



May 29, 2008

Via Email

British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
New Brunswick Securities Commission  
Superintendent of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
Securities Commission of Newfoundland and Labrador  
Registrar of Securities, Northwest Territories  
Registrar of Securities, Yukon Territory  
Registrar of Securities, Nunavut

c/o Gordon Smith  
British Columbia Securities Commission  
PO Box 10142, Pacific Centre  
701 West Georgia Street  
Vancouver, British Columbia V7Y 1L2  
Fax: (604) 899-6814  
e-mail: [gsmith@bcsc.bc.ca](mailto:gsmith@bcsc.bc.ca)

- and -

c/o Anne-Marie Beaudoin  
Secrétaire de l'Autorité  
Autorité des marchés financiers  
800, Square Victoria, 22 e étage  
C.P. 246, Tour de la Bourse  
Montréal, Québec H4Z 1G3  
Fax: (514) 864-6381  
e-mail: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

Dear Sirs and Mesdames:

**RE: Notice and Request for Comment on Proposed Amendments to National Instrument 45-106  
*Prospectus and Registration Exemptions***

---

This letter is provided in response to the Canadian Securities Administrators ("CSA") notice and request for comment dated February 29, 2008 (the "Notice") in relation to the proposed amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* ("NI 45-106").

Suite 1400  
700 – 2<sup>nd</sup> Street S W  
Calgary, Alberta  
Canada T2P 4V5  
Telephone (403) 298-1000  
Facsimile (403) 263-9193  
[www.gowlings.com](http://www.gowlings.com)

**Michael Wright**  
Direct (403) 298-1087  
Direct Fax (403) 695-3474  
Assistant (403) 298-1846  
[michael.wright@gowlings.com](mailto:michael.wright@gowlings.com)  
File No A108826

We act for, and are providing these comments on behalf of, a market participant who engages in the distribution of securities to investors across Canada, primarily in reliance on exemptions from the prospectus and registration requirements of applicable securities laws.

At the outset, we commend the CSA on its efforts to date and support the CSA's goal of improving the quality and transparency of securities distributed in the exempt market. At the same time, however, we have identified two proposed amendments to Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* ("**Form 45-106F2**") we think that the CSA should reconsider.

#### **A. New Audit Requirement for Offering Memoranda for Non-Qualifying Issuers**

Part B (Financial Statements – General) of the Instructions for Completing Form 45-106F2 includes the following amended instructions:

3. If the issuer has not completed one financial year or its first financial year end is less than 120 days from the date of the offering memorandum, include in the offering memorandum financial statements of the issuer consisting of:
  - (a) an income statement, a statement of retained earnings and a cash flow statement for the period from inception to a date not more than 90 days before the date of the offering memorandum,
  - (b) a balance sheet as at the end of the period referred to in paragraph (a), and
  - (c) notes to the financial statements.

...

9. The financial statements required by B.3 and the financial statements of the most recently completed financial period referred to in B.4 must be audited. The financial statements required under B.5, B.6 and the comparative financial information required by B.4 may be unaudited; however, if any of those financial statements have been audited the auditor's report must be included in the offering memorandum.

Instruction B.9 now requires audited financial statements when an issuer has not completed one financial year. Instruction B.3 of Form 45-106F2 currently in force does not require audited financial statements in this circumstance. We disagree with the CSA's proposed amendment to add an audit requirement for the following reasons:

1. If an issuer has not completed one financial year, the financial statements included in the offering memorandum will be interim financial statements, which are generally not audited. National Instrument 51-102 *Continuous Disclosure Obligations* allows reporting issuers to file unaudited interim financial statements on SEDAR and does not require audited interim financial statements. We submit that the same should apply to the financial statements of non-qualifying issuers. If the interim financial statements are prepared in accordance with, and comply with, National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*, they should be acceptable to the CSA for the purposes of Form 45-106F2.
2. The new audit requirement will only apply to non-qualifying issuers as this amendment has not been made to Form 45-106F3 *Offering Memorandum For Qualifying Issuers*. We submit that qualifying issuers and non-qualifying issuers should be subject to the same financial statement requirements and that

the proposed amendment is unfairly prejudicial to non-qualifying issuers. If qualifying issuers are allowed to incorporate unaudited interim financial statements by reference into their offering memoranda, non-qualifying issuers should be allowed to include the same in their offering memoranda. This is consistent with the principle of "proportionate regulation" that the CSA has relied on in the past to determine whether a different regulatory requirement is necessary for the junior market.

3. Audited interim financial statements will greatly increase the cost of preparing an offering memorandum for non-qualifying issuers and will limit their ability to go to market in a timely fashion because of the cost and time necessary to involve an auditor. An auditor engaged to audit financial statements for an offering memorandum will have to conduct a similar level of due diligence and prepare similar ancillary documentation such as consent, representation and engagement letters as for a prospectus offering. Accordingly, the auditor will have to charge fees commensurate with the required level of work as well as the level of risk the auditor will be exposed to because of their involvement in a securities offering. One of the reasons the CSA, excluding the OSC, adopted the offering memorandum exemption was to make it easier and less expensive for issuers, particularly small and medium sized issuers, to raise capital, without reducing investor protection. In its annual reports from 2002 to 2007, the Alberta Securities Commission ("ASC") has repeatedly stated this. In the *Alberta Capital Market: Exempt Market Study, March 2004* the ASC concluded that through the exemptions that are now incorporated into NI 45-106:

[T]he ASC has made it easier for issuers, particularly small and medium sized issuers, to raise money, made it easier for more investors to invest, and made it easier for investors to invest smaller amounts as they consider appropriate.

Many issuers choose to issue securities by way of an offering memorandum instead of a prospectus for these reasons. In fact, the ASC has consistently touted the increase in capital raised in the exempt market, particularly under the offering memorandum exemption, as an indicator of the success of its 2002 regulatory initiative. Imposing a new requirement to include audited financial statements in the offering memorandum will increase the cost and decrease the efficiency of the offering memorandum exemption without, we submit, correspondingly increasing investor protection. This is particularly the case for new issuers.

4. Many issuers using Form 45-106F2 are single purpose entities, such as limited partnerships, incorporated or organized immediately prior to the distribution of securities and have no operational history or assets at the distribution date. The financial statements included in the offering memorandum for those issuers are nil financial statements that do not convey any material information to a prospective investor, other than to disclose the issuer has no or minimal assets or operational history. **We submit that, at the very least, such nil financial statements should be exempt from the audit requirement.** The increased costs and time delay created by involving an auditor in those exempt offerings is most definitely not counterbalanced by increased investor protection because there is no risk to investors arising from nil financial statements, regardless of whether the financial statements are audited or not. Further, an investor may falsely assume the risk for those types of exempt offerings is reduced because of the involvement of an auditor.
5. In the discussion regarding the proposed changes to Form 45-106F2 in the Notice, the CSA has stated that the changes to the financial statement requirements were clarifying changes to make the requirements more consistent with National Instrument 51-102 *Continuous Disclosure Requirements*. However, the new audit requirement is more than just a "clarifying change". As stated above, NI 51-102 does not require interim financial statements to be audited and qualifying issuers are not required to have those financial statements audited. The change is a new and costly requirement for offering memoranda with little corresponding investor benefit.

**B. New material fact disclosure requirement in Item 8 - Form 45-106F2**

Item 8 is a new provision added to Form 45-106F2 and requires the issuer to disclose the following:

Give particulars of any material facts about the securities being distributed that are not disclosed under any other items and for which failure to disclose would constitute a misrepresentation in the offering memorandum.

1. We submit that the current disclosure required by the other items is comprehensive and captures all that should be necessary to disclose in an offering memorandum. It is likely that anything that would be stated in item 8 would already fit under one of the other items. If the CSA is seeking some specific additional information that it considers to be material it should clearly state what it is looking for. Further, Item 14 of Form 45-106F2 already requires an issuer to include a certificate that states "this offering memorandum does not contain a misrepresentation". We question why the CSA has introduced the proposed item 8 requirement because it is redundant and not necessary in light of the existing form and certificate requirements.
2. At a minimum, item 8 needs to be clarified so issuers know whether it is a mandatory disclosure item required in each offering memorandum, or whether it can be ignored if the issuer believes it has nothing further to disclose like other inapplicable items (see instruction A.3). It is not clear if item 8 is subject to instruction A.3. We suggest putting guidance in Companion Policy 45-106CP to clarify the application of item 8 and, if applicable, any mandatory disclosure statement that must be included in an offering memorandum to satisfy the requirements of item 8.

The above-noted changes will increase the regulatory burden for non-qualifying issuers without having any positive impact on the quality and transparency of securities distributed in the exempt market. Should you have any questions in relation to the above-noted comments or require further clarification, please do not hesitate to contact Michael Wright ([michael.wright@gowlings.com](mailto:michael.wright@gowlings.com) or 403.298.1087) or Tina Antony ([tina.antony@gowlings.com](mailto:tina.antony@gowlings.com) or 403.298.1085).

Sincerely,

**GOWLING LAFLÉUR HENDERSON LLP**

Michael Wright

MJGW:vk