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EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

c/o Jo-Ann Bund, Co-Chair of the CSA's
Prospectus Systems Committee
Alberta Securities Commission
4th Floor, 300-5th Avenue S.W.
Calgary, Alberta T2P 3C4

c/o Charlie McCready, Co-Chair of the CSA's
Prospectus Systems Committee
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario M5H 3S8

c/o Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

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

This is the undersigned's response to the request for comment on proposed repeal and replacement of National Instrument 44-101, *Short Form Prospectus Distributions*, published by the Canadian Securities Administrators on January 7, 2005.

We favour all the proposed changes to the short form offering system as the first step in achieving the integrated offering system. We also support the other potential changes that you suggested in the discussion of the "next steps in prospectus regulation" where eligible issuers would be able to issue securities simply by filing a final prospectus with the securities regulators. Given the robust continuous disclosure requirements that must be met under National Instrument 51-102, *Continuous Disclosure Obligations*, it seems logical to focus both the issuer's and the regulator's resources on ensuring that accurate information is disseminated to the market in a timely manner for the benefit of all investors. Under the proposed replacement of NI44-101, we believe that investors will receive the same quality of disclosure as is currently required, while being more efficient for issuers, underwriters and other market participants.

We set out below our thoughts about a few of the specific questions which were asked in the request for comments and make a few suggestions, principally about conforming National Instrument 51-102, *Continuous Disclosure Obligations*, to the proposed NI44-101.

Eligibility Requirements

We favour adopting the eligibility criteria set out in Alternative B whereby all but the smallest issuers can access the short form prospectus system. Investors are now receiving timely, comprehensive information from reporting issuers through continuous disclosure filings and there is no reason to discriminate against issuers based on their market capitalization or the length of time the issuer has been a reporting issuer. Provided the issuer's continuous disclosure record is up-to-date, and the other eligibility requirements set out in Alternative B are met, we believe the issuer should have recourse to the streamlined offering process.

Disclosure About Significant Acquisitions

We concur with the proposed elimination of the disclosure about most completed significant acquisitions, because substantially the same information is now required in a Business Acquisition Report (BAR). There may be some acquisitions, however, that have taken place in the last three completed financial years for which disclosure is currently required but for which a BAR was not required to have been filed (because the acquisition closed before March 30, 2004). You might consider whether any transitional rules are required to fill the gap until the BAR rules have been in place for three years.

Under the proposed Item 10.1 of Form 44-101F1, the short form prospectus must include disclosure about a proposed acquisition if it has progressed to a state where it is reasonable to believe that the acquisition will be completed. Furthermore, the financial statements of an acquired business (or a business proposed to be acquired), that would be required in a BAR, must be included if it is necessary to include them to make the short form

prospectus contain full, true and plain disclosure of all material facts.[1] If the acquisition is completed, there will be no exemption from the obligation to file a BAR in respect of the acquisition. We suggest that subsection 8.1(2) of NI51-102 be amended to provide an exemption from the requirement to file a BAR where a prospectus (filed under either the short form or long form system) contains the information and financial statements that would be required under the BAR rules if the acquisition is completed within nine months of the date of the receipt for the final prospectus and there have been no material changes in the terms of the acquisition. This exemption would parallel the present exemption when disclosure is contained in an information circular.

Disclosure of Interests of Experts

We agree with the changes to Item 15 of proposed Form 44-101F1 relating to the disclosure of the interests of experts, and the interests of the auditor in particular. Given the auditor independence requirements, the carve-out for auditors is sensible and we suggest that a similar amendment be made to Item 16 of Form 51-102F2, *Annual Information Form*.

References to Periodic and Timely Disclosure

There are reference in several places in the instrument and the companion policy to the phrase "periodic and timely disclosure" which is not defined. In the qualification criteria provisions, the phrase is "periodic and timely disclosure documents that [the issuer] is required to have filed in that jurisdiction *under applicable securities legislation*" (emphasis added). We think that the italicized phrase could and probably should refer to NI51-102, since that instrument now forms the complete code of continuous disclosure filing obligations for companies that are eligible to file a short form prospectus. In other cases, such as in section 4.3(b)(2), the phrase "periodic and timely disclosure" is not referenced to any particular law, rule or obligation. In that example, we are therefore not sure of the meaning of the phrase "the periodic and timely disclosure of the credit supporter," particularly if the credit supporter is a foreign public company that is not a reporting issuer in Canada.

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We appreciate the opportunity to comment on the proposed changes to NI44-101 and would be pleased to discuss any aspect of this submission with you. We have discussed in general terms the contents of this submission with some of Torys' other securities law practitioners, who support the views we express. Although we are not aware of contrary views, we have not done a complete canvass to determine whether other lawyers at Torys hold contrary views.

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[1] The companion policy states that there is a rebuttable presumption to this effect if the acquisition is or the proposed acquisition would be significant at the 40% level.

Yours truly,

"Robert H. Karp"

"Jennifer L. Friesen"

RHK/jj

cc: Jim Turner, *Torys LLP*
Sharon Geraghty, *Torys LLP*