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VIA EMAIL

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Re: Proposed National Instrument 41-101 *General Prospectus Requirements*, and Related Forms and Policy and Consequential Amendments

Dear Sirs/Mesdames:

This letter is being provided in response to the Notice and Request for Comment of the Canadian Securities Administrators ("*CSA*") dated December 21, 2006 with respect to proposed National Instrument 41-101 ("*Proposed NI 41-101*") and the related forms and companion policy, and the proposed consequential amendments to certain other National Instruments, forms and companion policies (the "*Consequential Amendments*"). We are generally supportive of the initiative of the CSA to harmonize the prospectus disclosure requirements both across Canada and with the continuous disclosure requirements and to include various policies and practices within Proposed NI 41-101. However, we submit that certain aspects of Proposed NI 41-101 are over-reaching, will unduly hamper certain aspects of the Canadian capital markets and business environment and go further than necessary to accomplish the stated policy objectives of the CSA in proposing such amendments. In addition, we have certain comments of a more technical nature on Proposed NI 41-101 and the Consequential Amendments.

A. PROPOSED NI 41-101 - CERTIFICATE REQUIREMENTS

Part 5 of Proposed NI 41-101 contains a comprehensive set of certificates that are proposed to be required, or may be required by the appropriate regulator, in a prospectus filed by an issuer, and therefore

make the signatories liable for misrepresentations in a prospectus subject, in certain cases, to available defences.

(a) Section 5.13 - Certificate of Substantial Beneficiary of the Offering

The most significant proposed addition to the prospectus certificate requirements is contained in section 5.13 of Proposed NI 41-101, which proposes that a prospectus would be required to contain a certificate, in the applicable issuer certificate form, signed by each "substantial beneficiary of the offering". The proposed definition of "substantial beneficiary of the offering" contained in section 5.13(2) is extremely broad and includes any person or company that (a) currently holds, held within the year preceding the date of the prospectus, or following the completion of any transaction or series of transactions disclosed in the prospectus is reasonably expected to acquire, control of (i) the issuer, (ii) a "significant business of the issuer", or (iii) voting securities carrying 20% or more of the voting rights attached to any class of voting securities of the issuer or a significant business of the issuer, and (b) is reasonably expected to receive, directly or indirectly, 20% or more of the proceeds of the offering of securities under the prospectus, whether as consideration for property or services, repayment of debt or otherwise.

The stated policy objective of the CSA for this proposed amendment is that the CSA believes a person or company that controls the issuer or a significant business acquired or to be acquired by the issuer has the best information about the issuer or significant business, and that such a person who also receives proceeds from the distribution should be liable for any misrepresentations in a prospectus regarding the issuer or a significant business. In particular, the CSA has stated that it believes these new provisions will create appropriate incentives for the person or company with the best information about the issuer or a significant business to ensure the prospectus contains full, true and plain disclosure of all material facts relating to the securities being distributed, which will directly benefit investors and prospective investors and raise confidence in the Canadian disclosure regime: see "Anticipated Costs and Benefits" contained in the Notice and Request for Comment.

Although we concur with the CSA's policy objective of obtaining increased confidence in the Canadian capital markets, we believe the provisions contained in section 5.13 of Proposed NI 41-101 are overreaching in several respects. Our most significant concern relates to the apparent requirement for the vendor of a "significant business" – whether the transaction has been completed within the prior year or a definitive agreement has been executed at the time of the prospectus, and which would include an interest in an oil and gas property to which reserves have been specifically attributed (as per the definition of "business" in section 8.1 of National Instrument 51-102) – who might be "reasonably expected to receive, directly or indirectly, more than 20% of the proceeds of the offering of securities under the prospectus" as part of the purchase price for the business or assets, to sign the prospectus and assume full joint and several liability for the disclosure contained in the entirety of the prospectus, and not just the portions pertaining to the "significant business" acquired or to be acquired by the issuer from that vendor.

