Delivered

April 6, 2007.

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Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission

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Dear Sirs / Mesdames,

Re: Comments on Proposed National Instrument 41-101 *General Prospectus Requirements* ("NI 41-101").

We submit the following comments in response the Notice and Request for Comments published on December 22, 2006 ((2006) 29 OSCB (Supp-3)) on NI 41-101. Section A consists of our general comments on NI 41-101 and Section B consists of specific comments relating to specific provisions of NI 41-101.

This letter represents the general comments of certain members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

SECTION A. GENERAL COMMENTS

We support the efforts of the Canadian Securities Administrators (the "**CSA**") to harmonize prospectus requirements and related matters across the country and encourage the CSA to continue with these efforts in a manner that enhances the competitiveness and integrity of Canadian capital markets. As options for Canadian and global capital continue to grow, we underscore the importance for our domestic regulation to be clear, streamlined and responsive to the needs to the capital markets, in the interests of both investors and other market participants.

We note the report commissioned by U.S. Senator, Charles E. Schumer, and New York City Mayor, Michael R. Bloomberg, published in January 2007 entitled "Sustaining New York's and the U.S.'s Global Financial Services Leadership" which concludes that, absent a shift in public policy, New York runs the risk of losing its status as a global financial market. The report underscores the need to remove impediments to financial services competitiveness, which impediments include a complex and unresponsive regulatory framework. Citing reduced barriers to the flow of capital on a global scale (on account, in part, of improved markets and technology abroad), the report highlights the risk of losing capital market activity to foreign markets due to the complexity and cost of doing business in the domestic market. Similarly, a report commissioned by the London Stock Exchange dated June 2006 entitled "The Cost of Capital: An International Comparison" highlights that a transparent, responsive and proportionate regulatory regime, along with supportive public policy, are among the leading factors that support and will continue to ensure London's leading position among capital markets, even in the face of increased global competition. We encourage the CSA to review the findings and recommendations cited in these reports as being informative, if not persuasive, as Canadian regulators take this opportunity to make significant changes to the prospectus regime.

Our comments are presented below in reference to the specific sections of NI 41-101, proposed Form 41-101F1, Form 41-101F2 and the Companion Policy to NI 41-101 to which they relate.

SECTION B. SPECIFIC COMMENTS ON PROPOSED NI 41-101

PART 1: DEFINITIONS AND INTERPRETATION

In respect of the definitions contained in NI 41-101, we suggest the following amendments and/or clarifications:

1. The definition of "business day" should be amended to take into consideration the fact that not all jurisdictions have the same statutory holidays. We understand this is meant to be clarified by s. 1.3 of the Companion Policy but would suggest that the definition in NI 41-101 be amended to avoid any ambiguity. We also submit that the interpretation in the Companion Policy would effectively penalize issuers in the jurisdiction that observed a statutory holiday in that it abridges the time period available to them while affording an extra day to all others. Where a statutory holiday in any jurisdiction falls during a relevant time period, the time period should be extended by one day in all jurisdictions to minimize the impact on those in the jurisdictions that are affected.

2. The definition of the term "derivative" is overly broad, and as drafted could be interpreted to include securities such as convertible debt, floating rate notes or exchangeable securities, etc. We do not believe that the definition is or should be intended to encompass these types of securities and would recommend that the term be more narrowly defined.

3. The term "executive officer" should be amended to include a full-time chair or vice-chair only.

4. The definition of "IPO venture issuer", should be clarified to set out clearly whether:

   (a) reference to "U.S marketplace" includes an issuer trading on the OTC Bulletin Board or the Nasdaq Small Cap Market; and

   (b) reference to "a marketplace outside of Canada" includes issuers listed and posted for trading on the Regulated Unofficial Market of the Frankfurt Stock Exchange or the Unofficial Regulated Market of the Berlin-Bremen Stock Exchange.

   Also, the market known as "OFEX" should be referred to by its new name, the PLUS MARKET.

5. In the definition of "junior issuer", the requirement to make adjustments for acquisitions should be limited to <u>significant</u> acquisitions or <u>significant</u> probable acquisitions of a business only, and additional guidance should be

given on how these adjustments are to be made, i.e. at the beginning of the relevant period or otherwise.

6. The term "material contract" is overly broad in that it references "any contract…." and should perhaps contain some guidance on how materiality is to be determined, for example, by reference to the effect of the contract on the market price or value of the securities of the issuer.

