

## National Instrument 43-101: Considerations for Private Issuers

Alexander Pizale, Gregory Hogan, Christopher Harasym

June 24, 2025

The requirement to comply with National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (NI 43-101) is widely known by Canadian public companies with interests in mineral projects. However, private (non-reporting) issuers with an interest in a mineral project on a property material to the private issuer are often not aware that they are also subject to NI 43-101 and must navigate their own compliance challenges. This article focuses on the specific issues that apply to private issuers when considering technical disclosure and compliance with NI 43-101.

### How does NI 43-101 Apply?

NI 43-101 defines “disclosure” to mean (**emphasis added**):

*“any oral statement or written disclosure made by or on behalf of **an issuer** and **intended to be, or reasonably likely to be, made available to the public in a jurisdiction of Canada**, whether or not filed under securities legislation, but does not include written disclosure that is made available to the public only by reason of having been filed with a government or agency of government pursuant to a requirement of law other than securities legislation”*

This definition illustrates that the **availability** of the disclosure drives the requirement to comply with NI 43-101, rather than solely the nature of the issuer itself (private vs. public). NI 43-101 further indicates the applicability of the rule to private issuers by virtue of the use of “issuer” rather than the narrower concept of “reporting issuer” used in other securities law instruments.

A core principle of NI 43-101 is that it is intended to capture information made available to the “public” by issuers. Accordingly, private issuers must be mindful of both their intended and likely audience when making statements about a mineral project on a property material to the private issuer.

### Who is Considered the Public?

While there is not a bright line test, the concept of what is considered to be “public” has been interpreted broadly by regulators and the determination will be based upon the facts of each case. Some key factors for

consideration are: (i) the number of persons the disclosure is provided to, (ii) the experience of such persons and their access to advice, (iii) their net worth and ability to handle risk, and (iv) their relationship to the issuer. A common test in Canada is to consider if the persons have common bonds of interest or association with the issuer or its personnel, which could include friends, family, and business associates.

## Technical Report Requirements

In most cases, private issuers that do not plan to go public in Canada will not have prepared a technical report under NI 43-101 or filed it on SEDAR+. However, NI 43-101 does contain a number of relevant and important to remember technical report triggers that are often overlooked by private issuers. Potential technical report triggers applicable to a private issuer may include:

1. The use of an “offering memorandum” or “OM” for an offering of securities, unless it is provided only to accredited investors. An offering memorandum includes the prescribed form for issuers relying on the offering memorandum prospectus exemption, and can also include any document purporting to describe the business and affairs of an issuer that has been prepared primarily for delivery to and review by a prospective investor to assist the prospective investor in making an investment decision under a prospectus exemption. This latter type of OM would include investor presentations and similar documents, and is the form of OM that is most likely to trigger a technical report for private issuers. To avoid triggering a filing requirement, private issuers can restrict the distribution of any OM to accredited investors or structure transactions, to the extent possible, to avoid triggering a technical report.
2. M&A transactions where the private issuer is involved in a shareholder approved acquisition as acquiror or target that involves share consideration, and an information circular is prepared to obtain that shareholder approval. This would include circulars prepared for acquisitions completed by way of an amalgamation.
3. M&A transactions where the private issuer tenders a formal bid for a private target.
4. Public disclosures of mineral reserves, mineral resources, or the results of a preliminary economic assessment (PEA) *that are material changes* in relation to the private issuer (Triggering Information).

Private issuers seeking to avoid technical report requirements should refrain from publicly sharing Triggering Information. Disclosures in press releases, corporate presentations, or on public websites may trigger a technical report filing or other compliance with NI 43-101 requirements. A private issuer will need to satisfy itself that Triggering Information will not be made available beyond its intended, limited audience to ensure it is not considered “public” and should take active measures to ensure that there is not an inadvertent public disclosure, including by labelling materials containing Triggering Information as “confidential” and restricting access.

If Triggering Information is made public — intentionally or inadvertently — the private issuer will be required to

file a technical report on SEDAR+ within 45 days. Private issuers have the ability to create a SEDAR+ profile and file technical reports in accordance with NI 43-101.

## Disclosure Standards

Complying with the disclosure standards can pose practical challenges for private issuers, as the rules may not be as familiar and the resources may not be as readily available or known to such issuers. For example, one of the most fundamental requirements of NI 43-101 is that scientific and technical disclosures made available to the public must be based upon information prepared by or under the supervision of a qualified person (QP) or approved by a QP. Private issuers may not have an ongoing relationship with a QP, or have a QP that is engaged and regularly involved in a project. Therefore, any planned disclosure involving scientific or technical information should factor in the time and cost associated with QP review.

For a summary of the disclosure standards under NI 43-101, please refer to our earlier publication entitled [“National Instrument 43-101: What Issuers Need to Know About the Application of NI 43-101”](#) dated January 25, 2024.

## Conclusion

Private issuers in Canada must remain vigilant in understanding and adhering to the disclosure and technical reporting requirements under NI 43-101, even if they are not reporting issuers. The broad interpretation of “public” by regulators means that caution should be exercised in all forms of communication involving scientific or technical information.

[For more on National Instrument 43-101, find all our articles in this series here.](#)

---

*Cassels has distinguished itself in the vanguard of the mining industry, offering the largest and most experienced dedicated mining group of any major Canadian law firm. Led by [Jen Hansen](#) and [Jennifer Traub](#), we are proud to be consistently ranked as Tier 1 for mining law by Chambers Canada. To learn more, visit [cassels.com/mining](https://cassels.com/mining).*

---

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*