A prospectus generally contains a significant amount of disclosure regarding an issuer that is not related to the "significant business" being financed, including its historical operations (and previous acquisitions and transactions in which the "substantial beneficiary of the offering" had no involvement), description of the general industry and a list of applicable risk factors. We believe the requirement to have the "substantial beneficiary" certify the prospectus as a whole is unduly burdensome on potential vendors of businesses and assets, as this would require them to undertake a full due diligence review of the issuer and

its business and operations in order to even position themselves as able to take advantage of a due diligence defence under the provisions of applicable securities legislation which defence, even if successful, may require significant cost and time to establish.

Additionally, the test as to when a person "directly or indirectly receives 20% or more of the offering of securities under the prospectus as consideration for property or services or repayment of debt" appears to be overly broad and subjective, as often an issuer will undertake multiple acquisitions or have significant capital expenditure programs where monies are fungible as between projects, particularly over the course of a one-year period.

Furthermore, the proposed requirement in section 5.13(6) to further potentially require any person or company that is a control person of a substantial beneficiary of the offering to sign a prospectus will lead to even further complications and provide additional disincentive for vendors to deal with issuers that would require access to the Canadian capital markets in connection with a potential significant acquisition, although we do understand the CSA's stated intention that such provisions would only be exercised where a person or company is attempting to avoid prospectus liability through the imposition of a holding company in its ownership structure.

We submit that even if a "substantial beneficiary" prospectus certification requirement was limited to the information concerning the "significant business" contained in the prospectus, to impose any type of prospectus certification requirement on the vendor of a business or assets where the purchaser may equity-finance a portion of the purchase price at any time within the year following the date of the transaction involving the significant business will create a significant "chill" on the mergers and acquisitions market in Canada. In particular, we submit that such a requirement will place significant restrictions and roadblocks on the ability of Canadian issuers to acquire businesses and assets that may require full or partial equity financing. Such a requirement would lead a rational seller to marginally prefer either foreign acquirors or, at a minimum, prefer large acquirors who could guarantee that an equity financing would not be required within a year following the date of the transaction so that the vendor could avoid any potential prospectus liability, either of which would significantly restrict the ability of smaller and mid-size Canadian businesses to grow for the benefit of their securityholders. While the CSA is seeking to protect participants in the Canadian capital markets, we submit that such measures will unduly and unnecessarily hamper Canadian issuers and capital markets and deny investors in Canadian issuers access to acquisitions that may be accretive and beneficial for such investors and the Canadian economy in general.

We submit that the existing prospectus liability regime provides investors with recourse and access to the appropriate parties for a misrepresentation in a prospectus, and certain of the CSA's concerns would be addressed under the current "promoter" certification/liability provisions of Canadian securities legislation. Vendors of a "significant business" to a Canadian issuer have generally already assumed and been allocated significant risk in the terms of the purchase agreement (by way of representations and warranties, indemnities and retained liabilities) with respect to the significant business sold or to be sold to the issuer, and adding an additional layer of uncertainty and risk on top of this will severely dissuade parties from completing transaction with Canadian issuers who may need to access the Canadian capital markets within the following year. In addition, purchasers of securities under a prospectus will generally have the ability to (indirectly) obtain recourse against the seller of a "significant business" for misleading commercial information provided about a "significant business" by way of a claim made by the purchaser/issuer under the indemnification clauses of a standard purchase and sale agreement for losses incurred by the

purchaser/issuer as a result of the breach of the commercial representations and warranties in the agreement.

Under many purchase and sale transactions, the commercial representations and warranties are heavily negotiated in order to allocate risk and arrive at an agreeable transaction price, and the added uncertainty of potential prospectus liability for the vendor of a "significant business", at any time within the next year and for an amount over which it may have no control, will add additional complications and disincentives to the negotiation of the transaction by a seller as it removes the ability to appropriately negotiate the price and deal terms as risk is appropriately allocated.