7. The term "principal security holder" should contain a carve-out or exception for underwriters and for those holding securities as collateral. The definition might also be better defined similar to the definition of "insider" in the *Securities Act* (Ontario) in that the ownership of 10% of more of the voting rights should be determined based on the voting rights attached to "all voting securities" of the reporting issuer as opposed to 10% of "any class" of voting securities as the definition currently reads.

8. In the definition of "probable reverse takeover" reference to "acquisition" should be changed to "probable reverse takeover".

9. The definition of "special warrant" should be narrowed:

   (a) to apply under paragraph (a) of the definition to situations where the terms of the security oblige the issuer to file a prospectus to qualify the distribution <u>by the issuer</u>;

   (b) to apply under paragraph (b) of the definition to situations where the terms of the security entitle or require the holder to acquire another security without payment <u>from the issuer</u>; and

   (c) to clarify that it does not apply to secondary offerings.

The following comments are presented in reference to the section numbers of NI 41-101 to which they relate.

1. s. 1.5 – Query how this provision would apply to payments where the amount is discretionary. Also, credit support for subordinated debt should be allowed to be given on a subordinated basis.

PART 2: REQUIREMENTS FOR ALL PROSPECTUS DISTRIBUTIONS

1. s. 2.2(3) – Please clarify to indicate that in Quebec the documents must be in French, or two separate versions, one in French and one in English; as the provision currently reads it appears to imply that one document in both languages may have to be filed.

PART 4: FINANCIAL STATEMENTS AND RELATED DOCUMENTS IN A LONG FORM PROSPECTUS

1. s. 4.2(1) and (2) – Pro forma financial statements should be specifically carved out of these provisions as they are not audited.

2. s. 4.4(1) – This section should perhaps indicate what type of approval is required where the issuer does not have a board of directors.

3. s. 4.4(2) – This section should take into consideration delegation by other means than by constating documents of the fund, for example, through a contract or agreement such as a management agreement.

PART 5: CERTIFICATES

1. s. 5.5(2) – The requirement for the certificate to be signed by the individuals set out in section 5.5(2)(b), where the trustee is a company, should not apply to a regulated trust company acting as trustee of a trust as in those circumstances requiring the certificate to be signed by the CEO and CFO and by or on behalf of the board of directors of a trust company would be inappropriate.

2. s. 5.5(3) – The carve-out in section 5.5(3) should apply equally to any form of trust, including an income fund or a securitization trust, and the carve-out should apply where the delegation is contained in either the declaration of trust, trust indenture, trust agreement or other agreement of the trust. These types of trusts often have arrangements similar to those of investment funds whereby such authority is delegated to another entity, such as a management company, by way of the declaration of trust or other agreement, such as a management agreement.

3. s. 5.13– We submit that it would be unfair to impose prospectus liability on a party that is receiving proceeds as consideration for the sale of assets or repayment of debt. Imposing such a certification requirement will discourage parties who may be caught by this section from entering into bona fide sale or debt transactions on account of the liability attached to signing the certificate. These are parties for which there is no policy or other reason to impose a certification requirement or prospectus level liability. We are concerned that the requirements of Section 5.13 are overbroad. A goal of Section 5.13 would seem to be to better ensure full, true and plain disclosure relating to the "significant business". The certificate in question, however, would relate to the purchaser as a whole. Since a "significant business" can be substantially less than all of the business of the purchaser, this potentially exposes a vendor to substantially more liability than would seem to be warranted by the stated

goals of Section 5.13. A vendor who was willing to provide such a certificate would of necessity be placed in the very difficult position of having to do complete due diligence on the purchaser. This requirement would greatly complicate any proposed transaction and related financing, particularly any transaction where the purchaser proposed to do a "short-form" prospectus offering based on its existing public disclosure record. The need for a vendor to do due diligence would also, in our view, impose difficult burdens on potential purchasers, as they would be required to allow vendors to conduct thorough due diligence on their business and operations; a practical requirement that in our view many purchasers would be unwilling to comply with.

This issue is compounded by the fact that Section 5.13 would only apply to a transaction if the business was a "significant business" to the purchaser, and if the purchaser determined, for one reason or another, to finance the purchase price through a public equity offering. As a result, it is the characteristics of the purchaser that would be determinative; not the characteristics of the vendor. In an auction or other competitive situation, therefore, purchasers who would be subject to Section 5.13 would be at what we expect would be a disqualifying disadvantage, since these purchasers would have to in effect make allowance in the purchase price for the economic cost of the increased liability of the vendor under Section 5.13, assuming that the vendor would even be willing to accept this liability. This would in our view greatly impair the ability of Canadian public companies to make acquisitions. We also make the following specific comments with respect to this section:

(a) The definition of "control" for the purposes of section 5.13 (2)(a)(i) should be provided.

