CIBC World Markets

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Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Nova Scotia Securities Commission
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut
Ontario Securities Commission
Prince Edward Island Securities Office
Autorité des Marchés Financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

DELIVERED BY EMAIL TO:

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Re: Proposed NI 41-101 *General Prospectus Requirements* and related amendments

Dear Sirs:

I am pleased to respond on behalf of CIBC World Markets Inc. to your Request for Comments dated December 21, 2006 regarding Proposed NI 41-101 *General Prospectus Requirements* (the "Proposed Rule") and the proposed amendments to National Instrument 44-102 – Shelf Distributions.

CIBC World Markets Inc. supports many aspects of the Proposed Rule that are expressly intended to harmonize and organize the prospectus requirements in of each of the jurisdictions. However, we have concerns about other aspects of the Proposed Rule, which contemplate unanticipated and substantive changes to the existing prospectus requirements.

Certificate of Substantial Beneficiary

CIBC World Markets Inc. objects to the CSA's proposed implementation of section 5.14 of NI 41-101 and the proposed corresponding amendments to Form 44-101F1. These provisions would have the effect, other than in Ontario, of requiring any substantial beneficiary of an offering to certify the content of an issuer's short form or long form prospectus. The term "substantial beneficiary" is defined overly-broadly to include, among others, any person or entity who, alone or acting in concert with third parties, is reasonably expected to receive, directly or indirectly, 20% or more of the proceeds of the offering and who:

- Now controls or owns 20% or more of the issuer's voting rights; or
- Has controlled or owned 20% or more of the issuer's voting rights within the preceding 12 months; or
- Will control or own 20% or more of the issuer's voting rights following completion of the offering; or
- Now controls or owns 20% or more of any significant business of the issuer; or
- Has controlled or owned 20% or more of any significant business of the issuer in the preceding 12 months; or
- Will control or own 20% or more of any significant business of the issuer following completion of the offering.

The proposed certification would make the substantial beneficiary responsible for the *entire content* of the issuer's prospectus and would *not be subject to any knowledge qualifier or due diligence defence*. CIBC World Markets Inc. does not believe that such a requirement would be warranted or appropriate. We believe that this proposal would unduly interfere with the efficiency of Canadian capital markets and significantly reduce the range of potential outcomes of M&A transactions.

Substantial beneficiary certification would materially limit a reporting issuer's ability to use equity financing to grow its business through significant acquisitions. Currently, it is not unusual for reporting issuers to finance their growth through equity offerings, including through offerings of subscription receipts. If the Proposed Rule were adopted as proposed by the CSA, we would expect such offerings to become far less common. Substantial beneficiary certification would require the vendor of any significant business to complete a comprehensive due diligence investigation of the purchasing reporting issuer's business and financial position sufficient to independently verify that the issuer's public disclosure does not contain any misrepresentation. Such a requirement would place any "cash poor" reporting issuer at a distinct disadvantage (from both timing and purchase price perspectives) relative to any prospective buyer of the significant business that is not a reporting issuer, because that other prospective buyer would not be burdened by the Proposed Rule's substantial beneficiary certification requirement and is would therefore be able to complete an acquisition more quickly.

To compete on a level playing field in connection with any significant acquisitions, any cash poor reporting issuer would likely need to use leverage, through bank borrowings or similar non-equity financing techniques, to finance its significant acquisition. However, even the use of borrowed money may be caught by the substantial beneficiary certification requirement because section 5.14 of NI 41-101 also catches "indirect" equity financings that involve a significant beneficiary. The "indirect" application would be problematic from a practical perspective. For example, a reporting issuer may elect to finance an acquisition through a pre-existing bank line,

with a view to deciding after completion of the acquisition – based upon prevailing market conditions at that time - whether to refinance the bank line or repay it from other borrowings, a bond offering or an equity offering. The Proposed Rule would significantly limit this important flexibility without achieving any demonstrable benefit.

In explaining the policy underlying the substantial beneficiary certification proposal, the CSA has noted in the Notice and Request for Comment accompanying the Proposed Rule that, "We believe a person or company that controls the issuer or a significant business has the best information about the issuer. Such a person or company who also receives proceeds from the distribution should be liable for any misrepresentation about the issuer or a significant business." We strongly disagree. Securities legislation correctly places the principal burdens of prospectus disclosure on issuers and, in the case of secondary offerings, on selling securityholders. Even the latter point, imposing prospectus liability on a selling securityholder without permitting any due diligence defence, is already a blunt instrument that warrants reconsideration by the CSA.

In our view, contrary to the CSA's assertion in the Notice and Request for Comment, substantial beneficiary certification would not "benefit the capital markets as a whole." Instead, in our view, requiring substantial beneficiary certification would:

- Place reporting issuers at a distinct disadvantage in any attempts to grow their businesses through substantial acquisitions financed, directly or indirectly, by new equity;
- Unduly interfere with the efficiency of Canadian capital markets and significantly reduce the range of potential outcomes of M&A transactions; and
- Unfairly create statutory liability, without any due diligence defence, for several categories of important capital markets participants who do not face any similar liability under the securities laws of other jurisdictions, including the United States.

We do not believe that the foregoing significant costs would be outweighed by any unproven potential for enhanced disclosure. Accordingly, we would urge the CSA to reconsider section 5.14 of the Proposed Rule in its entirety. Alternatively, we request that the CSA propose an alternative that would require a vendor to certify only the prospectus disclosure relating to the significant business being acquired by the reporting issuer, provide a due diligence defence to the vendor, limit the vendor's liability to the amount of proceeds actually received by the vendor and not apply the certification requirement to indirect equity financings (e.g. arm's-length borrowings that are not repaid within 30 days).

Certificate of Other Persons

CIBC World Markets Inc. is also concerned with the CSA's proposed implementation of section 5.16 of the Proposed Rule and the proposed corresponding amendments to Form 44-101F1. These provisions would have the effect, *other than in Ontario*, of requiring any "substantial beneficiary" of an offering to certify the content of an issuer's short form or long form prospectus.

Securities legislation in most provinces already provides staff of the provincial securities regulators with the discretion, in effect, to refuse to receipt a final prospectus if they determine that it would not be in the public interest to do so (e.g. section 61 of the *Securities Act* (Ontario)). In the event that staff exercises their discretion to refuse a receipt, securities legislation in most provinces provide the person or company who filed the prospectus with a right to a hearing before the securities regulator.

We believe that section 5.16 of NI 41-101 and the proposed corresponding amendments to Form 44-101F1 are unnecessary because existing securities legislation provides regulators with sufficient power to ensure that proper persons certify the contents of a prospectus. Moreover, we are concerned that, if "other person certification" becomes a requirement under the Proposed Rule, some staff may require certification of a prospectus in ways that were entirely unintended by the CSA at the time of drafting the Proposed Rule. We note that there is no guidance in the related Companion Policy to NI 41-101 (the "Proposed CP") and – unlike the corresponding provisions of securities legislation - the Proposed Rule does not provide any right to be heard in the event that the reporting issuer, or some other person who is required by staff to certify the issuer's prospectus, disagrees with staff's position concerning the application of section 5.16 of NI 41-101.

In our view, if the CSA determines to include other person certification in the Proposed Rule, the Proposed CP should provide some clear guidance concerning its intended use and the criteria that would be taken into account by staff in determining the appropriate form of the certificate. In addition, the Proposed Rule should afford an opportunity to be heard in the event that staff exercises its discretion to require a certificate pursuant to section 5.16 of NI 41-101. Requiring an issuer to obtain a certificate from a third party after filing a preliminary prospectus may jeopardize completion of the offering if it was a risk not bargained for between the business parties.

The CSA should also consider the interaction between any such certificate and the civil liability provisions of securities legislation. For example, although section 5.16 of NI 41-101 is one of many provisions of the Proposed Rule that are intended to apply "except in Ontario," clause 130(1)(e) of the *Securities Act* (Ontario) makes any person who signs a certificate in a prospectus liable for the contents of that prospectus. The same observation could be made concerning the "substantial beneficiary certification" contemplated by section 5.14 of NI 41-101, which is also intended to apply "except in Ontario." Unless the CSA is contemplating that issuers would file two versions of the prospectus, one in Ontario (without the certificates contemplated by sections 5.14 and 5.16 of the Proposed Rule) and the other (with such certificates) in the other provinces and territories, it's not clear that the "except in Ontario" qualification would accomplish much.

Compensation Securities

CIBC World Markets Inc. is concerned with the CSA's proposed implementation of section 11.3 of the Proposed Rule, which would limit prospectus-qualified compensation securities to 5% of the base offering. Although it is not common for CIBC World Markets Inc. to receive compensation securities in connection with our securities underwriting business, we see no policy reason for the CSA to place arbitrary limitations on the amount of compensation securities permitted by the Proposed Rule.

We are not aware of any "backdoor underwritings" and believe that the CSA's stated policy concern underlying this limitation is largely academic. In our view, any underwriter would be very reluctant to employ compensation options to effect a backdoor underwriting given that several provinces' securities legislation defines a "distribution" to include any transaction or series of transactions involving the purchase and sale or repurchase and resale of securities in the course of or incidental to a distribution. However, if the CSA is concerned about backdoor underwritings, a more appropriate means for addressing that concern might be to require a minimum hold period of 60 days for compensation securities.

So long as it's properly disclosed in the reporting issuer's prospectus, we don't believe that the quantum of underwriter compensation should attract securities regulatory intervention, whether such intervention is based upon the CSA's assertion of public interest jurisdiction or otherwise, and is a matter best left for negotiation between the issuer and its underwriters in the context of specific transactions.

Marketing and Advertising

Part 6 of the Proposed CP proposes to codify, in one instrument, a variety of existing policy statements, staff notices and other instruments not having the force of law. CIBC World Markets Inc. is supportive of any effort to bring more clarity to the requirements or guidelines relating to the marketing and advertising of securities.