Finally, the proposed requirement to have any person who "controls" an issuer, or who holds more than 20% of an issuer or a significant business of the issuer" to certify a prospectus is again over-reaching as this may catch otherwise passive investors, particularly at the 20% level. Several Canadian issuers and companies have passive investors that are significant securityholders (including pension funds and institutional investors) that have no particular control or direction over an issuer or an acquired "significant business" other than perhaps certain board representation, and we do not believe it is appropriate to have such persons sign a prospectus certificate. We submit the current "promoter" certification requirements address the policy objective of the CSA in this respect. Alternatively, we would recommend that in order to prevent persons from attempting to avoid prospectus liability through the imposition of a holding company, the CSA implement a provision whereby the regulator may require the certificate from a person who controls an issuer in such circumstances, as is done in other sections of Proposed NI 41-101.

(b) Section 5.5 - Trust Issuers

Many income or royalty trusts have appointed a corporate trustee such as Computershare Trust Company of Canada, CIBC Mellon Trust Company, etc.. as trustee, which has allocated or delegated the responsibility to govern and manage the business and affairs of the trust to a corporate or other entity that is a (direct or indirect) wholly-owned subsidiary of the Fund ("*Opco*"), either within the trust indenture or through some form of administration or delegation agreement. As a result, the directors and officers of Opco, which is not an "external management company", govern and manage the business and affairs of the trust, and it is the CEO and CFO of Opco, along with any two directors of Opco, that sign the prospectus on behalf of the trust just as such officers and directors would sign on behalf of a corporate issuer. We believe this is the appropriate practice given the definitions of "director" and "officer" in the *Securities Act* (Ontario) (the "*OSA*") and analogous legislation in other jurisdictions, which includes persons "acting in a capacity similar to that" of a director or officer of a company, which the directors and officers of a company such as Opco do.

The current wording in section 5.5(2) of Proposed NI 41-101 could require the chief executive officer, chief financial officer and directors of a corporate trust company such as Computershare Trust Company of Canada or CIBC Mellon Trust Company to be required to sign the prospectus certificate, which we do not believe to be the intent. We suggest that the situation may be rectified by amending section 5.5(1)(b) to read: "...on behalf of the trustees of the issuer by any two trustees of the issuer or by any two individuals who perform functions similar to those performed by the directors of a company." This approach, which is consistent with the proposed wording in section 5.5(1)(a) with respect to the CEO and CFO of a trust, would also be consistent with the definitions of "director" and "officer" in the OSA and tie into the prospectus liability provisions in section 130 of the OSA.

(c) Section 5.8 - Reverse Takeovers

The proposed requirement in section 5.8 of NI 41-101 to have a prospectus certificate signed by "each individual who is a director, chief executive officer or chief financial officer" of the reverse takeover acquiror is onerous as "reverse takeovers" can often involve large and sophisticated entities. To require each director of the reverse takeover acquiror to sign a certificate does not serve any further purpose than if the certificate were signed by the CEO, CFO and any two directors of the reverse takeover acquiror, as is done with a regular corporate issuer. If the CSA's concern is that, under section 130(1) of the OSA, liability is only imposed on all of the directors of the issuer regardless of which directors of the issuer sign the prospectus, and then only on each other person who actually signs the prospectus certificate, we would recommend either changing the legislation or taking the approach required for promoters where one authorized signatory executes the certificate on behalf of the promoter. This would result in corporate liability then attaching to the reverse takeover acquirer rather than the individuals, who in virtually all circumstances are will be protected form personal liability through corporate indemnities and directors' and officers' insurance in any event.