(b) The threshold of 20% for a party that does not control the issuer under section 5.13(2)(ii) is too low a threshold for the purposes of imposing certification requirements and prospectus level liability.

(c) The term "indirectly" as used in section 5.13(2)(b) is vague and therefore subject to interpretation and should be clearly defined.

(d) The determination of control as set out in section 5.13(3) is not appropriate given the policy reason for imposing certification requirements on substantial beneficiaries.

(e) If you intend to keep s. 5.13(3), to avoid problems similar with those encountered in interpreting s. 101 of the *Securities Act* (Ontario), we would recommend that if securities described in Section 5.13(3) are to

be deemed to be outstanding (see s. 5.13(4)) then all such securities (regardless of whether they are held by the person or company referred to in s. 5.13(3)) should be deemed to be outstanding. Leaving the provision as it currently reads would result in an inaccurate calculation of concentration of ownership where, for example, the person or company held exchangeable or convertible securities which formed part of a larger group or pool of outstanding exchangeable or convertible securities. Including part of the issue in the numerator while not including the entire issue in the denominator would not result in an accurate calculation.

(f) Despite the Ontario carve-outs contained in section 5.13(5) and (6) and in Section 5.14 and 5.16, on account of section 130(1)(e) of the *Securities Act* (Ontario), anyone who signs a certificate will be subject to prospectus liability in Ontario as well. Practically, to avoid this application in Ontario the issuer would have to file one prospectus in Ontario and one prospectus in all other Canadian jurisdictions. This runs counter to the goal and stated purpose of streamlining the financing process, achieving greater national harmony and creating uniform rules for securities offerings. This also differentiates between investors living in different Canadian jurisdictions and creates additional regulatory burdens for issuers.

4. s. 5.14 – See our comments in paragraph 3(f) above.

5. s. 5.15(2) - This section should state that the certificate must be signed by the operating entity, and then specify who is to sign on behalf of the operating entity, since the obligation is that of the operating entity itself, and not of its CEO or CFO.

6. s. 5.16 – See our comments in paragraph 3(f) above.

PART 6: AMENDMENTS

1. s. 6.2 (d) – We would suggest that, similar to s. 6.2 (c), consent letters be required to be filed again with an amendment only where the original consent letters are no longer correct as of the date the amendment to the prospectus is filed.

2. s. 6.3 (a) and (b) – Use of the term "relates to an auditor's comfort letter" is vague and subject to interpretation. We suggest this be revised to apply where the amendment "affects" the auditor's comfort letter.

3. s. 6.6(2) – This provision should clearly state that an amendment is required to be filed only where "securities in addition to the securities previously disclosed… are to be distributed by the issuer".

4. s. 6.6(5) – This provision effectively seems to make a prospectus distribution illegal where a material change has occurred, even where the material change occurred on account of circumstances outside the control of the issuer and/or where the issuer is not aware of the material change while it is in the process of distribution. This may result in a disproportionate and unfair impact on underwriters and issuers which, we submit, is likely not the intended effect.

PART 7: NON-FIXED PRICE OFFERINGS AND REDUCTION OF OFFERING PRICE UNDER A FINAL PROSPECTUS

1. s. 7.2(1) – This section is tighter than under current rules as section 1.5 of NI 41-501 sets out requirements for non-fixed price distributions but there is no requirement to distribute at a fixed price. The current rules seem preferable. Query as well how this may affect the issuance of debt securities on an accrued interest basis.

PART 8: BEST EFFORTS DISTRIBUTIONS

2. S. 8.2 (b) – This section should perhaps state that funds should be returned to subscribers without any deductions or interest.

PART 9: REQUIREMENTS FOR FILING PROSPECTUS

1. General Comments

While we appreciate the attempt to clarify what is meant to be excluded from contracts entered into "in the ordinary course of business" and by the term "necessary to understand the contract" we would submit that many of the types of contracts and provisions which NI 41-101 suggests must be disclosed will not be of interest or importance to securityholders and may be highly sensitive and confidential. Imposing these requirements will subject issuers to the additional cost and burden of ensuring that the documentation enables them to keep these contracts and/or provisions confidential. From the perspective of the average investor, the requirement in the annual information form to describe the material terms of material contracts should be enough to provide investors with the information they require about the business of the issuer. Disclosure of the nature contemplated by s.9.1(1) will only serve to aid competitive interests and may prove detrimental to issuers, particularly those in highly competitive and/or sensitive business sectors. Overall, this section seems to imply a much broader obligation with respect to disclosure of contracts than currently imposed by prospectus or continuous

disclosure rules. We would recommend that the CSA undertake a cost-benefit analysis to determine if the imposition of such broader obligations is warranted.

