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BY E-MAIL

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

c/o Patricia Leeson, Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
4th Floor, 300 – 5th Avenue S.W.
Calgary, Alberta T2P 3C4

-and-

c/o Heidi Franken, Co-Chair of the CSA's Prospectus Systems Committee
Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, Ontario M5H 3S8

-and-

c/o 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

Dear Sirs/Mesdames:

Re: Proposed National Instrument 41-101 *General Prospectus Requirements* and Companion Policy 44-101CP *General Prospectus Requirements*

The following comments are provided by McCarthy Tétrault LLP in response to the Canadian Securities Administrators' request for comment regarding proposed National Instrument 41-101 *General Prospectus Requirements* ("**Proposed NI 41-101**") and Companion Policy 44-101CP *General Prospectus Requirements* (the "**Companion Policy**").

General Prospectus Requirements

We support the efforts of the Canadian Securities Administrators to harmonize the long-form prospectus requirements. With respect to Proposed NI 41-101 and the Companion Policy, we are generally supportive of the provisions that provide guidance regarding the filing of material contracts, specify the requirements for filing of personal information forms, impose restrictions on the exercise of over-allotment options, require disclosure of a *bona fide* estimate of pricing information in a preliminary prospectus and require inclusion of only two years' financial statement history in a prospectus.

Specific Questions Identified for Comment

We have the following comments regarding the specific questions identified in the Request for Comment (using the same numerical sequence):

Certificate Requirements

1. We believe that the addition of a new certificate requirement for "substantial beneficiaries of the offering" (the "**New Certification Proposal**") would not be appropriate. In our view, liability for misrepresentations in a prospectus that are based on information provided by substantial beneficiaries should be dealt with contractually between the issuer and those persons and, to the extent necessary, through disclosure of such arrangements in the relevant prospectus.

   In our view, requiring substantial beneficiaries of the offering to sign a certificate and assume liability for a misrepresentation in a prospectus under the New Certification Proposal will have a material adverse effect on an issuer's ability to effectively compete for acquisitions of targets with certain other potential buyers, such as private equity firms, pension funds and closely-held issuers that do not require access to the public capital markets to fund acquisitions.

   Typically, the negotiations to acquire a target are conducted on an arm's length basis between the vendor and the issuer (and, to the extent that an acquisition involves related parties, the issuer would be required to comply with OSC Rule 61-501 and AMF Policy Q-27, unless exempted from those requirements). To the extent that an issuer proposing to make an acquisition must raise all or a portion of the purchase price of an acquisition by way of a public offering, the vendor is indifferent to the source of the purchase price proceeds, does not initiate the public offering and generally has no material involvement in the offering process itself, other than in

connection with the due diligence review undertaken by the issuer's underwriters regarding the business and affairs of the target. If anything, the need for a bidder to conduct a public offering to fund the acquisition increases the deal completion risk for the vendor as the ability of the purchaser to complete the transaction is entirely or partially dependent upon a successful offering.

In our view, the New Certification Proposal may have the effect of distorting an issuer's ability to make commercially reasonable business decisions by providing an incentive to fund acquisitions with bank debt or by way of a private placement of securities when the more prudent course of action would be to raise funds by way of a public prospectus offering. Further, the New Certification Proposal appears to be predicated on the assumptions that (i) vendors and purchasers are unable to appropriately allocate risk between themselves contractually, and (ii) any risks to the issuer that funds the acquisition through a public offering cannot be fully and properly set out in the related prospectus delivered to investors. Neither of these assumptions is, in our view, accurate.

The issuer can ensure that its prospectus contains full, true and plain disclosure of information regarding a significant probable acquisition by undertaking a thorough due diligence process. The due diligence role of the underwriters in the offering process also serves to safeguard against a misrepresentation in the prospectus. We believe that the liability for a misrepresentation in a prospectus would be more appropriately dealt with contractually (e.g., representations and warranties and indemnities) between the vendor of the target and the issuer. In our view, this is a more efficient way to ensure a level playing field between an issuer and the competing buyers described above than the New Certification Proposal.

We presume that this proposed requirement has arisen from the concerns identified in Parts 4 and 5 of National Policy 41-201 *Income Trusts and Other Indirect Offerings* ("**NP 41-201**"). We do not believe that the concerns identified in NP 41-201 are applicable to all issuers. We also understand that there is no analogous requirement imposed by applicable securities laws in the United States and therefore to impose such a requirement in Canada would put the Canadian capital markets at a serious disadvantage.

2. Please refer to our response in paragraph 1 above.

3. Please refer to our response in paragraph 1 above.

4. Please refer to our response in paragraph 1 above.

Material Contracts

5. We agree with the proposal in subsection 9.1(1) of Proposed NI 41-101 to identify specific types of contracts that will be excluded from the exemption for the filing of contracts entered into in the ordinary course of business. This will provide reporting issuers with more certainty surrounding what must be filed. However, we believe that the carve-out in paragraph 9.1(1)(a) from contracts to which directors, officers, promoters, substantial beneficiaries, selling security holders or underwriters are a party should also extend to the delivery or provision of services at fair value. We also note that the blanket carve-out of "credit agreements" in paragraph 9.1(1)(d) may be overly-broad and is inconsistent with similar rules adopted by the U.S. Securities and Exchange Commission.

6. We commend the CSA for providing issuers with certainty surrounding the redaction of certain provisions from a material contract filed under Proposed NI 41-101.