(d) Section 5.11 - Certificate of Promoter

We submit that the proposed requirement in section 5.11(4) of Proposed NI-41-101 whereby the regulator may require any person or company that is a control person of either a promoter of the issuer or a person or company who was a promoter of the issuer within the two preceding years to sign a prospectus certificate is potentially overreaching. If the intent of such a provision is solely to require certification where the regulator reasonably determines that a person or company is attempting to avoid prospectus liability merely through the insertion of a holding company to act as promoter, the concept is fine and we would suggest that the wording be amended to only address such situations. However, several companies have passive investors that are "control persons" (including pension funds and institutional investors) that have no particular control or direction over a "promoter" (other than perhaps certain board representation), and we do not believe it is appropriate to have such control persons sign a prospectus certificate, absent the "holding company" concern of the CSA noted above. Again, we submit that such a requirement is unnecessary as the definition of "promoter" includes "a person or company who, acting alone or in conjunction with one or more persons, companies or a combination thereof, directly or indirectly, takes the initiative ...". The definition is broad enough, and includes the concepts of acting in conjunction with others and direct and indirect actions, to already may require persons or companies attempting to avoid prospectus certification through the implementation of a holding company to be caught by the prospectus certification requirement. Accordingly, we would recommend that section 5.11(4) of Proposes NI 41-101 be eliminated and the appropriate guidance and policy be set forth in the Companion Policy.

(e) Section 5.15 - Certificate of Operating Entity

We understand the CSA's policy rationale for requiring a prospectus certificate to be provided on behalf of an "operating entity", but the requirement to have each individual who is a director, chief executive officer or chief financial officer of an operating entity is overly burdensome. Similar to our comments with respect to certificates to be signed by takeover acquirors in a reverse takeover situation, we believe adequate provisions can be made by having a single signatory sign the prospectus on behalf of an operating entity.

B. PROPOSED NI 41-101 - PERSONAL INFORMATION FORMS

Similar to the comments with respect to substantial beneficiaries and promoter certificates described above, we submit that the requirement in section 9.2(b)(ii)(D) of Proposed NI 41-101 to include a personal information form for each director and executive officer of a promoter or substantial beneficiary of the offering is unduly burdensome and does not benefit the capital markets, but simply creates another level of complexity and inconvenience on potential vendors of properties or assets who may otherwise engage in transactions with Canadian issuers but may avoid doing so in order to avoid the prospectus process and accompanying liability.

C. PROPOSED NI 41-101 - REQUIRED DOCUMENTS FOR FILING A LONG-FORM PROSPECTUS

The requirement contained in section 9.3(a)(xi) of Proposed NI 41-101 to file an undertaking with respect to an operating entity should be clarified that such a requirement would only be required where the issuer is not required to consolidate the results of the operating entity in the issuer's consolidated financial statements and disclosure.

D. PROPOSED AMENDMENTS TO FORM 44-101 F1

The proposed amendments to Item 16.1 of Form 44-101 to require a substantial beneficiary of the offering to disclose details regarding the value received from the issuer should not be required, as we submit that the overriding requirement of the issuer to provide full, plain, true disclosure in its prospectus in respect of a significant business or significant acquisition should be sufficient. Purchasers under the prospectus are investing in the issuer and not the substantial beneficiary and therefore such disclosure should not be relevant or required. Furthermore, the proposed requirement for a substantial beneficiary of the offering to disclose how the consideration was determined, the date the subject asset was acquired by the substantial beneficiary (i.e. the vendor to the issuer) and the cost of the asset to the substantial beneficiary of the offering provides no benefit to the public markets and again will provide a disincentive for vendors to do business with Canadian acquirors who may undertake a prospectus financing within the year following the date of the transaction. Similarly, the expanded disclosure with respect to substantial beneficiaries with respect to bankruptcies or other penalties and sanctions is unnecessary and of no value to investors, as the promoter disclosure requirements should address the CSA's concerns.

CONCLUSION

We hope you will consider the above comments and the potential significant negative impact on the Canadian capital and mergers and acquisitions markets and general environment that may result from certain of the proposed amendments. While investor protection and integrity of the Canadian capital markets is obviously a worthy goal, over-intrusion into the business sector will result in detrimental effects to Canadian issuers and, as a result, the securityholders that the CSA is trying to protect. We are happy to discuss these comments further with you at your convenience. Should you have any questions, please contact Chad Schneider at (403) 260-9660.

Yours truly,

Blake, Cassels + Graydon LLP