2. s. 9.1(1)(a) - Reference in this section to "any contract to which …." is overly broad and as currently worded would include many types of contracts which we submit are in the ordinary course of business. Additionally, Employment contracts should be specifically excluded under Section 9.1(1)(a). We submit that these also are in the ordinary course, to the extent there are important disclosure features they likely are already required to be disclosed in the information circular (by the disclosure mandated under Form 51-102F5 and F6) and that disclosure of these may run contrary to applicable privacy and protection of personal information principles.

3. s. 9.1(1)(b) – This section is overly broad and as drafted would potentially include a number of contracts that will be subject to significant confidentiality restrictions and/or that would be otherwise detrimental to the issuer and/or its business if disclosed. The threshold of "…upon which the issuer's business depends to a material extent" is vague and subject to interpretation and should be clarified. In determining whether a contract or agreement requires disclosure, the first hurdle would be to determine if it is material. Under the proposed clarifications in s. 9.1(1)(a) through (f), many of these provisions introduce further thresholds that are undefined or do not have a common meaning. It is also unclear how these thresholds are to be interpreted in comparison to the initial materiality threshold. For example, please clarify how thresholds such as "major part", "upon which an issuer's business depends to a material extent" and "upon which an issuer's business is substantially dependent" may differ from one another and how they are to be interpreted in light of the fact that only "material contracts" are required to be disclosed.

4. s. 9.1(1)(c) – This provision should stipulate how an issuer is to account for a contract that contemplates non-cash consideration and whether fixed assets are to be valued at fair market value or book value.

5. s. 9.1(1)(d) and (e) - Reference to "any" credit agreement is overly broad and should be limited to "material credit agreements" only. The term administration agreement could encompass a wide range of agreements that are not of interest or important to securityholders, especially without any materiality threshold, and could require an issuer to file a large number of agreements that should not need to be disclosed to the public. This provision is also inconsistent with s. 9.1(2)(g) in that use of different terms in these provisions seems to imply that while "any credit agreement" is required to be

filed, only the financing covenants in "material financing or credit agreements" are prohibited from being redacted.

6. s. 9.1(2) –We would suggest adding change of control clauses as "provisions that are necessary to understand the contract".

7. s. 9.1(2)(a) – The name of a material customer or material supplier will, in many cases, be highly confidential information. We would submit that while the terms of an important contract may be of interest to securityholders the issuer should not have to disclose the name of the supplier or customer.

8. s. 9.1(2)(b) – We note that it may be difficult to determine or calculate the applicable interest rate of an agreement on account of complex formulas.

9. s. 9.1(2)(e) – Please clarify what type of disclosure regarding related party transactions is contemplated by this section.

10. s. 9.1(2)(f) – Please clarify what is meant by "material contingency" clauses. It may also be difficult to determine which clauses are "material" at the time of disclosure. For example, indemnification provisions may not be material at the time of entering into a contract, but may become material at a later point in time on account of a change in circumstances or underlying facts.

11. s.9.2(a)(iii)(B) – This provision states that provisions which do not contain "information relating to the issuer or its securities that would be necessary to understanding the contract" may be redacted. However, s. 9.1(2), which sets out a description of such provisions, is not limited by the additional limitation of "information relating to the issuer or its securities" that would be necessary to understanding the contract, and we submit that such provisions go well beyond information relating to the issuer or its securities.

12. s.9.2(b)(ii)(C) – Requiring each promoter of the issuer to deliver a PIF is an extremely tedious undertaking and will require a significant amount of additional paperwork and resources which, we submit, will not, in ordinary circumstances, amount to any added protection or information for investors. Also, a promoter may not be an individual.

13. s. 9.3(a)(xi)(b) –The undertaking should not be required of operating entities that are consolidated with the issuer.

14. s. 9.3(a)(xiii) – This provision should also be subject to the same definition of "non-voting security" as set out in s. 12.1(1).

15. s. 9.3(b)(ii) – This requirement should only apply where application has been made to list securities on a Canadian exchange. It may be difficult or

impossible to obtain such a communication from exchanges outside of Canada that do not have a practice of providing them.

PART 10: CONSENTS AND LICENSES, REGISTRATIONS AND APPROVALS

1. s. 10.2 – Consider whether this paragraph should specify that the trustee must return the funds without deduction or interest. This provision as drafted is also quite broad and may inadvertently cause significant problems for issuers that are not intended to be covered by this. For example, mining exploration or research/development companies may often be considered to be in more than one "business". On a narrow view, the business of a mining exploration company could be "exploration". If so, then a movement to "production" could be a movement to a new business. If an exploration company raises money to try and advance a project to production, then we query whether it would be raising money to fund a new business under this provision. If so, then it will almost never be able to do this by prospectus, since the timeframe for advancing a project is generally years, and they typically would not have all material licenses, etc., for the operation of the new business until late in the process. The same concern would apply to research and development companies (e.g., query about the treatment of funds raised under a prospectus to fund a clinical trial for a new medical product).

PART 11: OVER-ALLOCATION AND UNDERWRITERS

1. s. 11.1(3) – We note that this provision uses the term "closing of the distribution" where as other references in NI 41-101 are to the "completion of the distribution".

2. s. 11.3 (b) – Counting compensation securities together with underlying securities results in double counting the same securities as effectively once the compensation security is exercised and the underlying security is issued the compensation security will not longer exist. As well, comparing compensation securities and imposing a limit on such securities based on a percentage of the securities issued in the base offering will be difficult to determine if the securities are in different forms, such as warrants or other exchangeable or convertible securities.

PART 12: RESTRICTED SECURITIES

1. s. 12.1(1) - Under the definition of "restricted security reorganization" we would suggest carving-out an increase in the restricted class of securities itself from the list of items that will be considered a restricted security reorganization under paragraph (b), specifically subparagraph (b)(ii). We

suggest this provision should be similar to subparagraph (b)(i) under the definition of "reorganization" in OSC Rule 56-501 *Restricted Shares.*

2. s. 12.1(1) - Under the definition of "restricted voting security", in paragraph (a), after permitted or prescribed by statute we would recommend adding, "or regulation or policy" which would take into account, for example, a CRTC directive.

3. s. 12.1(1) - Under the definition of "restricted voting security" and s. 12.1(2), in paragraph (b), the reference to securities that may be "voted" should conform to the wording of "voted or owned" in s. 12.1(2)(b).

4. s. 12.1(2)(c) – We would suggest changing the phrase "…imposed by any law governing the…" to read "…imposed by any law applicable to the…" for clarity.

5. Section 12.3(1)(a) - We suggest that:

   (a) the reference in the first line should be to prior majority approval of the "voting" security holders;

   (b) the phrase "in accordance with applicable law" does not indicate whether it would include requirements imposed by stock exchanges outside of law; and

   (c) the term "control person" should be defined.

6. Section 12.3(1)(b)(i) – The phrase "in accordance with applicable law" does not indicate whether it would include requirements imposed by stock exchanges outside of law.

7. Section 12.3(1)(b) (iii) – The term "or business reason" should be deleted so the sentence is consistent to apply to no purposes for the creation of the restricted securities were disclosed that are inconsistent with the purposes of the distribution.

8. Section 12.3(2)(a) and (c) – Similar to subparagraph 12.3(1)(b), both (a) and (c) should also be limited by "to the extent known by the issuer after reasonable inquiry."

PART 13 ADVERTISING AND MARKETING IN CONNECTION WITH PROSPECTUS OFFERINGS

1. s. 13.1(1) and s. 13.2(1) – Reference to communication that is "permitted or not prohibited" is vague and unclear; we note in this respect that it also not clear

as to exactly what type of information is permitted or not prohibited under s. 65(2)(a) of the *Securities Act* (Ontario).

2. s. 13.1(1)(2) and s. s. 13.2(2) – We would suggest stating that the language be set out in "prominent bold face type as large as that used generally in the body …." in order to clarify that the size of text used in headings is not contemplated under these requirements.

3. s.13.3 - This section should clarify that it applies to an "advertisement used in connection with a prospectus offering during a waiting period".

PART 14 CUSTODIANSHIP OF PORTFOLIO ASSETS

1. This part (Part 14) should state that it applies only to investment funds that are reporting issuers.

2. s. 14.1(1) appears to limit the application of s. 14.2 to the custodian of an investment fund that files a long form prospectus using Form 41-101F2. It is not clear how the remaining provisions of this part will apply to investment funds that have filed a prospectus under another form or investment funds that are not reporting issuers. Please clarify whether investment funds that have not filed a long form prospectus using Form 41-101F2 (such as those that are currently reporting issuers) will be exempt from these provisions. If these requirements are to apply to such investment funds, please provide transition provisions as compliance with certain provisions may require significant changes to current practices and processes as well as to pre-existing contracts.

