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VIA E-MAIL to marsha.manolescu@seccom.ab.ca

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Financial Services Commission

c/o Marsha Manolescu
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Alberta Securities Commission
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Dear Sirs & Mesdames:

Proposed Amendments to Multilateral Instrument 45-102 *Resale of Securities*

This letter is in response to the request for comments (the "Request for Comments") relating to the proposed repeal and replacement of Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102"). Defined terms used in the Request for Comments will be used in this comment letter.

We believe that MI 45-102 represents a significant advancement toward the goal of harmonizing securities regulation throughout the provinces and territories of Canada. Harmonizing the rules governing the resale of securities is especially important in light of the fact that Canada's two principal securities markets, the Toronto Stock Exchange and the TSX Venture Exchange, serve investors in all thirteen jurisdictions and effectively operate on a national basis. The proposed amendment of MI 45-102 presents an opportunity to resolve a number of difficulties that have been identified in the current multilateral instrument and make even further improvements.

Section 2.3 and Appendix D

We understand that it may have been the original intention only to list in Appendix D those provisions of securities legislation that were in existence prior to the adoption of MI 45-102. Any subsequently introduced prospectus exemptions would then specify, in the instrument in which they were introduced, whether resales would be subject to Section 2.5 or Section 2.6 of

MI 45-102. Unfortunately, this approach introduces an undesirable level of complexity in using MI 45-102. Ontario's private placement rules are now contained largely in OSC Rule 45-501, which is not referred to at all in Appendix D. Similarly, the new capital raising exemptions of Multilateral Instrument 45-103 ("MI 45-103"), which is in effect in Alberta and British Columbia and under consideration in other jurisdictions, are not referred to.

We recognize that MI 45-102 must be structured so that newly-created prospectus exemptions can be added in various jurisdictions without constantly having to amend Appendix D or Appendix E. However, since the instrument is currently being amended, we urge the CSA to take this opportunity to update it by adding to Appendix D and Appendix E the appropriate references to all prospectus exemptions currently in effect in all provinces and territories, including OSC Rule 45-501 and MI 45-103. Accepting this recommendation would make it significantly easier to use and understand MI 45-102, particularly in light of the current complicated interplay between MI 45-102 and OSC Rule 45-501.

Section 2.5(1)

This section currently provides that a trade specified by Section 2.3, or "other securities legislation of a jurisdiction", is a distribution. We are concerned that there is currently some ambiguity as to whether Section 2.5(1) deems trades specified under the "legislation of a jurisdiction" to be a distribution just within that particular jurisdiction, or rather for the purposes of all jurisdictions that have adopted MI 45-102.

We recommend that, for the avoidance of doubt, this provision be revised to say "…or other securities legislation of *any* jurisdiction *in which this Section 2.5 applies*, is *deemed to be* a distribution *for the purposes of the securities legislation of each jurisdiction in which this Section 2.5 applies*". This will clarify what must already be the intention of Section 2.5, which is to allow each jurisdiction to determine the resale regime that will apply to securities on a national basis, rather than just within the jurisdiction itself. Otherwise, securities privately placed in one province would immediately be freely tradeable in every other jurisdiction, which cannot be the intended result. Take, for example, securities issued in Ontario under the accredited investor provisions of OSC Rule 45-501. Although OSC Rule 45-501 specifies that trades made under that exemption are subject to Section 2.5 of MI 45-102, that rule is only effective under Ontario law and has no authority in British Columbia. Accordingly, it is only by virtue of the wording of Section 2.5 of MI 45-102 (because that provision is also effective under British Columbia law) that a resale by the Ontario accredited investor to a B.C. purchaser would be deemed to be a distribution.

Section 2.5(2)3 – Legend Requirement

(a) Request for an Alternative to the Legend Requirement

Notwithstanding the rationale articulated in Section 1.7 of the Companion Policy to proposed MI 45-102, we do not believe that imposing a requirement to place a legend on a certificate evidencing a security is necessarily the most effective manner of alerting investors to the existence of resale restrictions under Canadian securities laws. In many cases, investors do not even physically receive possession of the certificate. Some private companies, for example, have a practice of keeping all original share certificates in the minute book, so that investors will not lose them. Further, securities sold in a private placement transaction made through an underwriter or selling agent are usually represented by a global note or share certificate which is registered in the name of a depository or other intermediary, and investors only hold beneficial interests in those securities. Finally, if the certificate is not legended it is the holder who suffers the sever consequence that the securities will never become freely tradeable in Canada (although it is only the holder, and not the issuer, who has control over whether or not the certificate is legended).

There are also costs and inconveniences associated with the legending requirement that may greatly outweigh its benefits. Take, for example, an Ontario issuer that has common shares listed on the Toronto Stock Exchange. The issuer proposes to offer convertible debt principally in the United States under Rule 144A, or under a U.S. registration statement. The issuer would also like to be able to make sales to eligible Canadian private placement purchasers under prospectus exemptions. Ordinarily, a single global certificate would be issued and registered in the name of the Depository Trust Company ("DTC") in the United States, which would act as the registered holder for all beneficial purchasers, including institutions in Canada.

We understand from past discussions with DTC that, in a registered U.S. offering, it cannot accept a security that bears any restrictive legend, even one required by the securities laws of another jurisdiction. Further, private placement offerings under Rule 144A typically must be able to trade through the PORTAL market in order to be attractive to U.S. institutional investors. We understand that any legend on a security certificate, other than the legend required under U.S. securities laws, will compromise the ability to make a security eligible for trading through PORTAL.

We understand that some issuers in this type of situation have been reluctant to pursue resolving the logistical difficulties of issuing separate physical certificates to each Canadian investor, or creating – and finding a depository or other nominee willing to hold – a global certificate solely evidencing the beneficial ownership position of Canadian investors. These reasons have, on occasion, led issuers to make sales to Canadian institutional purchasers without satisfying the legending requirements of MI 45-102. In such cases purchasers should be notified that MI 45-102 will not be available and that no resales – either of the convertible debt, or the underlying

TSX-listed shares – will ever be permitted under Canadian law, and that all resales must only be made into the United States. This seems to be a bizarre result, and arguably may do more to undermine the credibility of our regulatory regime than help ensure compliance with it.

We therefore strongly urge the CSA to provide issuers with an alternative option to the legending requirement. One possibility would be to provide that, in lieu of placing a legend on the certificate evidencing the security, the applicable resale restrictions may be brought to the attention of Canadian purchasers through disclosure in the offering document (or a supplement to it). Purchasers could also be required to provide representations and warranties confirming that they are aware of the applicable resale restrictions and will comply with them. If the original purchaser resells the security to a subsequent purchaser during the applicable hold period by means of another private placement exemption, the original purchaser should be required to disclose to the subsequent purchaser the length of the hold period remaining. A subsequent purchaser could also be required to provide representations and warranties to the original purchaser confirming that it is aware of the length of the remaining hold period and that it will comply with it.

(b) Timing

Section 2.5(2)3 requires that "a certificate representing the securities was issued that carried a legend stating…". This requirement is in urgent need of clarification. Does it mean that all securities must, at the time they are issued, be evidenced by a legended certificate or else they will never be eligible for resale under MI 45-102? Some practitioners have taken that view, but it seems unduly harsh and restrictive. What if the securities are shares of a private company that, to reduce administrative costs and complexities, would prefer not to issue any certificates unless and until the investor requests them? Or what if, through oversight, no certificate is issued at the time? If a certificate was issued that inadvertently omitted the legend, can that defect be cured by re-issuing a new certificate with a legend? If so, until what point in time? Can a holder of an unlegended certificate surrender it to the issuer, get a new one with the required legend, and then proceed to make a trade under MI 45-102 all in the same day? What purpose is served by the requirement in that case, especially since the four month restricted period will have already expired? The result of the failure to comply with the legending requirement in Section 2.5(2)3 is that an otherwise lawful resale after the four month hold period will be an illegal distribution. We therefore submit that clarification must be made within the body of MI 45-102 itself, and not merely in a companion policy or through a Frequently Asked Questions document.

(c) Text of the Legend

We also wish to raise several specific comments relating to the text of the legend that has been proposed in new MI 45-102. First, we recognize that the language in proposed Section 2.5(2)3 is an attempt to simplify the legending requirement by creating a single, relatively brief provision that can be used in all circumstances. However, we strongly urge the CSA to revert to two

separate forms of legend, one for an issuer that is a reporting issuer on the distribution date, and one for non-reporting issuers. For a reporting issuer, the legend should simply state that the restriction applies until the date that is four months and a day following the distribution date, as contemplated by current Section 2.5(2)3. A holder of a security bearing this legend need only consult a calendar to determine if the security is freely tradeable. If the issuer is a reporting issuer on the distribution date, this simple and convenient legend should be all that need be said. Requiring all issuers to add the reference in (ii) to the date the issuer became a reporting issuer imposes a due diligence obligation (i.e., to research the date on which reporting issuer status was obtained) on all holders of legended securities, which is unjustified where the issuer is already a reporting issuer. It would be much simpler, and much more convenient for investors, to require reporting issuers and non-reporting issuers each to use the form of legend appropriate to them.

In addition, we would suggest that the words "unless permitted under securities legislation" should be changed to say "except pursuant to a prospectus or a prospectus exemption". Under securities legislation, trades are never "permitted" – rather, trades that constitute a distribution, including a trade in security subject to a hold period, are prohibited unless the prospectus requirements are complied with or an exemption from those requirements is available. The phrase "unless permitted" therefore only serves to beg the question of whether a proposed trade is, or is not, permitted to be made without a prospectus or an available prospectus exemption. If the purpose of the legend is to allow investors to determine whether or not the securities are freely tradeable, it would seem desirable for them to be able to make that determination without having to consult a securities lawyer to find out whether a proposed sale is "permitted under securities legislation".

Further, we would suggest that the legend be clarified, by means of a heading, to indicate that it only addresses Canadian securities law, and further clarified to indicate that the restriction only applies to resales in certain provinces of Canada. As indicated above, it is very common for Canadian issuers to make concurrent private placements in multiple jurisdictions, or public offerings in the United States with a concurrent private placement in Canada. If the issuer determines to use the legend contemplated by MI 45-102, it should be clear to holders in Europe, for example, that the legend is not intended to prevent them from making resales to other European holders. It should also be clear to holders that the restrictions do not apply to resales made in Manitoba, New Brunswick, Prince Edward Island and the Yukon Territory. Currently, the risk of confusion to holders in other jurisdictions is yet another disincentive for issuers to place the MI 45-102 legend on their securities.

We would therefore propose that the form of legend for use by reporting issuers be as follows:

> ***Resale Restrictions Under Canadian Securities Law*** – Except pursuant to a prospectus or a prospectus exemption, the holder of the securities shall not trade the securities in the Provinces of

> Alberta, British Columbia, Saskatchewan, Ontario, Nova Scotia or Newfoundland and Labrador, or in the Northwest Territories or Nunavut, before [insert the date that is four months and a day after the distribution date].

The proposed form of legend for use by non-reporting issuers would be as follows:

> ***Resale Restrictions Under Canadian Securities Law*** – Except pursuant to a prospectus or a prospectus exemption, the holder of the securities shall not trade the securities in the Provinces of Alberta, British Columbia, Saskatchewan, Ontario, Nova Scotia or Newfoundland and Labrador, or in the Northwest Territories or Nunavut, before the date that is 4 months and a day after the later of (i) [insert the distribution date], and (ii) the date the issuer became a reporting issuer in any province or territory.

Section 2.7 – Exemption for a Trade if the Issuer Becomes a Reporting Issuer After the Distribution Date

It is somewhat unclear to us what rationale underlies the provisions of this section.

(a) Restricted Period

Traditionally, the "hold period" of six, twelve or eighteen months that was imposed by Section 72(4) of the *Securities Act* (Ontario) and comparable provisions in other provinces ran for six, twelve or eighteen months from the *later* of the date of the private placement or the date that the issuer became a reporting issuer. We understand that this hold period was thought to serve two purposes by imposing a *gap* requirement and a *history* requirement. First, it required a *gap* – the length of which varied in the circumstances – between the time that an eligible private placement purchaser acquired the securities and the time it could resell the securities to a non-exempt purchaser. Conceptually, the purpose of this gap was to prevent an indirect distribution to a non-exempt purchaser. Second, by requiring the issuer to have a *history* as a reporting issuer for a prescribed minimum period – the length of which was 12 months – it would be assured that the market would possess sufficient information about the issuer, based on the length of time that it had been subject to continuous disclosure requirements, to justify allowing a non-prospectus exempt purchaser to acquire securities initially sold under a prospectus exemption.

The *gap* requirement survives as Section 2.5(2)2., and the *history* requirement survives as Section 2.5(2)1, although the period of each has been reduced to four months.

It is unclear why the *history* requirement should not apply if the issuer becomes a reporting issuer by filing a prospectus after the distribution date. One could argue that, in light of the

advanced speed of communication and the public availability of documents over the internet, the *history* requirement no longer serves a useful purpose. If that is the case, then Section 2.5(2)1. should be deleted completely. On the other hand, if the *history* requirement is still viewed as relevant, then Section 2.7(1) has the perverse effect of relieving an issuer from the *history* requirement if, and only if, it has a public reporting history of less than four months.

Finally, it is unclear why Section 2.7(1) should be limited to issuers that become a reporting issuer only by filing a prospectus and not by any other means. We would submit that the same result should apply whether the issuer has become a reporting issuer by filing a prospectus, or through any other means that entails the preparation, and public dissemination, of a document containing prospectus-level disclosure.

(b) Seasoning Period

Traditionally, the "seasoning period" of twelve months that was imposed by Section 72(5) of the *Securities Act* (Ontario) and comparable provisions in other provinces was solely for the purpose of imposing a *history* requirement. This *history* requirement survives as Section 2.6(3)1, although it has been reduced to four months.

If the *history* requirement is no longer thought to serve a necessary public policy, it would seem appropriate to delete Section 2.6(3)1 completely. Otherwise, the effect of Section 2.7(2) is also perverse as demonstrated by the following example. Issuer A and Issuer B both issue securities on the same day under exemptions that are specified in Section 2.4 as being subject to Section 2.6 (the "Seasoning Period Securities"). Issuer A became a reporting issuer by completing its initial public offering one month before issuing the Seasoning Period Securities. Issuer B becomes a reporting issuer by completing its initial public offering the day after issuing the Seasoning Period Securities. By virtue of proposed Section 2.7(2), shareholders of Issuer B would be able to trade their Seasoning Period Securities immediately after the initial public offering, even though Issuer B only has a one day reporting history. Shareholders of Issuer A, however, must wait three more months before they can trade their Seasoning Period Securities, even though it has a reporting history that is one month longer than that of Issuer B.

Another example shows the potentially unfair effect of Section 2.7(2) as between security holders of the same issuer. A company issues Seasoning Period Securities to Holder A, and then completes an initial public offering by prospectus one month later. The next day, it issues Seasoning Period Securities to Holder B. By virtue of Section 2.7(2), Holder A's securities become freely tradeable immediately. Holder B, however, cannot avail itself of Section 2.7(2), because the issuer became a reporting issuer before (rather than after) the distribution date of Holder B's securities. Potential purchasers of securities from either Holder A or Holder B have the same information regarding the issuer publicly available to them following its initial public offering, but only Holder B must wait for the four month seasoning period to elapse before it can sell its securities.

Again, it is unclear why Section 2.7(2) should be limited to issuers that become a reporting issuer only by filing a prospectus and not by any other means resulting in the preparation of a document containing prospectus-level disclosure.

(c) Control Person

Traditionally, Section 72(7) of the *Securities Act* (Ontario) and the comparable provisions of other provinces required that an issuer have an eighteen-month history as a reporting issuer before a control person would be allowed to make sales into the public market through the use of the provisions contained in Section 72(7). This eighteen-month history requirement survives as Section 2.8(2)1 of proposed MI 45-102, although it has been reduced to four months.

For the same reasons discussed above in the example regarding Seasoning Period Securities, it is difficult to understand the rationale underlying proposed Section 2.7(3). It would seem that the condition in Section 2.8(2)1 should either be deleted entirely or proposed Section 2.7(3) should be removed. Finally, it is unclear why becoming a reporting issuer through the preparation of a prospectus should be distinguished from becoming a reporting issuer by any other means that requires prospectus-level disclosure regarding the issuer to be made publicly available.

