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April 5, 2007

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

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Dear Sirs/Mesdames:

Request for Comment – Proposed National Instrument 41-101 *General Prospectus Requirements*, Form 41-101F1, Form 41-101F2 and Companion Policy 41-101CP, Proposed Repeal of National Instrument 41-101 *Prospectus Disclosure Requirements*; Proposed Amendments to certain other National Instruments and Companion Policies

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

Request for Comments

1. *"Substantial Beneficiary" Rules*

We submit that the proposed new "substantial beneficiary" rules will adversely affect Canadian public issuers and have a disproportionate economic effect on growth industries including the energy and technology sectors which are acquisition intensive. Acquisitions in growth sectors of the Canadian economy typically involve multiple transactions for junior and mid-sized companies as they grow their businesses.

We are concerned that the proposed certificate requirements for "substantial beneficiaries of an offering" will create an uneven playing field in the acquisitions market, which will prefer private buyers to junior or mid-cap Canadian reporting issuers by making it almost universally inadvisable for vendors of assets to sell to entities who rely on the proceeds of public financing to fund their acquisitions.

In an environment where private equity and foreign issuers already enjoy a lower cost of capital, the imposition of prospectus liability on vendors who sell assets to Canadian issuers who use public financing proceeds to fund acquisitions would further impair such Canadian issuers from successfully competing for opportunities.

These proposed rules will severely impact whether vendors will even consider potential buyers who have to finance the acquisition through public funds. If vendors are willing to accept such purchasers (likely in either a distressed asset context where there are no other buyers, or where a significant premium is being offered), the cost of additional due diligence and the risk of potential liability will be added into (and will inflate) the total acquisition cost for Canadian issuers. This inflation will be exacerbated by the fact that the proposed new rules would impose liability on the "substantial beneficiary" for all disclosure in the prospectus and not just the disclosure relating to the acquired business or assets.

Since the "substantial beneficiary" is often a passive investor without the same access to information as a director or officer, this person or entity may be faced with having to

perform full due diligence on the issuer even if the sale of the "substantial beneficiary's" business only represents a portion of the issuer's business. The "substantial beneficiary" may also face challenges attempting to obtain indemnification from the issuer due to enforceability issues and the financial position of the issuer. In our view this requirements goes too far. It will have an appreciable impact on the economy by favouring certain bidders (and reducing the number of competitive bidders), slowing transactions and imposing prospectus liability on vendors of assets.

In the commentary surrounding the implementation of National Policy 41-201, the CSA agreed with a comment that the proposed requirements for prospectus liability in NP 41-201 did not make any clear distinction between arm's length and non-arm's length transactions. The CSA responded by stating that their concern was primarily with vendors that negotiate the terms of the purchase of a business by the trust, and are also involved in the negotiation of the terms of the public offering with the underwriters. Where the transaction is a bona fide arm's length transaction these concerns do not generally arise. The guidance provided in NP 41-201 was therefore amended to address this issue. We are unclear as to why the same principles do not apply in this circumstance, specifically if the sale of the "significant" asset requires that proceeds be raised from the public, but the vendor is an arm's length vendor and not involved in the offering process, no liability should be imposed on such vendor. The proposed new rule should, at a minimum, be modified to impose the "substantial beneficiary" requirement only in those circumstances where the vendor is a non-arm's length party. Further, such a vendor should only be responsible for the disclosure relating to the asset/business being sold to the issuer, not the issuer's disclosure in its entirety.

We are also concerned about the proposed requirement for issuers to deliver a personal information form and authorization form of a substantial beneficiary or each director and officer of the substantial beneficiary if it is not an individual. This requirement is unnecessary and cumbersome for the issuer and will, at a minimum, be a nuisance for the substantial beneficiary.

2. ***Material Contracts***

We submit that the proposed categories of material contracts which must be filed, notwithstanding that they are entered into in the ordinary course of business, is too broad. In particular, we believe that the requirement to file all material credit agreements and management or administration agreements is inappropriate, as these are agreements entered into the ordinary course of business by most issuers. We also submit that the requirement to file any contract to which substantial beneficiaries are parties is inappropriate for the same reasons.

We also submit that there should be a similar time limitation for the filing of material contracts as imposed in Section 12.2(1) of National Instrument 51-102, limiting the filing to contracts entered into within the last financial year, or before the last financial year but still in effect. Contracts entered into prior to that time, unless still in effect, should not be considered material in any circumstances.

Further, we submit that specifically listing the provisions that are "necessary to understanding the contract" is unnecessary. There are significant variations between types of contracts and the provisions that would be relevant to an understanding of the contract. If there is to be a requirement not to redact provisions "necessary to understanding the contract", the determination of what terms fall into that category, in the specific facts and circumstances, should be left to the issuer and its counsel. In addition, many terms "necessary to understanding the contract" may in fact be competitively sensitive information, disclosure of which would be prejudicial to the issuer's business. We submit that issuers should be able to redact commercially sensitive information, either as of right or through the process of applying for confidential treatment of such information.

3. ***Distribution of Securities Under a Prospectus to an Underwriter***

We submit that the proposed limitation set forth in Section 11.3(b) of the proposed rule will unduly limit the flexibility of underwriters in establishing their compensation structure for certain transactions. The division between cash and equity compensation of underwriters is established by negotiation between the issuer and the underwriter, and is fully disclosed in the prospectus. We submit that regulation of the equity component of the compensation is unnecessary and should be left to the marketplace. Particularly for junior to mid-cap companies, the issuance of compensation options to their underwriters in return for a reduction in the cash compensation paid is a beneficial term of the transaction, enabling more cash to flow to the issuer. We understand that practice among underwriters varies between a full cash commission and a split cash:equity commission where compensation options typically range between three and, unusually, ten percent of the securities offered under the prospectus. It is common for the compensation options to constitute no more than five per cent of the securities offered under a prospectus but we submit that the imposition of a limit of five per cent is unduly restrictive and unnecessary given the competitive market among underwriters.