PART 15 DOCUMENTS INCORPORATED BY REFERENCE BY INVESTMENT FUNDS

1. s. 15.1(2) and s. 15.1(4) should be worded similarly to s. 15.1(1) and (3) in that they should apply only to an investment fund that is in continuous distribution, as the applicable requirements meant to be imposed by those provisions only apply to such funds.

PART 17 LAPSE DATE

1. s. 17.2(2) – This provision should refer to " with reference to the distribution of a security that has been qualified under a prospectus, the date that is …."

2. s. 17.2(4) – In light of the interpretation of the term "prospectus" provided under s. 1.2(1), we submit that s. 17.2(4)(b) and (c) should expressly state whether the reference is to a preliminary prospectus or a final prospectus.

PART 19 EXEMPTION

1. s. 19.3(2)(a)(ii) – We recommend that in the circumstances described in this subparagraph the letter and acknowledgement be required to be filed on SEDAR in the interests of disclosure.

PART 20 TRANSITION, REPEAL AND EFFECTIVE DATE

1. Please provide transition provisions for all areas to be governed by NI 41-101 in addition to those referred to in s. 20.1 For example, please clarify how NI 41-101 would apply to a distribution that was qualified by a prospectus prior to NI 41-101 becoming effective that has not been completed at the time NI 41-101 comes into force or to provisions relating to custodianship of portfolio assets, etc.

APPENDIX A PERSONAL INFORMATION FORM

1. We submit that 10 years of residential address history is an onerous requirement for many people (especially younger people in their student year) who may move frequently and that this information may not be readily available to them. We would suggest a shorter period balancing the need or importance of this information against the significant difficulty associated with tracking it.

2. We note that the requirement to have a personal information form notarized or commissioned may not be feasible for short form or other offerings which are completed on a time sensitive basis.

3. We would recommend not requiring PIFs generally, as they should only be required for IPOs or where there is other good reason for the regulator to need them.

SECTION C: SPECIFIC COMMENTS ON FORM 41-101F1 – INFORMATION REQUIRED IN A PROSPECTUS

1. General Instructions, paragraph (9) – Please clarify how significance is to be determined as it is used in this paragraph.

2. S. 1.1 and 1.2 – We submit that the requirement should be to state language substantially similar to that which is set out in these provisions (as opposed to requiring the exact language) **[to accommodate multi-national and/or cross border offerings.]**

3. s. 1.4(2) – This section would, if it applies to securities acquired in the secondary market, and an interim misrepresentation results, impose damages

or rescission rights against an issuer who had received no proceeds. This seems inappropriate.

4. s. 1.1 – We note that Form 41-501F1 has a specific requirement regarding disclosure of underwriter compensation options under s. 1.4(8), and that there appears to be no such equivalent in Form 41-101F1.

5. s. 1.7 – We generally disagree with the proposed new requirement to include a bona fide price range in the preliminary prospectus. While there is a similar requirement in the U.S., in the U.S. a number of amendments are typically filed and a price range it typically not inserted until later in the process. Query how issuers would be able to comply with this unless a similar process (i.e. of filing a number of amendments to the preliminary) is contemplated, since presumably the only way that a "bona fide" price range can be established is if some degree of marketing has been done. However, under our prospectus rules pre-marketing is not permitted. Typically, while issuers and underwriters will have an idea of what they are going to price at, they will not know what the "bona fide" range is until they have taken the offering on the road. Disclosure of a price range prior to this will be meaningless and may result in issuers and underwriters tipping their hand in advance, thereby reducing their bargaining strength when it comes to the actual pricing of the deal. If the price range is provided after a market check (i.e., as an amendment instead of in the preliminary), then this concern is mitigated. In such circumstances we question however whether any benefit would result for investors. This would result in higher costs and more time (as issuers would be required to print and re-circulate the amendment(s)) without any tangible benefit to investors. If the CSA are intending on including this type of requirement we urge that a cost-benefit analysis be undertaking to ensure that the added costs are justified.

6. s. 1.9(1) –This section should clarify whether the requirement is to disclose Canadian exchanges and quotation systems only or otherwise.

7. s. 1.9(3) – This section should be similar to s. 1.7(3) of Form 41-501F1 in that it should also contemplate the required disclosure where no market for the securities currently exists.

8. s. 1.11(6):

   (a) The second column should read "maximum size or number of securities "available" and not "held".

   (b) In the first column, disclosure relating to any option granted by the issuer or insider of the issuer, total securities under option and other

compensation securities should be limited to those that are issuable "to the underwriters" and this should be clarified in the column headings themselves.

9. s. 1.13(1) – As per s. 2.3(2) of OSC Policy 56-501 *Restricted Shares*, and s. 12.2(1) the issuer should be able to describe the restricted securities by the term used in the constating documents to the extent it differs from the required restricted security term, at least once on the prospectus.

10. What is the "source" of the financial information in s. 3.1(2)(5).

11. s. 3.1(3) – This provision should also account for information that is included by reference in the prospectus.

12. s. 4.2(2)(c) – This provision should also account for subsidiaries that may not be corporate entities by also referring to the jurisdiction pursuant to which they may be "formed or organized."

13. s. 4.2(4) – The carve-outs contained in this provision for certain subsidiaries should not only apply if the applicable thresholds are satisfied as at the most recent financial year end but should also be available where, prior to filing the prospectus, there has been a restructuring or other transaction that would result in a subsidiary not being required to be disclosed if these thresholds are calculated as of a more recent date.

14. s. 5.1(2) and (3) – The disclosure required by these provisions should be limited to the extent it is material.

15. s. 5.2(3) – In our view, issuers should not be required to disclose forward-looking information of the nature that is contemplated by this provision unless defences for forward-looking disclosure, similar to those available for documents that are not prospectuses, are made available. This provision in effect forces issuers to disclose forward-looking information, which by definition is speculative, without affording them the appropriate defences.

16. s. 5.3(1), s.5.4 and s. 5.5(1) – The disclosure required by these provisions should only be required where the interests of the issuer are material.

17. s. 6.2(b)(i) – The disclosure required by this provision, in the final prospectus only, should be the "estimated" net proceeds of the securities offered.

18. s. 6.2(b)(ii) – If the prospectus if filed in the beginning of the month, for example, on the first or second day of the month, requiring disclosure as at the month end will in most cases be information that is too recent and is not readily available.

19. s. 6.3(1)(a) and (b) – Reference in this section should be to the purposes for which the net proceeds and the funds available "are expected to" be used.

20. s. 6.5(1) – We question whether the disclosure contemplated by this section is meant to include securities where the assets consist of securities and suggest this be clarified in the provision.

21. s. 6.9 – The disclosure required by this section should be limited to apply to the extent it is applicable. It should not apply to most issuers.

22. s. 8.4(1) – We question whether this disclosure is appropriate or necessary where the offering consists of securities that are not voting or equity securities, such as non-convertible debt securities, preferred shares asset-based securities, etc.

23. s. 8.8(1) – We note that there is no definition of the term "significant equity investee" in either NI 41-101 or the Form.

24. s. 10.5 – We note that the disclosure contemplated by this provision apparently creates a legal remedy for a holder of special warrants in certain circumstances and question whether the CSA have the jurisdiction to create legal remedies through disclosure required in the prospectus form.

25. s. 10.9 – This section should require disclosure only where the issuer "has asked for and has received" any other kind of rating, including a provisional rating, so that the issuer is not responsible for disclosure of ratings which are unsolicited and/or of which it may not be aware.

26. s. 12.1(1) – Consistent with s. 12.1 of Form 41-501F1, paragraphs (a) through (e) should clearly state that the disclosure is required "without naming" the individuals.

27. s. 13.1 – The disclosure required by this provision should expressly carve-out disclosure regarding prior sales of compensation securities, such as stock options. While we do not believe this section is intended to include compensation securities, however, this is not clear on the plain reading of the wording.

28. s. 13.1 – The disclosure should be required of the prices at which the securities have been sold and the number of securities sold at each price, not every trade.

29. s. 13.1 – Similar to s. 13.1 of Form 41-501F1, s. 13.1(a) should include reference to securities that are to be sold by the issuer or the selling securityholder.

30. s. 14.1(1) –Contractual restrictions should only be required to be disclosed with respect to the securities offered by the prospectus and imposed by the issuer or selling securityholder. We also suggest that the contractual restrictions on transfer required to be disclosed should expressly carve-out certain restrictions, such as those existing under pledges made to lenders.

31. s. 16.3 – This disclosure should be limited to existing or potential conflicts of interest which are known to the issuer.

32. 16.4(a) – We suggest that the age of each member of management should be kept confidential and not be required disclosure and question whether such disclosure would be appropriate under privacy and protection of personal information principles.

33. s. 16.4 – Instructions – We suggest that the instructions should clarify that disclosure is required only of "executive directors", and that including employees and contractors is well beyond what is commonly understood to be the management group. We suggest eliminating reference to "entrepreneur" in the instructions as the principal occupation of some individuals will in fact be best described as "entrepreneur". This restriction in the instructions will cause difficulties for those people whose occupation is best described in this manner.

