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March 8, 2005

BY E-MAIL

Ontario Securities Commission
20 Queen Street West
Suite #1903
Box 55
Toronto, Ontario
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Attention: Mr. Charlie MacCready
Co-Chair of the CSA's Prospectus Systems Committee

Dear Mr. MacCready:

Re: Proposed Replacement of National Instrument 44-101 - *Short Form Prospectus Distributions*

The following comments principally address the merits of Alternatives A and B in respect of the proposed qualification criteria for access to the short form prospectus distribution ("SFP") system as set out in Proposed NI 44-101 published for comment in the January 7, 2005 OSC Bulletin. Comments are also made on the usefulness of the filing and delivery of preliminary prospectuses.

The key difference between Alternative A and Alternative B is that Alternative A incorporates a "seasoning" requirement as well as a "quantitative (size)" requirement. In my view, neither such requirement is necessary and, hence, Alternative B is the superior alternative for the following reasons:

It is noted under the "Alternative B - Seasoning" Requirement" sub-heading in the Request for Comments that the CSA view is that the CD Rules, etc. are sufficiently rigorous that a seasoning requirement is not essential and that the CSA hasn't changed such view since the 2000 Concept Proposal (the "Proposal"). Further, as is noted in the Summary of Comments Received on the Concept Proposal (the "Comments"), none of the commenters supported the inclusion of seasoning as a condition of IDS eligibility, and eight commenters specifically agreed that seasoning should not be imposed as a condition. Accordingly, there seems general accord amongst the regulators and the representatives of the users of the SFP system that seasoning shouldn't be an eligibility requirement.

Presumably, the principal rationale for a seasoning requirement is that such creates a track record of disclosure and allows sufficient time for information about the issuer to be disseminated to and absorbed by the marketplace. Given the implementation of the CD Rules as well as SEDAR and general technological advances vis a vis the dissemination of information, the foregoing rationale is difficult to support.

In respect of the quantitative requirement, it is noted in the Request for Comments under the "Alternative B - Quantitative (Size) Requirement" sub-heading that the CSA view is that the CD Rules, etc. are sufficiently rigorous so that a quantitative requirement is not essential and that the CSA hasn't changed such view since the Proposal. Further, as is noted in the Comments, none of the commenters supported the inclusion of a quantitative requirement as a condition of IDS eligibility and 10 commenters specifically agreed that a size requirement should not be imposed as a condition. Accordingly, there seems general accord amongst the regulators and the representatives of the users of the SFP system that a size requirement shouldn't be an eligibility requirement.

It would appear that the principal rationale for a quantitative requirement is the belief that larger issuers generally provide a higher quality of disclosure than smaller issuers. A fairer statement might be that there are a higher proportion of smaller issuers whose disclosure is so deficient that a refiling of their continuous disclosure documents is required – see OSC Staff Notice 51-715 – Corporate Finance Review Program Report – October, 2004. (As an aside, the existence of the foregoing review program will also encourage issuers to improve their disclosure.) However, even making the assumption that larger issuers do have higher quality disclosure, it seems somewhat inappropriate to penalize all smaller issuers because some arguably have lesser quality disclosure. For that matter, there are larger issuers with lesser quality disclosure as well. More importantly, however, there are certain key policy considerations that support enabling smaller issuers to participate in the SFP system. First, such participation may well have the effect of generally improving the overall quality of their disclosure. These smaller issuers will now have a substantial incentive to maintain high quality disclosure as access to the SFP system enables them to raise funds publicly based on their disclosure documents. To the extent that smaller issuers will now be able to more easily public finance, there will be more underwriter or other intermediary involvement in their financings and this "gate-keeper" role, and the knowledge of issuers that such will occur, will also serve to improve disclosure and hopefully lessen the frequency of address the issue of "deficient" disclosure as noted above. Second, capital markets policies should, all other things being equal, be designed to offer the most cost-effective and efficient way for issuers to raise funds. Participation of smaller issuers in the SFP system allows them to raise capital on a much more cost-effective and timely basis.

I would also reiterate the comment made in the Comments that disclosure for certain smaller issuers might in fact be superior to that of larger issuers, simply because of all relevant details of the smaller issuer are much easier to provide than for a larger issuer. For example, in the natural resources sector, an issuer's asset base might well consist of a single, or relatively few, mines, projects or properties. Hence, in terms of investors having available information to make investment decisions, a smaller issuer is in all likelihood

more transparent and easy to assess. Note that, although smaller issuers are likely riskier, the issue of risk is distinct from that of adequate disclosure – it is adequate disclosure that enables investors to most efficiently assess entity risk.

I would further refer you to Sections 7.21 and 7.24 in the Allan Committee's Interim Report which supports all issuers being entitled to participate in the SFP system, which Sections are reproduced below;

7.21 *If statutory civil liability attaches to the cornerstone AIF and supplemental disclosure documents, one must presume that a greater degree of care will be taken by issuers and that the need for external participation in a prospectus will be reduced. Also, and perhaps more importantly, if all issuers were allowed (through, in effect, an expanded POP system) to incorporate their AIF, material change reports, etc. into a short form prospectus, one would expect that a greater degree of care will be taken in their preparation due to the possibility that such documents will be reviewed by underwriters and regulators in the context of a public offering, which is currently not the case.* ***We recommend that the SRAs consider expanding the POP system to allow its use by all reporting issuers.*** *We believe that the carrot is a better motivator than the stick.*

7.24 *We believe our recommendations lead to a system under which there is little, if any, new content in a prospectus. We believe that under the system we are recommending, under which continuous disclosure is to meet prospectus standards and under which civil liability to injured investors is established, the distinction between "POP" and "non-POP" issuers would be irrelevant. We believe that the eligibility tests would be unnecessary. This streamlining of the process would, in one sense, be purchased:*

- *by issuers accepting liability for their continuous disclosure documents; and*
- *by regulators engaging in a periodic review of disclosure whether or not an issuer filed a prospectus.*

The foregoing recommendations were also repeated in the Allan Committee's Final Report – see Section 7.8.

As to the questions regarding the usefulness of the filing and delivery requirements related to preliminary prospectuses, at the very least, the delivery requirement for preliminary prospectuses should be eliminated. First, a short form prospectus typically provides little more useful information in most cases than does the initial press release announcing such offering. Second, it is not so much that a preliminary prospectus (or final prospectus for that matter) assists individual investors in making their investment visions but rather that such provides useful information generally in the marketplace to analysts and others both before and, perhaps, more importantly, after the offering. In any event, a preliminary prospectus adds no significant information to the market place that isn't in the final prospectus. Third, if an investor wants a copy of the preliminary prospectus, such can either be obtained electronically on SEDAR or, alternatively, from the issuer or the underwriter. That a prospective investor can easily obtain a copy of the preliminary prospectus should the investor wish

to do so should be sufficient. (The same rationale also applies to the delivery requirement for the final prospectus; however, I suspect that the regulators will be unwilling to go so far as to the eliminate that requirement.)

As to the requirement of actually filing a preliminary prospectus, such is not a particularly onerous undertaking. In any event, such is far preferable than the imposing of more onerous restrictions on accessing the SFP system because of the elimination of such requirement. Also, rather than requiring a receipt to be issued, such should perhaps be handled in a manner similar to that for rights offerings, in other words, staff would have the right to object to any offering within a specified limited time period after the filing of a preliminary prospectus, absent which objection the issuer would thereafter simply file a final prospectus without review. Such a mechanism would enable routine issues to proceed without formal regulatory staff review while providing a gatekeeper type function for unusual or atypical offerings or offerings with which the regulator has identified significant unresolved issues. I would also note that the issuance of a preliminary receipt is usually a somewhat of a meaningless exercise as such is typically simply the receipt of fees and checking off the items listed on the applicable checklist.

I would be happy to discuss or clarify the above comments with you should you wish such to be done.

Yours very truly,

Peter McCarter
Executive Vice-President,
Corporate Affairs

PMC/sf