Section 2.14 – First Trades in Securities of a Non-Reporting Issuer Distributed under a Prospectus Exemption

We understand that the policy rationale underlying Section 2.14 is that resale restrictions under Canadian securities laws should not apply so as to preclude a Canadian holder of foreign securities from reselling them outside of Canada. We fully support this position, but would submit that it does not go far enough toward achieving its intended objective. If the purpose of Canadian securities laws is to serve as a form of consumer protection legislation for Canadian investors, we do not see what Canadian public policy objective is achieved by imposing any limitation on the ability of Canadians to resell securities through an exchange or market outside of Canada, or otherwise to a person or company outside of Canada. The United States has taken a similar approach (except in the case of distributions by control persons), and Rule 904 of Regulation S may be instructive to the CSA by way of example.

Accordingly, we submit that the exemption in Section 2.14 should be broadened so that it is available for securities of any issuer (whether or not a reporting issuer), and whether or not Canadians hold 10% or more of the outstanding securities, or represent 10% or more of the holders. In light of the purpose of protecting Canadian investors, however, Section 2.14 should contain an anti-avoidance provision that would make the exemption unavailable if the seller knew, or had reason to know, that the securities were ultimately being purchased to or for the benefit, or account, of a Canadian resident.

With respect to the 10% tests contained in Section 2.14(b), we also wish to point out that there are a number of significant difficulties with their application. Section 1.12 of the Companion Policy attempts to give some guidance on how these amounts are to be determined, and states that "an *issuer* should use reasonable efforts" to make the determinations as specified. However, it is of course not the *issuer* that is responsible for compliance with the conditions of Section 2.14, but the *shareholder* who proposes to make the resale. The issuer is under no obligation to provide the shareholder with any of the information that would be necessary to make the determination contemplated by Section 1.12 of the Companion Policy. Consequently, the Canadian shareholders seeking to rely on Section 2.14 will never be able to establish with any certainty whether the 10% tests have been met. The CSA cannot impose any effective requirement for these non-Canadian reporting issuers to provide this information to Canadian

shareholders, as it has no jurisdiction over them. This difficulty is yet another reason why, in our view, the 10% tests should be removed from Section 2.14.

As a final observation, the interrelationship between the exemption in Section 2.14 and the Interpretation Note that replaced Ontario Securities Commission Policy 1.5 (and comparable instruments in other jurisdictions) is not entirely clear. Ontario, and a number of other Canadian provinces, have expressed the view that their securities laws do not necessarily apply to sales of securities to purchasers outside of the jurisdiction. It would be helpful for the CSA to clarify that Section 2.14 is only intended to be a "safe harbour" provision (as we believe must be the case), and that a separate analysis should also be conducted under the local laws and policies of a jurisdiction to determine whether or not its securities laws apply at all.

Section 3.1 – Transitional Provision

This transitional provision relates directly to the comments raised above under *Section 2.5(2)3 – Legend Requirement* (b) Timing. If no certificate was previously issued for securities distributed while former MI 45-102 was in effect, can the absence of the legend be cured by issuing a certificate bearing the new form of legend? If so, when must this be done? Within a specified period after the effective date of new MI 45-102, or any time up to the day before a trade is made? Does the resale regime applicable to a particular security (i.e., Section 2.5 of former MI 45-102 versus Section 2.5 of new MI 45-102) depend entirely upon the text of the legend on the certificate evidencing the security? From a public policy perspective, we believe that a shareholder should be entitled to any applicable benefits of new MI 45-102, even if the share certificate bears the form of legend prescribed by former MI 45-102.

Form 45-102F1

The Instruction to this form indicates that it is to be filed with the securities regulatory authority "in each jurisdiction where you sell securities". It goes on to say that where securities are being sold on an exchange, the form should be filed in every jurisdiction across Canada. However, for those cases where the securities are not being sold on an exchange, it may be helpful to clarify that "in each jurisdiction where you sell securities" is intended to mean each jurisdiction where purchasers of the securities are resident. If the Provinces of Alberta and British Columbia are of the view (as they may be) that a sale occurs in those provinces even if only the vendor, but not the purchaser, resides there, then that should be expressly stated in the Instruction to the form.

