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April 11, 2005

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

Attention:

Jo-Anne Bund
Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
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And

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Ontario Securities Commission
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And

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Autorité des marchés financiers
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Dear Sirs/Mesdames:

Proposed Repeal and Replacement of National Instrument 44-101 "Short Form Prospectus Distributions", Form 44-101F3 Short Form Prospectus and Companion Policy 44-101CP Short Form Prospectus Distributions

This letter is in response to the Notice and Request for Comments in respect of the above noted instrument, published on January 7, 2005 at (2005) 28 OSCB 117. The answers will follow the numbering of the specific questions set out on pages 127 to 129.

1. Proposed qualification criteria – Alternative A or Alternative B?

We support the broadening of access to the short form prospectus system which is represented by Alternative B. We agree with the Canadian Securities Administrators ("CSA") that a listed issuer that has prepared and filed a long-form prospectus or other disclosure document containing prospectus-level disclosure in order to become a reporting issuer and that maintains up-to-date continuous disclosure relating to its business, including an initial annual information form, should be able to access the capital markets using a short form prospectus without regard to its market capitalization or the period of time that it has been a reporting issuer. The CSA should ensure that the initial annual information form of any new reporting issuer that did not file a long-form initial public offering prospectus is reviewed with the same rigour as an initial public offering prospectus to maintain the integrity of the capital markets.

2. Other aspects of the Proposed Rule – requirement to deliver an undertaking with respect to credit support providers.

We believe that the requirement that the issuer deliver an undertaking to file the periodic and timely disclosure of its credit support provider is an appropriate method to ensure there is sufficient disclosure about the credit support provider in the secondary market.

3. Other aspects of the Proposed Rule – exemptions in item 13 of proposed Form 1.

With respect to the exemption in Item 13.1(e), we believe this exemption is redundant given that under (a) the credit support provider must have provided "full" and unconditional credit support for the securities being offered.

In offerings where there is a credit support provider, investors are most concerned about the financial situation of the credit support provider. We therefore suggest that Items 13.1(f)(i), 13.2(f)(i) and 13.3(f)(i) should simply require the incorporation by reference of the financial statements of the credit support provider in all situations.

We are of the view that the consolidating summary financial information for the credit support provider contemplated by Items 13.1(f)(ii), 13.2(f)(ii) and 13.3(f)(ii) would not

add meaningful disclosure for an investor to that provided by the credit support provider's consolidated financial statements and therefore should be deleted.

4. Other aspects of the Proposed Rule – item 15 of proposed Form 1.

We have no comments on this question.

5. Possible further changes in prospectus regulation – elimination of preliminary prospectuses and prospectus review.

We endorse the alternative approach proposed by the CSA which would permit issuers to access the capital markets by filing a final prospectus and delivering that final prospectus to a potential investor before entering into an agreement of purchase and sale with an investor, subject to a right of withdrawal and rights of rescission and damages if there is a misrepresentation in the prospectus ("Alternative C"). In light of the anticipated adoption in Ontario and possibly other jurisdictions of civil liability for continuous disclosure filings which are not subject to the prior review of securities regulators, there does not appear to be a valid policy rationale to support the current requirements relating to the filing and review of a preliminary prospectus other than in the context of an initial public offering.

We also note that the implementation of Alternative C would be consistent with recent proposals by the United States Securities and Exchange Commission (the "SEC") which, if adopted, would in effect permit certain issuers to access the capital markets by the filing and delivery of only a final prospectus. We strongly urge the CSA to introduce, at a minimum, amendments to the prospectus system for interlisted issuers that are eligible to access this regime in the United States (i.e., well-known seasoned issuers). The failure to adopt such amendments would preclude Canadian issuers from taking full advantage of this United States system once it is adopted in light of concerns related to the "flow-back" of securities into Canada.

We do acknowledge that a move to Alternative C will have implications for the due diligence process, in much the same way that the introduction of the "bought deal" financing had implications for the due diligence process. However, this is a matter to be worked out between issuers and their underwriters, rather than to be dealt with by regulation.

6. Possible further changes in prospectus regulation – qualification criteria.

We note that the CSA seeks comments on whether to introduce qualification criteria for accessing Alternative C. While it may be appropriate to initially limit access to this system on the basis of market capitalization, consistent with the SEC proposals, we believe that it would be inconsistent with the policy rationale supporting Alternative B to

impose a seasoning requirement. We also note that "substantial issuers" may access the current short-form system without compliance with the current seasoning requirement. Accordingly, we would not support a seasoning requirement as one of the qualification criteria.

7. Possible further changes in prospectus regulation – marketing triggered on the issuance of a press release.

We acknowledge and agree with the concerns of the CSA regarding the use of undisclosed information about an offering; however, we believe that the obligation of an issuer to issue a press release upon having determined to proceed with a public offering is a timely disclosure matter that should not be separately regulated by NI 44-101. In particular, we are concerned that some participants in the capital markets or their counsel interpret the current press release requirement in the shelf prospectus regime to require disclosure prior to the time that disclosure would otherwise be required by the timely disclosure regime, including the insider trading provisions of applicable securities laws, and we believe this result is inconsistent with the efficient operation of the capital markets. Issuers and their underwriters should not be permitted to trade securities with knowledge of undisclosed material information regarding the issuer but issuers should not be subject to a requirement that requires premature disclosure of an issuer's consideration of its capital requirements thereby inhibiting an issuer's ability to access the capital markets on an efficient basis.

Separately, we wish to draw the attention of the CSA to a separate but somewhat related matter. Section 7.1(c) of NI 44-101 provides that solicitations of expressions of interest are permitted before the filing of a preliminary short form prospectus only if, among other things, "the issuer has issued and filed a news release announcing the agreement immediately upon entering into the agreement". We would ask the CSA to revise this provision to require that the news release be issued prior to the solicitation of expressions of interest but that it need be filed only as soon as practicable thereafter and in any event within one business day of the issuance of the press release. The dissemination of the press release is the more important of the two steps in this process and once that has been completed solicitations of expression of interest should be permitted to begin, whether or not the filing of the press release has been completed. Although this distinction may seem like a minor one, in our experience the practical implications in the context of "bought deal" financings can be significant.

* * *

We are pleased to have had an opportunity to comment on the proposals contained in this request for comment. If you have any questions or comments, please do not hesitate to contact Doug Marshall (416-4218), Jean Fraser (416-862-6537), Mark DesLauriers (416-862-6709), Steven Smith (416-862-6547) or Robert Lando (212-907-0504).

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP
JS:vkl