INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

Susan Copland
Director - IIAC

March 28, 2007

Patricia Leeson
Co-Chair – CSA Prospectus Systems Committee
Alberta Securities Commission
4th Floor, 300 – 5th Ave. SW
Calgary AB T2P 3C4

Heidi Franken
Co-Chair – CSA Prospectus Systems Committee
Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto ON M5H 3S8

Anne-Marie Beaudoin
Directrice du secretariat
Autorité du marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246,22e étage
Montréal QC H4Z1G3

Dear Sirs/Mesdames

Re: National Instrument 41-101 – *General Prospectus Requirements* and related instruments

Thank you for providing us with the opportunity to comment on the above noted instrument. The Investment Industry Association of Canada (IIAC or the Association) is the professional association representing over 200 investment dealers in Canada. Our mandate is to promote efficient, fair and competitive capital markets for Canada and assist our member firms across the country.

…/2

General

The Association generally supports CSA initiatives that consolidate and harmonize regulation across Canada. We believe it is essential to simplify and streamline the Canadian regulatory framework.

To the extent that the proposed changes to NI 41-101 achieve this harmonization objective, we are supportive. However, we have concerns as to how it is proposed that harmonization and consistency is to be achieved.

It appears that in the harmonization process, little attention was paid to simplifying the Instrument or revisiting whether there is an actual need for the regulation contained within it. The resulting Instrument contains more layers of prescriptive regulation which now include provisions from various provinces. The industry would have been better served by a carefully considered review of whether such prolific and detailed regulation is required, and how the industry and investors could be better served by a more principles-based document.

We are also concerned that certain provisions in the Instrument are not applicable to all provinces. Most notably, a number of certificate requirements (many of which are burdensome) do not apply in Ontario. This increases the complexity and cost from a compliance standpoint. It also results in a non-level regulatory playing field among jurisdictions, as there would be a regulatory disincentive to file in the other provinces. It is misleading to characterize such regulation as a National Instrument when key features do not apply to the nation's largest province.

Specific Issues

In addition to the general issues described above, there are a number of key provisions in the Instrument that are of concern to our members.

Substantial Beneficiaries of the Offering

The requirement for "substantial beneficiaries of the offering" to sign the certificate is very problematic. The certificate requirement is a blunt and unfocussed means to address the CSA concerns about liability avoidance by parties with significant information about the issuer.

If implemented, this requirement will have significant unintended negative consequences. Requiring substantial beneficiaries to certify the disclosure of the *entire prospectus*, rather than the portions to which they have specific information, imposes a significant burden on these parties. The resulting costs will not only accrue to the parties to the transaction, but to entire sectors of the economy. These costs are not properly aligned with the intended benefits of the requirement.

Making a substantial beneficiary responsible for all of the information in the prospectus and potentially liable for the entire amount of the offering, whether it relates to their transaction and whether such funds flow to them, creates a disproportionate risk profile and cost/benefit outcome for potential vendors. It is also an ineffective and improperly focused means of ensuring appropriate prospectus disclosure. Although the substantial beneficiary is clearly in the best position to provide and certify the accuracy of the information relating to its business, it generally does not have first hand information or knowledge relating to the purchaser's business.

Requiring the substantial beneficiary to obtain third party assistance to investigate and verify this information imposes a significant regulatory cost without a clear benefit. The regulation currently requires that this disclosure be certified by parties with direct knowledge and access to information. The requirement places the risk on the wrong party. It is unclear why a vendor should be liable for information of a purchasing entity. The risk should be proportionate and link to matters over which the vendor has control and expertise.

The certification burden introduces time and cost elements that will likely result in many transactions becoming uneconomical. As a result, there is a real danger that substantial acquisitions undertaken by public issuers in Canada will be materially reduced. This distortion of the market by regulatory transaction costs ultimately will affect issuers and industry segments (particularly the oil and gas sector) by making them less profitable. Certain vendors may choose not to undertake business with Canadian public companies due to the greatly increased regulatory risk. This has significant implications for the economic standing and competitiveness of Canadian issuers, as similar requirements do not exist in the U.S. or elsewhere.

Rather than impose such a broad and far reaching requirement to address a specific and identifiable issue, the CSA should use its prospectus receipting powers to target situations that appear to have been constructed to avoid liability. This focused use of existing rules would send a strong message to those seeking to structure such transactions, and would not result in the significant damage to the industry that would flow from the broad certification requirement.