Resolution of Conflicts

We believe that MI 45-102 should contain a provision expressly stating what result should apply, on a national basis, where securities are distributed in a single transaction that utilizes an exemption listed in Appendix D in one or more jurisdictions but also utilizes an exemption listed in Appendix E in one or more jurisdictions. For example, take the case of an Ontario issuer

(with a greater than four month reporting issuer history) that distributes securities to holders in Ontario, British Columbia and Alberta under the prospectus exemption for an exempt take-over bid. The securities issued into British Columbia will be subject to a legending requirement and a four-month holder period under Section 2.5. The securities issued into Ontario and Alberta will be freely tradeable immediately, without restriction. This example appears in Question 18 to the Frequently Asked Questions set out in CSA Staff Notice 45-302, which states that "the same distribution may have different resale restrictions applicable in different jurisdictions".

Consider a second example. A British Columbia issuer (with a greater than four month reporting issuer history) distributes securities to holders in Ontario, British Columbia and Alberta under the prospectus exemption for an exempt take-over bid. The Province of British Columbia takes the position that all trades by issuers in that province, even to acquirers outside the province, must comply with its securities laws. For the purposes of British Columbia law, the exemption relied upon for the distribution in British Columbia, Alberta and Ontario results in all of the securities being subject to the Section 2.5 resale restrictions. However, as a matter of Alberta and Ontario law, the governing resale provision is Section 2.6. What are the resale rights of the holders in Alberta and Ontario? Are they permitted to make resales immediately under Section 2.6 in all jurisdictions other than British Columbia? If the securities issued into Alberta and Ontario are not legended, then they will never become freely tradeable under Section 2.5 for the purposes of British Columbia securities laws. What if the Alberta and Ontario holders resell the securities on the Toronto Stock Exchange, in which case the purchaser could well be resident in British Columbia?

We submit that the conflicts and uncertainties raised by these examples are highly undesirable. In order to succeed in the laudable objective of harmonization, MI 45-102 must contain a rule for resolving such conflicts. One possibility would be to say that, if Section 2.5 applies by virtue of the laws of any jurisdiction, then Section 2.5 (and not Section 2.6) will apply nationally, notwithstanding any other provision of MI 45-102 or local law. Another possibility would be to provide that the laws of the jurisdiction to which the issuer has the closest connection must govern on a national basis. In light of the importance of this issue, we believe it should be addressed in the body of MI 45-102 itself, and not in the Companion Policy or another Frequently Asked Questions document.

Securities Initially Issued Outside of Canada

We suggest that it would be helpful to add an express provision to MI 45-102 (or perhaps the Companion Policy) stating that, as we assume must be the case, neither Section 2.5 nor Section 2.6 will apply to securities initially issued outside of Canada in circumstances where Canadian securities laws do not apply (as determined by reference to the laws and policies of the relevant local jurisdiction). It does not appear that any other conclusion could be reached in light of the fact that those distributions would not be made in reliance upon any of the exemptions listed in

either Schedule D or Schedule E, but rather on the basis that no exemption was required as the prospectus requirement did not apply to the issuance outside of Canada.

Participation of Québec in the Multilateral Instrument

It is unfortunate that only one jurisdiction in Canada has not yet agreed to participate in MI 45-102, preventing it from achieving the status of a National Instrument. It is also unfortunate that several jurisdictions, while participating in parts of MI 45-102, have not adopted resale regimes that are in harmony with those applicable in the rest of Canada. The proposed amendments to MI 45-102 may present a timely opportunity to revisit with the Province of Quebec the possibility of its participation, and the harmonization of the resale regime in all provinces and territories.

We understand that, since the date on which MI-102 was initially adopted, the Québec Securities Commission has subsequently embraced its underlying policy through several of its own decisions, including most recently Decision No.: 2003-C-0016 dated January 14, 2003. This is no doubt a positive development toward national harmonization.

The rules governing the resales of securities are among those most important to investors, and special effort is warranted to ensure that they are clear, consistent and fair. Further, the unanimous participation of all Canadian jurisdictions in a single instrument governing the resales of securities in Canada could be a significant first step in demonstrating to the world financial community that the harmonization and integration of Canada's capital markets is not only achieveable, but already well underway.

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If you have any questions regarding our comments or wish to discuss them with us, please contact Rob Lando (at 212-907-0504, or by tie-line at 416-862-5928), David McIntyre (at 416-862-6516) or Andrea Whyte (at 212-905-0503).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

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