4. ***Waiting Period***

We support the CSA's proposal to vary the minimum waiting period to less than ten days. Investors have withdrawal rights which provide them with a cooling off period prior to making an investment decision. Therefore, a minimum waiting period is not necessary to ensure investors have sufficient time to properly assess an investment.

5. ***Amendments to a Preliminary or Final Prospectus***

We submit that a requirement to file an amendment based on the continued accuracy of information in the prospectus is inappropriate. The lower standard of "accuracy of information" would result in due diligence being conducted until closing. It would also result in either accelerated closings or an increased number of amendments to the final prospectus delaying closing, both of which would have a chilling effect in the marketplace.

While investor protection is a primary objective of securities regulation, we disagree with imposing on issuers an ongoing obligation to disclose material facts as an essential means to achieving this objective. The financial and time burdens that are generated by providing transitory information to the marketplace outweighs the advantage of providing investors with that information. More transitory information is not necessarily good for the marketplace. The Ontario Court of Appeal in *Kerr v. Danier Leather Inc.* found this reasoning persuasive in holding that the issuer had no duty to disclose material facts which occur after the date of a final prospectus.

In *Danier*, the Ontario Court of Appeal also cited three Ontario Committee reports which considered the distinction between "material facts" and "material changes": the Merger Report of 1970, the Allen Report of 1997, and the Crawford Report of 2003. The reports recognized that Canadian securities legislation accommodates the fact that the materiality of corporate intentions and business plans develops with their progress and implementation. The legislation correctly requires timely disclosure only after such plans have developed to the point where they are sufficiently firm that they may be characterized as a change in the issuer's business, operations or affairs. To impose a standard of material facts would cause practical difficulties by increasing filing obligations and requiring ongoing press releases. As stated in the Crawford Committee report, without the benefit of hindsight, issuers would have difficulty in determining whether to disclose material information and issuers would face a significant burden of continually monitoring matters external to them.

6. ***Bona Fide Estimate of Range of Offering Price of Number of Securities Being Distributed***

We submit that the requirement to provide a range within which the offering price or the number of securities being distributed is expected to be set would not be appropriate in Canada. In the United States, where the requirement does exist to insert a price range, an issuer now typically files a registration statement initially containing a preliminary prospectus without the range to begin the process of clearing the registration statement with the Securities and Exchange Commission ("SEC"), and then files one or more amendments to the registration statement prior to printing the preliminary prospectus, one

of which would add a price range. The commercial copy of the preliminary prospectus filed and printed prior to the roadshow would contain the price range. In the cross-border context, imposing a price range requirement in Canada would likely have the effect of delaying filings of preliminary prospectuses in Canada until after the price range has been added in the United States filing. If this range requirement is adopted in Canada, we submit that issuers should only be required to insert the range in the amended and restated preliminary prospectus that is being printed prior to the roadshow for consistency with the United States approach.

We also submit that the instrument should clarify that the range requirement would only apply to an initial public offering, and not a follow-on offering (even if filed using the long form prospectus rules) given that a follow-on will be priced in the context of the market price.

7. ***Two Years Financial Statement History***

We support the CSA's proposal to reduce the number of years for financial statements in a long form prospectus to two years as the historical financial information is publicly available. However, we note that not many reporting issuers would use the long form prospectus.

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 41-101:

1. Form 44-101 F1 Item 7A is unnecessary as that information is already publicly available.

2. We also want to comment on a related point to NI 41-101, specifically the use of electronic roadshow materials in the cross-border initial public offering context. The current state of Canadian securities law is that, absent relief, access to the electronic roadshow must be password-restricted, and the password only be made available to Canadian institutional investors (and not retail investors).

   However, in the United States, changes to the 1933 Act, which came into effect in December 2005, require an issuer to either file the electronic roadshow materials with the SEC or make them "available without restriction by means of graphic communication to any person..." in an initial public offering. The SEC's position is that any password restriction, for residents anywhere in the world, means that a bona fide version is not generally available to the public, and therefore it must be filed.

This inconsistency between Canadian and United States securities laws has required underwriters who want to utilize electronic roadshow materials as part of the marketing of an offering to seek exemptive relief from the Canadian securities regulators. The exemptive relief granted in Canada to date has required the issuer and the Canadian underwriters to provide purchasers with a contractual right of action equivalent to the statutory rights under section 130 of the Ontario *Securities Act* for the contents of a prospectus, applicable to any misrepresentation in the electronic roadshow materials. These exemption orders have not specified as of what date or time such liability attaches to the contents of the roadshow (that is, are the contents required to be true and correct when first made available by the issuer, or do they speak at the time of each viewing, or at the time of closing of the offering?). The exemption orders issued to date also do not contain any provision for updating or correcting the information to which liability attaches after the completion of the roadshow. We suggest that NI 41-101 should contain express provisions allowing for the use of an electronic roadshow, without password protection, in a cross-border initial public offering. We submit that, if contractual rights of action are required, the electronic roadshow materials and the prospectus should be considered as a whole, so that the "information package", including information in the electronic roadshow materials, can be updated or corrected through amendments to the preliminary prospectus or through the final prospectus, if necessary.

Thank-you for the opportunity to respond to this Request for Comment. Please call Craig Wright (613-787-1035) or Elizabeth Walker (613-787-1060) if you have any questions concerning our comments.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP