

COMMENT LETTER /SUBMISSION

NOTICE AND REQUEST FOR COMMENT

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

AND

**PROPOSED AMENDMENTS TO
NATIONAL POLICY 41-201 *INCOME TRUSTS AND OTHER INDIRECT OFFERINGS***

AND

**PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 44-101 *SHORT FORM PROSPECTUS DISTRIBUTIONS* AND
COMPANION POLICY 44-101CP *TO NATIONAL INSTRUMENT 44-101 SHORT FORM
PROSPECTUS DISTRIBUTIONS***

AND

**PROPOSED AMENDMENTS TO
COMPANION POLICY 44-102CP *TO NATIONAL INSTRUMENT 44-102 SHELF
DISTRIBUTIONS***

AND

**PROPOSED AMENDMENTS TO
NATIONAL POLICY 47-201 *TRADING SECURITIES USING THE INTERNET AND OTHER
ELECTRONIC MEANS***

http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20111125_41-101_rfc-pro-amd-pre-marketing.htm

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We appreciate the opportunity to comment on the proposed amendments. Due to our limited resources we are able to provide only a high level commentary on the proposed changes. Our general concern is that the sheer number of relaxations of regulatory rules is coming at a time of increased retail investor abuse and threats to the Ombudsman for Banking Services and Investments.. For us, the priority is changing the Fund Facts disclosure regime, saving and fixing OBSI , amending NI31-103 to mandate OBSI ,a restitution fund for investors , a fiduciary standard for those licensed as advisers and an increase in provincial statute of limitation periods.

As we understand it ,under the proposed amendments, issuers would be permitted to upsize a bought deal; term sheets and road shows would be permitted for use in marketing public offerings, subject to specified conditions and restrictions; and issuers and investment dealers would be permitted to “test the waters” for certain initial public offerings (IPOs) before filing a preliminary prospectus. Our focus in this submission is on investor protection for retail investors.

Disclosure is one of the pillars of investor protection so any attempt to water down aspects of disclosure is immediately suspect. Even with full regulator approved disclosure , our experience is that the content , jargon and legalese are of limited use to the average retail investor. We are glad to see that mutual funds are not included .However, it appears that ETF's and closed end funds are included. It s not so long ago that leveraged and reverse ETF disclosures caused so much confusion for retail investors and even their advisors.

Our main concern with this proposal is that marketing efforts sometimes go beyond what is in a prospectus, but misrepresentations that are outside of the prospectus do not attract liability under s. 130 of the Securities Act. So it is very hard to sue market participants who make misrepresentations during a “road show” unless those misrepresentations are also in the prospectus.

The proposed amendments introduce a limited permission for road shows (a presentation to potential investors regarding a distribution of securities conducted by an investment dealer on behalf of an issuer in which one or more executive officers of the issuer participate.) for retail investors during the waiting

period. Under definitions, we recommend the term “retail investor” be defined. The proposed conditions for conducting such a road show would, as we understand it, include:

- that the disclosure in the road show must be fair, true and plain; Too often we see exaggerated claims, undefined assumptions, controversial back-testing practices, cleverly drawn /misleading charts , unsupported “facts” and the like. Our comment here is “What happens if such disclosures are not accurate, true , up-to-date or complete?”. What kind of enforcement is contemplated or possible? It is also not clear if independent review and approval of marketing/presentation materials by individuals with appropriate authority and proficiency (e.g. Chief Compliance Officer (CCO) is required.
- other than contact information for the investment dealer conducting the road show, all information in the road show concerning the securities must be disclosed in the preliminary prospectus and any amendment to the preliminary prospectus;
- that the issuer provide written authorization to the investment dealer to conduct the road show; and
- that only potential investors, registered individuals (i.e., representatives of a registered investment dealer) and representatives of the issuer attend the road show. Under the proposed amendments, an investment dealer would not be permitted to provide written material, other than a preliminary prospectus, to an investor attending a retail road show unless the written material complies with the term sheet requirements . Notably, the retail road show provisions do not permit the inclusion of comparables (unless they are included in the preliminary prospectus, for which statutory liability attaches). We agree with the CSA's concern that allowing comparables to be provided to retail investors could be “cherry picked” and misunderstood by retail investors. In any event, retail investors invited to a road show should be only ones for which the potential investment is suitable. We also take this opportunity to remind regulators that seniors are particularly vulnerable to road shows. There is a fear that they may feel obligated to honour any indications of interest based on disclosures that may subsequently materially change.

The proposed amendments require that the investment dealer conducting a road show must commence the road show by reading a prescribed cautionary statement making reference to the preliminary prospectus or final prospectus, as applicable. We would suggest that any documents distributed be prominently marked with suitable cautionary language and warnings.

There should be a requirement that dealers must establish, maintain and apply policies and procedures that establish a system of controls and supervision to ensure compliance with securities legislation and these proposed amendments.. CSA Staff Notice 31-325 – Marketing Practices of Portfolio Managers gives numerous examples of misleading marketing practices that seem to recur year after year , despite repeated OSC cautions and warnings. The CSA is no doubt aware that these malpractices are not limited to Portfolio managers. This is why we are constructively critical of the pre-marketing initiatives.

Presumably the reference to written materials is meant to include electronic files or slide shows made available over the Internet , Social media or by electronic means. We assume “attendance” means physical attendance in all cases and not conference calls, /webinars or similar web technologies (because of the inability to validate identity) . The amendments should state a minimum retention period of attendee records at road shows.

While the CSA believe that the policy rationale for the existing rules (including ensuring equal access to information, providing investor protection through adequate disclosure, deterring conditioning of the

market and deterring insider trading) still apply, the proposed amendments ease regulatory restrictions faced by issuers and investment dealers when marketing prospectus offerings. We urge the CSA to refer the issue to the OSC's Investor Advisory Panel for deeper consideration.

Summary and Conclusion

We see these amendments as adding risks for retail investors without much or any corresponding benefits or safeguards. We remember specifically that exaggerated claims was an issue in the infamous FMF case . A Powerpoint presentation that was used on the roadshow employed very aggressive and misleading language that did not appear in the prospectus, but the defendants could not be sued under s. 130 for those statements. We would be less uncomfortable with this proposal if the Securities Act were amended to impose liability for misrepresentations in any in marketing efforts made in connection with a public offering. Even so, we remain lukewarm supporters of this initiative. The KYC/Suitability constraints should apply to all retail investors invited to the road shows. We also have concerns that some issuers and dealers are selling exempt securities in reliance on the accredited investor (AI) exemption to individual investors who do not meet the definition of an AI-we have suggested a tightening of the definition of AI. Bottom line: We do not see how these changes that increase the range of permissible pre-marketing and marketing activities in connection with prospectus offerings is in the best interests of retail investors.

Do not hesitate to contact us should there be any questions about our submission.

We consent to the public posting of this Comment letter.

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cc

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Autorité des marchés financiers
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