Personal Information Form and Authorization

7. We do not see any practical difficulties with requiring an issuer to deliver a completed personal information form and authorization for every individual described in subparagraph 9.2(b)(ii) of Proposed NI 41-101 with the first preliminary prospectus filed by the issuer. In addition, we also commend the CSA for attempting to eliminate unnecessary duplication by permitting an issuer to deliver personal information forms in the form set out in Appendix A of Proposed NI 41-101 or in the form of a personal information form delivered to the Toronto Stock Exchange or the TSX Venture Exchange, if it was delivered to the applicable exchange and has not changed.

Over-Allocation

8. We generally agree with the manner in which Proposed NI 41-101 restricts the exercise of an over-allotment option to the lesser of the underwriters' over-allocation position and 15% of the base offering. We also agree with the change to the time for the determination of the over-allocation position to the closing of the offering from the close of trading on the second trading day next following the closing of the offering.

Distribution of Securities Under a Prospectus to an Underwriter

9. Compensation options and warrants are key forms of compensation used by issuers, and particularly by junior issuers, conducting a prospectus offering. We note that where compensation is paid in the form of option or warrant coverage, it is customarily in excess of the 5% ceiling proposed under Proposed NI-41-101 and often in the range of 7% to 8% of the number or principal amount of the securities

being distributed under the prospectus. In our view, the number of compensation options or warrants issued to underwriters would be best left to negotiation between the issuer and the underwriters, subject to appropriate disclosure in the prospectus. Concerns with "back-door underwriting" could be more appropriately dealt with in other ways, including by imposing transfer restrictions on the compensation securities.

Waiting Period

10. We do not believe that a minimum waiting period is necessary to ensure investors receive a preliminary prospectus and have sufficient time to reflect on the disclosure in the preliminary prospectus before making an investment decision. The statutory rights of rescission are sufficient to address any issues in this regard. Also, the regulators' review process for a preliminary long form prospectus will necessarily involve a period of time during which investors can digest the information in a preliminary prospectus.

Amendments to a Preliminary or Final Prospectus

11. We believe that the current requirements to file amendments to a preliminary prospectus upon the occurrence of a material adverse change and to a final prospectus upon the occurrence of a material change are appropriate. Any effort to tie the requirement to amend a prospectus to the "continued accuracy of disclosure" must in any case import a materiality concept to be useful. Accordingly, the distinction drawn between accuracy of disclosure versus changes in the business, operations or capital of the issuer is not helpful.

Bona Fide Estimate of Range of Offering Price or Number of Securities Being Distributed

12. We believe that there is merit in requiring disclosure in a preliminary prospectus of a *bona fide* estimate of the range within which the offering price or the number of securities being distributed is expected to be set. This approach is consistent with practice in the United States and issuers and underwriters generally estimate pricing for green sheet purposes in any event. This additional disclosure would provide investors with meaningful pro forma information in a preliminary prospectus based on a given offering price.

    We note, however, that there would be some uncertainty regarding whether a change in the offering price outside of the estimated range would require an amendment to the preliminary prospectus. Section 4.2 of the Companion Policy states that a difference between the estimate and the actual offering price or number of securities being distributed is not "generally" a material adverse change for which the issuer must file an amended preliminary long form prospectus. It would be helpful if a bright line approach were used for these purposes – for example, requiring an

amendment where the actual offering price is more than a specified percentage (e.g., 5% or 10%) outside of the high- or low-end of the estimated range.

2 Years' Financial Statement History

13. We agree that reporting issuers using the long form system should only have to provide the same number of years financial history that they would normally provide under the short form system.

Other Comments

We have the following additional comments regarding Proposed NI 41-101:

(a) We note that subparagraphs 9.3(a)(x) through (xiii) of Proposed NI 41-101 contemplate the preparation and filing of certain undertakings by an issuer filing a final long form prospectus. We believe that it would streamline the long form prospectus filing process if the filing of these undertakings was eliminated and the subject matter of the undertakings simply included as requirements imposed by Proposed NI 41-101 or National Instrument 51-102 *Continuous Disclosure Obligations*, as applicable.

(b) With respect to the proposed amendments to National Instrument 81-101, Form 81-101F1 and Form 81-101F2, we generally agree with the effort to clarify and consolidate the filing requirements for simplified prospectuses, amendments thereto and supporting documents. We have the following specific comments:

(i) We believe that there is a typographical error in Section 1.4 of Appendix I, Schedule 1 such that references that are currently to Section 2.8 should be to Section 2.9.

(ii) There is a requirement in proposed Section 2.3(1)(b)(iv) and proposed Section 2.3(2)(b)(vi) to include a signed letter to the regulator (typically referred to as a "comfort letter") from the auditor of the mutual fund if a financial statement of the mutual fund included in the preliminary or pro forma simplified prospectus is accompanied by an unsigned auditor's report. We believe that a comfort letter in such circumstances is an unnecessary expense and logistical difficulty that provides no value to prospective investors or to the regulators. In the context of a new mutual fund the comfort letter would be with regard to the draft balance sheet filed with a preliminary prospectus, which balance sheet is a simple statement typically containing no financial information whatsoever. With respect to the pro forma filing, a pro forma simplified prospectus is not typically filed for public access on

SEDAR but only for review by the regulators and there is no benefit to the public to having a comfort letter filed along with the pro forma prospectus.

We appreciate the opportunity to comment on Proposed NI 41-101 and the Companion Policy. If you have any questions with respect to our comments, please feel free to contact any one of Jonathan Grant (416-601-7604), Robert Hansen (416-601-8259) or Katherine Gurney (416-601-8230) in Toronto, Sven Milelli (604-643-7125) in Vancouver, Peter Goode (403-260-3649) in Calgary, Virginia Schweitzer (613-238-2174) in Ottawa or Nathalie Forcier (514-397-5462) in Montreal.

Yours truly,

"McCarthy Tétrault LLP"