Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto
Montréal
Ottawa
Calgary
New York

March 8, 2006

(416) 862-4218

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission - Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o
Ms Rosann Youck,
Chair of the Continuous Disclosure Harmonization Committee
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver BC V7Y 1L2
E-mail: ryouck@bcsc.bc.ca

– and –

Ms Anne-Marie Beaudoin,
Directrice du secretariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montréal, Québec H4Z 1G3
Fax: (514) 864-6381
E-mail: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames :

Request for Comment – Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations*, Form 51-102F1, Form 51-102F2, Form 51-102F3, Form 51-102F4, Form 51-102F5, Form 51-102F6 and Companion Policy 51-102CP *Continuous Disclosure Obligations*; Proposed Amendments to National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*; and Proposed Amendments to National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* and Companion Policy 71-102CP *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*

We are pleased to respond to the above-referenced Request for Comment of the Canadian Securities Administrators.

Request for Comments

2. Request form

We support the CSA's proposal to eliminate the requirement that reporting issuers mail a request form to shareholders each year as we expect that this will reduce costs for reporting issuers.

If the CSA determines to retain this requirement, we would recommend that the CSA not prescribe the content of the request form. As recognized in section 1.3 of Companion Policy 51-102CP, issuers are subject to corporate law requirements that address the delivery of financial statements to issuers and such corporate law requirements may be inconsistent with a prescribed request form that indicates that shareholders may elect to receive the annual and interim financial statements. For example, section 159(1) of the *Canada Business Corporations Act* and section 154(3) of the *Business Corporations Act* (Ontario) each require corporations governed by those statutes to send a copy of the annual financial statements to each shareholder except to a shareholder who has informed the corporation in writing that the shareholder does not wish to receive a copy of the financial statements.

Accordingly, the request form that such issuers use should provide for shareholders to elect not to receive the annual financial statements rather than to request to receive a copy of the financial statements and should indicate that shareholders will receive the annual financial statements unless they indicate that they do not wish to receive them. If the CSA determine to retain the requirement that issuers send a request form to shareholders, issuers should be free to prepare the content of the request form in accordance with applicable securities and corporate law requirements.

4. Filing of Certain Documents

We believe that it would be helpful for the CSA to either amend section 12 of NI 51-102 or provide further guidance in Companion Policy 51-102CP to clarify whether any or all of the different types of agreements or other documents entered into by an issuer in order to obtain debt financing must be filed with securities regulators.

We understand that, in determining whether a loan agreement with one or more financial institutions must be filed under section 12, many issuers assess whether the loan agreement is a material contract entered into other than in the ordinary course of business. If so, the issuer files such agreement, or possibly a redacted version of such agreement, pursuant to section 12.2 of NI 51-102. In this regard, we would note that the

limited case law in Canada addressing the meaning of the term "ordinary course of business" indicates that a contract is in the ordinary course of business if it is the kind of contract that is entered into by a person in a particular business or industry from time to time. Section 1.9 of Companion Policy 51-102CP is consistent with this case-law. Accordingly, if a loan agreement entered into by an issuer is typical of the type of loan agreement entered into by the issuer and its competitors, it need not be filed under section 12.2 of NI 51-102. This analysis is supported by a policy argument to the effect that investors in a public company may be presumed to be knowledgeable of the types of contracts entered into by public companies in the industries in which they invest.

It may be that a loan agreement in respect of a material amount of debt materially affects the rights of the holders of equity securities of the issuer and on this basis must be filed under section 12.1(e) of NI 51-102, in which case it would not be possible to file a redacted version as is possible under section 12.2. We submit that, absent unusual circumstances such as financial distress or particular covenants in the loan agreement affecting the rights of the holders of equity securities, a loan agreement need not be filed under section 12.1(e).

We understand that some issuers have concluded that a trust indenture setting out the terms and conditions of publicly offered debt securities must be filed under section 12.1(e) on the basis that the trust indenture "creates" the rights of the holders of such securities and that the holders of such securities fall within the meaning of the term "securityholders generally" in section 12.1(e). We submit that it is not clear that "securityholders generally" can mean the holders of a class of securities as opposed to the holders of all outstanding debt and equity securities, although we acknowledge a valid policy rationale for the terms of a publicly offered and traded debt security to be readily accessible to investors in such securities.

A typical loan agreement is distinguishable from a trust indenture for the purposes of section 12.1(e) of NI 51-102 on the basis that a loan agreement does not create the terms of a security; however, if this result was intended, we believe that the wording of section 12.1(e) could be more clear.

