	Electronic	Commission
Issuer's submission to jurisdiction	Filed	Electronic	Commission
Non-issuers submission to Jurisdiction	Filed	Electronic	Commission
Expert's consent	Filed	Electronic	Commission
Credit supporter's consent	Filed	Electronic	Commission
Material contracts	Filed	Electronic	Commission
Other mining reports (as applicable)	Filed	Electronic	Commission
Other oil and gas reports (as applicable)	Filed	Electronic	Commission
Other reports and valuations (as applicable)	Filed	Electronic	Commission
The Commission may request the filing of advertising or sales literature used in connection with the prospectus	Filed	Paper	Commission
Miscellaneous documents to be Filed			
Signed copy of prospectus amendment (English and French)	Filed	Electronic	Commission
Documents required to support an amendment	Filed	Electronic	Commission
Consent letters (as required) to support an amendment	Filed	Electronic	Commission
DOCUMENTS REQUIRED TO BE DELIVERED			
Documents to be delivered in conjunction with a Preliminary Long-Form Prospectus			
Personal information (as prescribed by NI 41-501) with respect to each director and executive officer of an issuer and of the promoter of the issuer	Delivered	Paper	Commission
Authorization to collect	Delivered	Paper	Commission

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
personal information			
Calculations of earnings coverage (for debt securities)	Delivered	Paper	Commission
Material contracts	Delivered	Paper	Commission
Reports and valuations	Delivered	Paper	Commission
Auditors comfort letter regarding audited financial statements (if applicable)	Delivered	Paper	Commission
Comfort letter regarding foreign auditor's report (if applicable)	Delivered	Paper	Commission
Documents to be delivered in conjunction with a Final Long-Form Preliminary Prospectus			
Auditor's comfort letter regarding unaudited financial statements	Delivered	Paper	Commission
Blacklined final prospectus	Delivered	Paper	Commission
Miscellaneous documents to be delivered			
Blacklined copy of an amended preliminary long form prospectus or final long form prospectus	Delivered	Paper	Commission

APPENDIX III

General Filing and Delivery Requirements pursuant to National Instrument 51-102, *Continuous Disclosure Obligations*.

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
DOCUMENTS REQUIRED TO BE FILED			
Annual financial statements and auditors report	Filed	Electronic	Commission
Interim financial statements (must be accompanied by a notice if unaudited)	Filed	Electronic	Commission
Notice of change of year end	Filed	Electronic	Commission
Notice with respect to change in corporate structure	Filed	Electronic	Commission
Change of auditor notice	Filed	Electronic	Commission
Auditor reporting package	Filed	Electronic	Commission
Annual MD&A	Filed	Electronic	Commission
Interim MD&A	Filed	Electronic	Commission
Supplement to MD&A (for SEC issuers)	Filed	Electronic	Commission
Annual information form	Filed	Electronic	Commission
Materials incorporated by reference in the AIF	Filed	will depend on the nature of the document filed	Commission
Material change reports	Filed	Electronic	Commission
Material change related news releases	Filed	Electronic	Commission
Business acquisition report	Filed	Electronic	Commission
Proxy	Filed	Electronic	Commission
Information circular	Filed	Electronic	Commission
Any additional information send to securityholders	Filed	will depend on the nature of the document filed	Commission
Change of status report (i.e. a reporting issuer becomes a venture issuer)	Filed	Electronic	Commission
Voting results report	Filed	Electronic	Commission
Any news releases issued that disclose information regarding historical or prospective results of operations	Filed	Electronic	Commission
Articles of incorporation, amalgamation, continuation or any other constating or establishing documents.	Filed	Electronic	Commission
contracts that can reasonably be regarded as materially affecting the rights of its securityholders generally	Filed	Electronic	Commission
Securityholders' right plan or similar such plans	Filed	Electronic	Commission
Material contracts	Filed	Electronic	Commission
DOCUMENTS REQUIRED TO BE DELIVERED			
Annual request for delivery of financial statements and MD&A, the interim financial statements and MD&A.	Delivered	Paper	Registered holders and beneficial owners of securities
Auditor reporting package	Delivered	Paper	Former Auditor
MD&A (if requested by a registered or beneficial holder)	Delivered	Paper	Registered holders and beneficial owners of securities
Material change reports	Delivered	Paper	Commission

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
marked confidential			
Proxy	Delivered	Paper	Registered holders and beneficial owners of securities
Information Circular	Delivered	Paper	Registered holders and beneficial owners of securities

APPENDIX IV

General Filing and Delivery Requirements pursuant to National Instrument 44-101 – *Short Form Prospectus Distributions*.

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
DOCUMENTS REQUIRED TO BE FILED			
Documents filed in conjunction with a Short Form Preliminary Prospectus			
Signed copy of short form preliminary prospectus (English and French)	Filed	Electronic	Commission
Qualification certificate	Filed	Electronic	Commission
Material incorporated by Reference	Filed	will depend on the nature of the document filed	Commission
Mining reports (if required)	Filed	Electronic	Commission
Oil and gas reports (if required)	Filed	Electronic	Commission
Documents filed in conjunction with a Short Form Final Prospectus			
Signed copy of short form prospectus (English and French)	Filed	Electronic	Commission
Material incorporated by reference	Filed	will depend on the nature of the document filed	Commission
Issuer's submission to jurisdiction	Filed	Electronic	Commission
Non-issuers submission to jurisdiction	Filed	Electronic	Commission
Experts consent	Filed	Electronic	Commission
Credit supporter's consent (if applicable)	Filed	Electronic	Commission
Material contracts	Filed	Electronic	Commission
Other mining reports (if applicable)	Filed	Electronic	Commission
Other oil and gas reports (if applicable)	Filed	Electronic	Commission
Other reports and valuations (if applicable)	Filed	Electronic	Commission
Documents filed in conjunction with an AIF			
Annual information form (initial or renewal)	Filed	Electronic	Commission
Revised annual information form (initial or renewal)	Filed	Electronic	Commission
Material incorporated by reference into the AIF	Filed	will depend on the nature of the document filed	Commission
Mining reports	Filed	Electronic	Commission
Documents to be filed in the case of an amendment			
Signed copy of prospectus amendment	Filed	Electronic	Commission
Documents required to support an amendment (as applicable)	Filed	Electronic	Commission
Consent letters (as required) to support an amendment	Filed	Electronic	Commission
DOCUMENTS REQUIRED TO BE DELIVERED			
Documents to be delivered in conjunction with a Short Form Preliminary Prospectus			
Personal information with respect to each director executive officer of an issuer and of the promoter of the issuer	Delivered	Paper	Commission

Document	Filed or Delivered?	Form: Paper or Electronic	Who is document filed with or delivered to?
Authorization to collect personal information	Delivered	Paper	Commission
Calculations of earnings coverage (for debt securities)	Delivered	Paper	Commission
Material contracts	Delivered	Paper	Commission
Reports and Valuations	Delivered	Paper	Commission
Auditors comfort letter regarding audited financial statements	Delivered	Paper	Commission
Documents to be delivered in conjunction with a Short Form Final Prospectus			
Auditor's comfort letter regarding unaudited financial statements	Delivered	Paper	Commission
Blacklined prospectus	Delivered	Paper	Commission
Documents to be delivered in the case of an amendment			
Blacklined copy of an amended a preliminary prospectus or short form prospectus	Delivered	Paper	Commission
Documents required to support an amendment (as applicable)	Delivered	Paper	Commission
Prospectus Amendment	Delivered	Paper	Each recipient of the original short form prospectus
Documents to be delivered in conjunction with an AIF			
Personal information with respect to each director executive officer of an issuer and of the promoter of the issuer	Delivered	Paper	Commission
Authorization to collect personal information	Delivered	Paper	Commission
Upon request: the following shall be delivered: 1) one copy of the AIF 2) material incorporated by reference 3) financial statements of most recently completed financial year for which financial statements have been filed together with accompanying report of the auditor and a copy of the most recent interim financial statements of the issuer that have been filed (if any) 4) one copy of the information circular of the issuer of its most recent annual meeting of shareholders 5) once copy of any other documents that are incorporated by reference in the preliminary short form prospectus or the short form prospectus	Delivered	Paper	Any person or company who so requests