34. Item 19 – We submit that it is not appropriate to require corporate governance and audit committee disclosure in a prospectus and to subject all of those signing the certificate (e.g. underwriters, etc.) in the prospectus to prospectus liability for such disclosure.

35. s. 20.6 – The anticipated size of any over-allocation position and the effect on the price of securities may not be known at the time that this disclosure is required to be included in the prospectus.

36. s. 20.7 (b) – This provision should state that "the trustee must return the funds to subscribers <u>without deduction</u>" and perhaps also without interest.

37. s. 20.7 – This is inappropriate. Issuers should be able to apply funds to seek required approvals (e.g. a mining permit). 90 days may also be too short. See also our similar comment above under Part 10.

38. s. 20.10 – The term "conditional listing approval" is a Canadian term. Query how it will be applied to foreign markets.

39. s. 21.1(2) – The risk disclosure contemplated by this provision will be difficult for trust and partnership issuers to comply with, as issues relating to trust beneficiary and partnership liability are unclear in some jurisdictions.

40. s. 22.1(1) – The comparative disclosure currently relates to a person or company that has been a promoter of the issuer or subsidiary of the issuer within the past 2 years. We do not see any need to expand this requirement and suggest that it should remain at 2 years instead of 3 years. This information may not be readily available or be able to be confirmed by the issuer where it predates 2 years prior to filing the prospectus.

41. s. 22.1(1) – If it is to be maintained, the disclosure relating to a substantial beneficiary of the offering should contain a carve-out for Ontario as a certification of a substantial beneficiary is not required in Ontario.

42. s. 22.1(1) (d) – This disclosure required should be for the 2 years prior to the date of the preliminary prospectus, for the same reasons set out in comment 39 above.

43. s. 22.1(1) (d) (ii) – The disclosure required by this section should be required to be included only to the extent it is applicable.

44. s. 22.1(4)(b) – This section should expressly exclude penalties or sanctions imposed by securities regulatory authorities relating to late SEDI filings. We do not believe that these are meant to be caught by the disclosure under this provision, but may be required upon a plain reading of it.

45. s. 23.1(3) – The term "current" assets is limiting and a bit random (i.e. it varies on a daily basis), and we suggest reference should be to assets.

46. s. 23.2 – The disclosure required by this provision should only be required to the extent it is material (see also comment #43 above).

47. s. 24.1 – We suggest amending the wording to provide that the information required to be disclosed is that which has materially affected "or is reasonably expected to materially affect…" in both instances in this provision as this issuer will not be in a position to know what will materially affect the company or a subsidiary.

48. s. 24.2 – We question whether this disclosure is necessary as it would be included in s. 1.4.

49. s. 27.1 – The disclosure required by this provision should be limited to material contracts entered into in the 2 years immediately proceeding the date of the preliminary prospectus.

50. s. 31.1 – This section should require an issuer to list <u>all provisions</u> of the Instrument and Form 41-101F2 <u>or Form 41-10F2, as applicable,</u> in respect of which the issuer has been granted an exemption. We also query whether the

issuer would be required to list exemptions granted to other parties governed by the instrument, such as underwriters, custodians, substantial beneficiaries, etc.

51. s. 34.2(a) – We note that in some cases subordinated indebtedness may be secured by a subordinated guarantee. We do not believe that these circumstances are meant to be excluded by reference to "full and unconditional credit support" in this provision, however, that is not clear upon a plain reading of the provision.

SECTION D: FORM 41-101F2

1. We re-iterate of the comments made on Form 41-101F1 to the extent the provisions of Form 41-101F2 are the same.

2. s. 40.2 – Similar to s. 40.1 this provision should also be limited to apply to "an investment fund that is in continuous distributions, except for a scholarship plan…."

SECTION E: SPECIFIC COMMENTS ON THE COMPANION POLICY TO NI 41-101

1. s. 2.3 – We note that reference to "controlling shareholder" in the third bullet of the second full paragraph should be to "controlling person".

2. s. 3.2 – An issuer that has filed a confidential material change report prior to filing a prospectus should be able to file a prospectus once the material change is generally disclosed or the decision to implement the change has been rejected and the issuer has so notified the regulator of each jurisdiction where the confidential material change report was filed. This is consistent with the guidance provided later in the same paragraph where a confidential material change report is filed during the distribution period of securities under prospectus.

3. s. 3.6(2) – We submit that it is not appropriate to require disclosure of the types of plans and arrangements listed in this section on account of privacy concerns and in order to protect the personal information of individuals.

Thank you for the opportunity to comment on these proposals.

Submitted on behalf of members of the Securities Practice Group at Stikeman Elliott LLP by,

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