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April 13, 2005

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

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Alberta Securities Commission
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Dear Sirs/Mesdames:

Re: Request for Comments: 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*.

We are pleased to provide our comments to the members of the Canadian securities administrators (CSA) on the proposed Repeal and Replacement National Instrument 44-101 – *Short Form Prospectus Distributions*, Form 44-101F3 - *Short Form Prospectus* and Companion Policy 44-101CP - *Short Form Prospectus Distributions* ("Proposed NI 44-101").

Our comments on the proposed instruments have been compiled with input from the lawyers in our Securities and Capital Markets Group, and therefore reflect a consensus of our views. Our comments do not necessarily reflect the opinions of, or feedback from,

our clients and we expect that our clients will provide their comments directly to the CSA. For purposes of this comment letter, we have adopted and use the same defined terms as in the Request for Comments.

General Comments

We applaud the CSA for this important initiative. We agree with the concept of more fully integrating the disclosure regimes for the primary and secondary markets. We also agree with eliminating the AIF filing and acceptance procedure.

We support the extension of the period within which the underwriting agreement must require the filing of a preliminary short form prospectus from two business days to up to four business days. This extension should assist with due diligence and the preparation of the preliminary prospectus in more complex transactions.

We recommend deleting the requirement for Item 3 (Consolidated Capitalization) in Form 44-101F1. It is not clear to us why there should be a focus on share and loan capital as opposed to any other financial statement item or, for that matter, any other material item. If there is a previous material change there should have been a material change report filed disclosing this information, which would be incorporated by reference.

As a drafting point, eligibility for the use of the short form prospectus system under section 2.2 of both Alternative A and the Current NI 44-101 depends upon what is called "market capitalization" being at least $75 million. The use of this term could be misleading as the holdings of 10% shareholders are to be eliminated from this calculation. Accordingly, we suggest defining the term as "public float" or "adjusted market capitalization".

We strongly endorse the CSA's decision to remove Part 4 of the Current NI 44-101 so as to eliminate the extensive requirements for financial statements relating to acquisitions and dispositions, and to place reliance on the BAR requirements in the CD Rules. In particular, the elimination of the requirement to include financial statements where there have been multiple insignificant acquisitions is a great improvement. Our experience with this suggests that, when this requirement applied, it could result in great expense and inconvenience to an issuer with little benefit to investors. Because the disclosure requirement for insignificant acquisitions might only become apparent in retrospect, as a result of the subsequent occurrence of other insignificant acquisitions, it can be very difficult for an issuer to obtain the necessary audited and interim financial statements and to obtain the necessary information to prepare pro forma financial statements. Accordingly, we strongly support this change.

We note that, notwithstanding the timing requirements for filing of a BAR following a significant acquisition, the proposed Form 44-101F1 requires the filing of financial statements if they are necessary to provide full, true and plain disclosure in the prospectus. Paragraph 4.10 of Companion Policy 44-101CP suggests this is presumed to apply if the significance tests are satisfied at the 40% level. Two questions arise in this context. First, in light of the requirement to file a BAR including financial statements at the 20% level, which presumably reflects a regulatory view on materiality, one wonders

whether issuers will feel bound to include financial statements at the 20% threshold anyway. Accordingly, we would recommend that, rather than leaving this to the discretion of issuers, there be a hard and fast rule that financials statements are only required at and above the 40% level.

Second, if our above recommendation is not accepted, the statements in paragraph 4.10(c) of 44-101CP needs to be clarified. Issuers can "rebut this presumption [regarding the requirement for financial statement disclosure if the significance tests are satisfied at the 40% level] if they can provide compelling evidence that the financial statements are not required for full, true and plain disclosure." At what point is this evidence to be provided, and to whom? Is an exemption required or some other dispensation? If it is contemplated that some formal process is to be followed prior to filing the preliminary prospectus, or some other procedure, it should be spelled out. Conversely, does this mean that the securities regulatory authorities will not question a decision to omit financial statements where the 40% level is not exceeded? If such financial statements were suddenly required due to regulatory review, they could be very difficult to obtain on a timely basis in the context of a bought deal in reliance on a short form prospectus. This again suggests a bright line test for inclusion of financial statements would be better. The flexibility of leaving such statements out could be preserved by providing for an explicit exemption process where it can be demonstrated that the inclusion of financial statements is not justified based on materiality and other factors.