We appreciate that there are a variety of policy objectives behind those requirements and we recognize that the existing patchwork of policy statements, staff notices and other guidance may not reflect today's market practices or the many competing policy objectives underlying those requirements. For example, existing regulatory guidance does not sufficiently distinguish between initial public offerings (where "preparing the market" should be the principal policy consideration) and subsequent offerings (where "tipping" should be the principal policy consideration). Similarly, some of the existing guidance reflected in Part 6 of the Proposed CP seems outdated. Increasingly, most of the CSA's policy and regulatory initiatives have been shifting away from episodic, transaction-specific offering documents towards continuous disclosure and an integrated disclosure system. The broadening of eligibility criteria for short form prospectuses and the implementation of statutory civil liability for continuous disclosure warrants a thorough re-thinking of the CSA's existing guidance. Any new CSA guidance concerning the marketing and advertising of securities offerings should be consistent with that broader theme.

By way of illustration, subsection 6.5(1) of the Proposed CP seems to suggest that the CSA would even limit institutional investor "roadshows" to identifying the security offered, stating the price (if then determined) and identifying the underwriters. Subsection 6.5(2) says that, in the CSA's view, "The use of any other marketing materials during the waiting period would result in a violation of the prospectus requirement." Taken together, these provisions seem to indicate that there is a substantial difference between the CSA's interpretation of securities legislation and industry practice.

We do not feel that it would be appropriate to address these requirements in the Proposed CP without a thorough, consultative discussion between the CSA and market participants. CIBC World Markets would be pleased to participate actively in any such consultation.

Minimum Waiting Period

CIBC World Markets Inc. does not believe that any significant policy objective would be achieved by retaining the existing 10-day minimum waiting period prescribed by the *Securities Act* (Ontario).

Disclosure of Price Range in Preliminary Prospectus

Section 1.7 of Form 41-101F1 – Information Required in Prospectus, which is attached as Appendix B to the Proposed Rule, would require a preliminary prospectus to disclose a *bona fide* estimate of the range in which the offering price or the number of securities being

distributed is expected to be set. CIBC World Markets Inc. does not believe that this requirement is necessary or, at least in the case of follow-on offerings by existing reporting issuers, desirable. In the case of follow-on offerings, if any face page pricing disclosure is required, it should be the market price of the securities at the time of filing the preliminary prospectus, with appropriate caveats.

If the CSA determines to include a version of section 1.7 s in the final version of Form 41-101F1, we would suggest that the last sentence of section 4.2 of the Proposed CP be deleted and replaced with, "A difference between this *bona fide* estimate and the actual offering price or number of securities being distributed is not *in itself* a material adverse change for which the issuer must file an amended preliminary long form prospectus." [Emphasis added]. CIBC World Markets Inc. would not be supportive of adding a further requirement in the Proposed Rule for issuers to reflect the mid-point of that range to fill the bullets in the capitalization table, earnings coverage ratios and pro forma financial information in the preliminary prospectus. Such a requirement would unduly restrict pricing flexibility and could contribute to an unwarranted conclusion that changing the numbers in those tables as a result of final pricing constitutes a material adverse change requiring an amended preliminary long form prospectus.

Novel Derivatives and Asset-backed Securities

CIBC World Markets Inc. is concerned with the CSA's proposed amendments to the definition of "novel" in section 1.1 of *National Instrument 44-102 – Shelf Distributions* (the "Shelf Rule"). Under the proposed amendments, reporting issuers will be required to pre-clear the initial shelf prospectus supplement for each new type of specified derivative or asset-backed security, regardless of whether another reporting issuer has previously distributed a similar specified derivative or asset-backed security under a prospectus receipted by securities regulators. We do not believe that this proposed change is warranted.

If the CSA is concerned about the prospectus disclosure relating to the distribution of linked notes and similar specified derivatives qualified by way of shelf prospectus, CIBC World Markets Inc. would be quite willing to work cooperatively with the CSA in developing detailed disclosure requirements or guidelines relating to such offerings. We believe that requiring pre-clearance on an issuer basis may be cumbersome and inefficient because it would make it more difficult for issuers to respond to particular market opportunities and will not be transparent to other issuers of similar types of securities. Accordingly, we would urge the CSA to reconsider amending the definition of "novel" in the Shelf Rule.

Except in Ontario

We note that the phrase "except in Ontario" appears 48 times in the Proposed Rule and the related documents that accompany the CSA's Notice and Request for Comment.

We can appreciate that there may be good and valid policy reasons for one or more provinces not to be aligned with the remainder of the CSA on all rules. However, we are concerned that the Proposed Rule will not achieve the CSA's stated purpose of harmonizing and consolidating the prospectus requirements across Canada so long as several significant components of the Proposed Rule will not apply in Ontario, which is home to approximately 40% of the population of Canada and a large number of significant participants in Canada's capital markets. Also, as noted above, excluding Ontario from the new prospectus certification requirements of the Proposed Rule may leave to persons who are obligated to sign certificates under other provinces'

requirements under the Proposed Rule nonetheless liable under Ontario securities legislation in the event that a prospectus contains a misrepresentation.

We trust the foregoing is satisfactory and would be pleased to answer any questions you might have.

Yours truly,

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Vice- President, Legal

cc.
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