Restriction of Compensation Options

We oppose this provision on a number of fronts. The first is that it is not apparent that the problem this restriction is intended to solve has been an issue in the industry.

We are not aware of any practice in which dealers acquire securities through compensation agreements with a view to re-sell them without the prospectus liability. In fact, many dealers voluntarily impose time based resale restrictions on such securities. The CSA should not create new regulation unless it is clear that a problem exists. If it is clear that there is a market problem, the proposed solution must address the issue directly to avoid unintended consequences.

The proposed restriction appears to fall short on both counts. If the problem of backdoor underwriting can be shown to exist, an attempt to eradicate it through limits on broker compensation is a badly targeted solution. If the regulators are concerned about liability on a post prospectus distribution, they should deal with that issue directly rather than placing restrictions on broker compensation, which appears to be only peripherally, related to the issue. Would such a problem not be adequately addressed by the civil liability regime that is being introduced throughout Canada?

It is not an appropriate for the CSA to regulate market forces. Compensation agreements between issuers and dealers are not matters affecting the public interest, and should not be the subject of regulation, either directly or under the auspices of dealing with another market issue.

Bona Fide Estimate of the Range of the Offering Price

Members have expressed concern about mandating disclosure of an estimated price range in the preliminary prospectus. In an initial public offering in particular, the estimated price range may change materially due to market conditions from the initial filing of the preliminary prospectus. Certain of our members are concerned that the range provided in the preliminary prospectus will effectively limit the issuer's flexibility as investors' expectations will be set and the effectiveness of the price discovery process constrained.

Although an estimate may provide potential investors with useful information in some circumstances, the fact that the issuer may change the price without amending the preliminary prospectus is evidence that the CSA does not believe it to be essential to investor protection. Issuers should be afforded the flexibility to include or exclude this information, depending on the circumstances of the offering.

We would further note that in an initial public offering, the price range is generally set after the initial preliminary prospectus is filed. If a concern exists regarding inconsistencies between the green sheets and the preliminary prospectus, a more practical solution with fewer unintended consequences would be to only require the estimated price to be included in the amended preliminary prospectus filed immediately prior to the commencement of marketing activities. The estimated price would also be included in the commercial copies of the preliminary prospectus.

Advertising and Marketing

The provisions in the companion policy interpreting the advertising and marketing requirements highlights a clear difference between regulatory expectations and industry practice. The provisions in the companion policy, if followed, would lead to a rather bizarre result in respect of dealer "road shows" conducted to ascertain interest in potential offerings. In particular sections 6.5(3) and (4) would not permit dealers making a presentation to potential investors to communicate any details about the commercial features of the issue beyond: the type of security; price, if determined (which it may not be at that stage); the business of the issuer (but only if it is a non reporting issuer); if the

security qualifies for special tax treatment (but they cannot explain how); and how many securities will be available.

The resulting presentation would not permit registrants to convey any meaningful information to potential investors, even when such information is contained in the prospectus. It appears that even an oral presentation discussing the prospectus would be prohibited. Surely, this is not the intention of the regulation.

Potential investors seeking information would not be well served by this interpretation, as rather than being provided with a summary of the salient aspects of the transaction, with a facility to ask questions, their information session would consist of a supervised prospectus reading session which investors or their representatives would be unlikely to attend. It is not clear why, at a minimum, it is not permissible to extract and present information directly from the prospectus or from other publicly available information, as this would serve the interests of investors without public interest concerns. If the CSA has concerns about selective disclosure in these information sessions, they have existing powers that can be used to address this problem.

Conclusion

The Association supports CSA efforts to harmonize and consolidate regulation. However, it is critical that in undertaking these efforts the CSA examine whether there is a real market need for the regulation, and if so, whether that need can be accommodated in a more flexible, less prescriptive principles-based framework. If this analysis is not undertaken, the result will be a continued proliferation of complex and costly regulation. The benefits of harmonization under such a scenario are marginal and arguably not worth the significant effort to achieve it.

Thank your for considering our comments. If you have any questions please do not hesitate to contact the undersigned.

Sincerely,

Susan Copland
Director, IIAC

888 Dunsmuir Street, Suite 1230, Vancouver, BC V6C 3K4
Tel: 604-482-1793 Fax: 604-633-1574 scopland@iiac.ca / www.iiac.ca