While perhaps not directly raised in the context of the Proposed NI 44-101, we would also strongly recommend to the CSA that the income test be eliminated from the significance tests contained in the CD Rules. While there are a number of reasons for this, the two principal reasons are that it may produce perverse results and that income is already reflected in the investment test. As an example of the first reason, we note that because absolute values of loss and earnings numbers are sometimes compared in applying the test, an issuer with a large loss may not be caught by the test, while an issuer with a small profit would be. Regarding the second reason, because the amount of most investments is at least in part based upon an analysis of earnings (or EBIT or EBITDA), earning power is already reflected in the issuer's investment in the target company.

If the income test cannot be eliminated in its entirety, and it is considered necessary to have a test based on the earnings statement, we would recommend that it be replaced with a revenue-based test.

Responses to Specific Request for Comments

We are also pleased to provide answers to certain of your specific questions using the same numbering scheme as set out in your request for comments.

1. *The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out as Alternative B?*

We support the proposal to conform the qualification criteria for Proposed NI 44-101 with NI 51-102. There is an obvious need to harmonize the instrument with the CD Rules.

With respect to broadening access to the system as set out in Alternative B, we are generally supportive of the alternative but have the following comment. Proposed Alternative B relies on compliance with all of the CD Rules but venture issuers are exempt from many of the CD Rules (e.g. annual information form, filing of voting results, composition and reporting requirements of MI 52-110, proposed MI 52-111, certain aspects of the proposed corporate governance disclosure under proposed NI 58-101). Therefore, Alternative B may not be appropriate for venture issuers, unless they voluntarily comply with all the CD Rules.

2. *Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market? If not, why not? Please also suggest alternatives to this requirement.*

It was not clear to us if the requirement under 4.3(b)2 of Proposed NI 44-101 applied to sections 12.1(1), (2) and (3). Presumably under sections 12.1(1) and (2) the credit supporter would already be filing under section 12.1(1) CD documents as a reporting issuer or filing under section 12.1(2) 1934 Act filings. If neither section 12.1(1) nor (2) apply to the credit supporter it may be difficult for the issuer on an on-going basis to undertake that certain information will be filed. As an alternative, we suggest that an issuer be mandated to deliver an undertaking that the issuer use its "best efforts" to adhere to the credit supporter disclosure requirements in Section 12.1.

5. *Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?*

We are supportive of the elimination of the preliminary prospectus and prospectus review for senior issuers. It has been our experience that with senior issuers seldom are there substantial comments from the review process and therefore, in certain cases, days are wasted.

6. *If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include additional qualification criteria and restrictions, such as the following:*

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- *a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;*

- *a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and*

- *a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.*

Do you think these are appropriate?

If access is broadened under Alternative B of Proposed 44-101 and preliminary prospectus and prospectus reviews are eliminated then we believe certain criteria should be imposed on issuers. The three criteria that are listed above would be appropriate to be included in a list of criteria which an issuer must satisfy in order to file a short form prospectus which would not be subject to review.

7. *Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by issuers and dealers? If so, should the press release or public notice be required on "the issuer forming a reasonable expectation that an offering will proceed" or on some other event?*

Generally, we expect that given the opportunity issuers would use this alternative, although the ability of an issuer to trigger a marketing regime on the issuance of a press release or other public notice would depend on the issuer and the securities being marketed.

We hope that our comments will be considered as constructive by the CSA. Please contact either Paul A.D. Mingay at 416-367-6006 or Michael C. DeCosimo at 416-367-6222 if you wish to discuss our comments with us.

Yours very truly,

"Borden Ladner Gervais LLP"

Securities and Capital Markets Group
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