Another means by which an issuer may obtain debt financing is by privately placing debt securities to a limited number of institutional investors. The indenture or note purchase agreement setting out the terms of these securities is similar to a trust indenture for publicly offered and traded debt securities. It is even less clear, though, that such securityholders constitute "securityholders generally" for purposes of section 12.1(e). Also, a policy rationale for documents being filed premised on the agreements being readily accessible to investors in such securities is less compelling. The investors in such securities will each have a copy of the relevant documentation and there is likely to be limited trading of such securities. Furthermore, such documents may contain

competitively sensitive pricing information that the issuer would prefer to redact prior to filing, but that is not possible under section 12.1(e).

In light of the foregoing, we submit that it would be helpful for the CSA to amend section 12 or to articulate more clearly in Companion Policy 51-102CP the types of debt financing documents that need to be filed or the policy rationale underlying the need for filings under sections 12.1 and 12.2.

Additional Comments

In addition to the foregoing responses to the specific items in respect of which the CSA has solicited comments, we have the following comments in respect of the identified sections of NI 51-102:

Definition of "restructuring transaction" and Section 4.9

Section 4.9 of NI 51-102 sets out a new test for determining whether an issuer is required to file a change in corporate structure notice, and includes a reference to a "restructuring transaction" which is defined under Section 1.1 of the Instrument. We note that the definition of restructuring transaction in Section 1.1 is broadly worded and references a number of different categories of transactions which will constitute a "restructuring transaction".

In particular, the references to "new securityholders owning or controlling a sufficient number of the reporting issuer's securities….." raises a number of potential questions. The Companion Policy indicates that "new securityholders" includes both securityholders who did not hold any of the securities before the restructuring transaction and securityholders that held some securities before the transaction but who now, as a result of the transaction, can elect a majority of the issuer's directors. However, the Companion Policy does not indicate whether the reference to securityholders "owning" a sufficient number of the issuer's securities in paragraph c(i) of the definition, refers to beneficial or registered title to such securities, and does not address whether such securityholders must be acting together (which concept is included in paragraph c(ii) of the definition). For those issuers whose securities are held principally or exclusively in a book-based system, a determination of the identity of its beneficial securityholders for this purpose will be difficult. Moreover, the reference in clause (d) to "any other transaction similar to the transaction listed in paragraphs (a) to (c)" provides little guidance to issuers who must determine whether a filing is required to be made under Section 4.9 of NI 51-102.

Although the Companion Policy does attempt to clarify some of the terms used in the definition of "restructuring transaction", we submit that the CSA should provide additional guidance to issuers in determining which types of transactions will constitute "restructuring transactions" and to articulate more clearly the policy rationale underlying

the need for the filing in Section 4.9 to assist issuers in determining whether a particular transaction is a transaction similar to a transaction contemplated in paragraphs (a) to (c) of the definition.

Section 4.2

It is clear from section 4.c.ii of the amending instrument attached as Appendix B to the Request for Comment that the words "and auditor's report" will be deleted from the preamble to paragraph 4.2(a) of NI 51-102. In the black-lined version of NI 51-102 attached as Appendix H to the Request for Comment, these words have not been deleted from the preamble to paragraph 4.2(a). We assume that this is merely a typographical error in Appendix H.

Section 11.5

The Summary of Proposed Amendments attached as Appendix A to the Request for comment indicates that this new requirement is intended to require an issuer to issue a press release if it is determined that the issuer filed a document that is materially deficient. We understand the policy rationale for the imposition of such a new requirement. We submit that this policy rationale will be met if the new requirement mandates a press release when the issuer has decided to re-file a document and that it is both not necessary and potentially over-inclusive to refer to the re-stating of information in a document.

We submit that it is not clear that the re-stating of information in a document in circumstances where it is not necessary to re-file the document should give rise to an obligation to issue a press release, other than in the context of a "material change" where a press release is already required. For example, the filing of an annual information form in respect of the most recently completed fiscal year may restate information that appeared in the annual information form for the prior fiscal year and such re-stated information may be materially different from the information in the prior fiscal year's annual information form due to the passing of time. In such circumstances, there will not have been any determination that the prior year's annual information form was materially deficient. The restated information is simply more current information. An issuer should not be required to issue a press release upon deciding to file its current annual information form. These circumstances may be contrasted with the circumstances in which an issuer determines that a filed document, when filed, contained a material error such that the document did not satisfy one or more of the requirements of NI 51-102 and so a new version of the document must be filed to, in effect, replace the previously filed document. Accordingly, we submit that the words "or re-state information in a document" and "or re-stated information" should be deleted from this new requirement.

Sections 13.3(2)(e) and 13.4(2)(h)

We believe that the CSA should either amend Section 13 of NI 51-102 or provide further guidance in Companion Policy 51-102CP to clarify the meaning of the words "in the manner and at the time required by U.S. laws and any U.S. marketplace" contained in the conditions to the availability of the exemptions in Sections 13.3(2)(e) and 13.4(2)(h) of the Instrument. In particular, is the exemption from the requirement to deliver interim and annual financial statements to holders of the applicable securities, satisfied by posting such information to an issuer's website in the manner and at the time required by applicable U.S. laws and stock exchange rules, (in lieu of delivering such information to its security holders resident in Canada), if such an approach would satisfy the requirements under applicable U.S. laws and stock exchange rules with respect to U.S. security holders? We understand that the New York Stock Exchange (the "NYSE") has proposed a rule that eliminates the current NYSE Listed Company Manual requirement that listed companies distribute the annual report to shareholders, so long as such companies can satisfy their annual financial statement distribution requirements by making such documents available on, or by a link through, the issuer's corporate website, with a prominent undertaking to deliver a paper copy free of charge to any security holder who requests it. To our knowledge no equivalent proposal is pending in Canada. If the NYSE's proposed rule is adopted, it is our submission that foreign credit supporters should be able to satisfy the exemption requirements by posting interim and annual financial statements to their website in lieu of mailing such annual reports.

Section 13.3(3)(c)

The effect of Section 13.3(3)(c) of revised NI 51-102 is that a parent issuer is required to file reports under National Instrument 55-102 as soon as it beneficially owns any designated exchangeable securities. In most, if not all, exchangeable security structures the parent issuer will become the beneficial owner of designated exchangeable securities when the first holder of designated exchangeable securities exercises its "exchange" right to receive securities of the parent issuer. A holder typically exercises its "exchange" right by exercising its right to have the exchangeable security issuer redeem the designated exchangeable securities; however this right is typically subject to an over-riding "call right" of the parent issuer or one of its subsidiaries which is typically exercised. It is not unusual for at least one holder to exercise its "exchange" right relatively shortly after closing of the transaction in which the designated exchangeable securities were originally issued. Accordingly, as a result of section 13.3(3)(c), the parent issuer will be required to report under NI 55-102 for virtually the entire life of the structure and will be required to report each time that a holder exercises its exchange right. It is not clear that the additional expense that will be incurred by the parent issuer in complying with NI 55-102 in this manner is warranted. Furthermore, the parent issuer insider has no ability to control when a holder of designated exchangeable securities

exercises its exchange right so the usual policy rationale for reporting by insiders is not present. We urge the CSA to consider carefully whether section 13.3(3)(c) is necessary.

Section 13.4(1)

(a) In Section 13.4(1) of NI 51-102, the definition of "designated credit support securities" includes a requirement that the holder be entitled to receive payment from the credit supporter within 15 days of any failure to make payment by the credit support issuer. However, it is unclear whether the 15 day period is inclusive of any grace period contained under the primary credit agreement, or commences only after any such grace periods have lapsed. We believe that the CSA should clarify this point and submit that the latter approach is appropriate since in many instances the negotiated grace period following a non-payment would run longer than the 15 day period contemplated in the definition.

(b) We note that there is some discrepancy between a definition contained in NI 51-102 and the same term as defined in National Instrument 44-101("NI 44-101"). Under NI 44-101 the definition of "credit support issuer" includes a person who provides a guarantee or "alternative credit support". In NI 51-102 the concept of "alternative credit support" does not appear in the definition of "credit support issuer" with the result that absent a guarantee, the exemptions in NI 51-102 would not appear to be available. There does not appear to be any policy rationale for the different definitions in NI 51-102 and NI 44-101 and, therefore, we submit that the definitions in NI 51-102 and NI 44-101 should be conformed.

Section 13.4(2)(g)

Pursuant to Section 13.4(2)(g) of NI 51-102, a credit support issuer that has operations that are independent of the credit supporter, other than "minimal operations", is required to file annual comparative financial information derived from the credit support issuer's audited consolidated financial statements for its most recently completed financial year. No guidance is provided, however, in determining whether the credit support issuer's operations qualify as "minimal operations" and, therefore, it is unclear in what circumstances, or on what basis a credit support issuer will be exempt from the requirement to file annual financial information. Companion Policy 51-102CP does not provide any guidance. It would be helpful for the CSA to articulate more clearly in Companion Policy 51-102CP, the types of operations that would be considered "minimal operations" or the policy rationale underlying the need for the filing in Section 13.4(2)(g).

Thank-you for the opportunity to respond to this Request for Comment. Please call Doug Marshall (416-862-4218) or Sivan Fox (416-862-4728) if you have any questions concerning our comments.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP