

# PROPOSED CHANGES TO THE PROMOTIONAL ACTIVITY DISCLOSURE REQUIREMENTS: INSTRUMENT 51-519

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On May 26, 2021, staff of the BCSC ("**Commission**") proposed Instrument 51-519 *Promotional Activity Disclosure Requirements* ("**Instrument**") that would introduce additional obligations on reporting issuers as part of the Commission's ongoing work to regulate promotional activity.<sup>[1]</sup> The purpose of the Instrument is to provide a framework for promotional activity disclosure and enhanced transparency for investors in the marketplace.<sup>[2]</sup> The Commission has provided a 60-day comment period for stakeholders to address the proposed Instrument, which expires on July 26, 2021.<sup>[3]</sup>

In recent years, regulators have identified an increase in promotional activity that they viewed as non-compliant with securities law requirements.<sup>[4]</sup> For example, social media platforms are often used for promotional activity, however, disclosure related to potential conflicts or financial interests of the promoters has not always been disclosed as it would typically be in more traditional promotional documents.<sup>[5]</sup> The Commission has worked to address issues related to promotional activity in several ways.

In 2018, CSA Staff Notice 51-356 *Problematic promotional activities by issuers* discussed the increase in these issues.<sup>[6]</sup> The notice outlined activities of concern, particularly promotional campaigns that provide unsubstantiated material information relating to an issuer's business.<sup>[7]</sup> Following this, in March of 2020, the B.C. *Securities Act* ("**Act**") was amended to provide additional measures for the Commission to regulate promotional activity.<sup>[8]</sup> These amendments include the new definition of "promotional activity", which is defined more broadly than "investor relations activities". The amendments also created related powers of the Commission to issue orders against persons engaged in promotional activity, and provided specific prohibitions against certain statements with respect to the promoted company or securities for persons engaged in promotional activity. The proposed Instrument continues this work of securities regulators by introducing new disclosure requirements for promotional activity.

The Instrument would apply to all reporting issuers, and as a British Columbia instrument, the promotional activity would need to have a real and substantial connection to the province of British Columbia ("**BC**") for the Commission to have jurisdiction over the activity. This 'real and substantial connection' to BC may be achieved where the activity is directed or targeted towards a person in the Province, the issuer is a reporting issuer in BC,

the activity relates to a listed security on an exchange recognized under section 24 of the Act, or the issuer is directed, administered or has operations in BC.<sup>[9]</sup> Due to the interconnectedness of Canada's capital market, the Instrument will likely reach activities conducted across the country.

The current draft of the Instrument applies to all reporting issuers but specifically does not apply to enumerated categories of persons, such as a person or company that is registered with respect to promotional activity relating to their activities as registrant, international dealers, and international advisors. Importantly though, the Instrument would apply to the companies that engage the services of these groups requiring such companies to provide the additional disclosure around promotional activities. Though the registrants themselves are not mandated to provide disclosure, a reporting issuer that engages a registrant would be mandated to then provide disclosure on the promotional activities of the registrant.<sup>[10]</sup>

The mandated disclosure is proposed to occur in the following ways:<sup>[11]</sup>

**Promotional Disclosure:** Issuers will be required to disclose promotional communications if a person or company is engaged to conduct promotional activity; this could occur orally within presentations, however if the promotion is in writing, the disclosure must be prominent within that written document as well. The disclosure would need to include specified information outlined in more detail within the Instrument itself. This disclosure includes the identity of the of the person conducting the activity, ownership of securities of that person, any trading or transactional intentions of that person, along with additional enumerated items such as compensatory information, platforms or mediums used for promotional activities, and any ownership or intent to acquire securities of the issuer.

**News Releases:** The Instrument will require that venture issuers, meaning those issuers that are not listed on the Toronto Stock Exchange, the Aequitas NEO Exchange or a U.S. marketplace, issue a news release if they arrange for a person or company to conduct promotional activity. This disclosure must include a description of the activity, the contact information of the person or company conducting promotional activity and their relationship with the issuer, the date and duration of the activity as well as its nature, the platform through which it will occur, and an outline of the compensation being received by the person conducting promotional activity. In addition, such issuers may also be required to provide updated news releases if significant changes occur to the information in the news release. Promotional activity conducted by persons within a company, specifically its directors, officers, or employees, is exempt from certain portions of the Instrument, including these news releases.

**MD&A:** Venture issuers will be required to disclose total expenditures in an MD&A if the operating expenses of the promotional activities exceed 10% of total operating expenses. They may also be required to disclose the components of the expenditures that comprise the promotional activities in their interim and annual

MD&A.<sup>[12]</sup>

The proposed Instrument represents the broader initiative by securities regulators to address promotional activities that they view as problematic.<sup>[13]</sup> If adopted, issuers should be aware of the additional compliance obligations they will have when engaging in, or hiring others to engage in, promotional activity as well as their increased continuous disclosure requirements.

[1] Notice and Request for Comment - Proposed Companion Policy 51-519 Promotional Activity Disclosure Requirements, BCSC Weekly Summary Issue 21:22 (26 May 2021) BC Notice 2021/03.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] CSA Staff Notice 51-356 Problematic promotional activities by issuers, CSA Notice, (2018) 41 OSCB 9357.

[7] *Ibid.*

[8] *Supra* note 1.

[9] Annex B – *Proposed Companion Policy 51-519 Promotional Activity Disclosure Requirements*, BCSC Weekly Summary Issue 21:22 (26 May 2021) BC Notice 2021/03.

[10] Annex A – *Proposed Companion Policy 51-519 Promotional Activity Disclosure Requirements*, s.2, BCSC Weekly Summary Issue 21:22 (26 May 2021) BC Notice 2021/03.

[11] *Supra* note 1.

[12] *Ibid.*

[13] *Ibid.*

by [Cory Kent](#), [Sasa Jarvis](#), [Katherine Akladios](#) (Summer Law Student)

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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