STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

May 30, 2008

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
New Brunswick Securities Commission
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 Mr Gordon Smith,
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: (604) 899-6814
gsmith@bcsc.bc.ca

-and-

M[e]Anne-Marie Beaudoin
Secrétaire de l'Autorité
800, square Victoria, 22 eétage
C.P. 246, Tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: (514) 864-6381
consultation-en-cours@lautorite.qc.ca

Dear Sirs / Mesdames,

Re: Comments on Proposed Repeal and Replacement of National Instrument 45-106 *Prospectus and Registration Exemptions* ("proposed NI 45-106") and Proposed Amendments to National Instrument 45-102 *Resale of Securities* ("proposed NI 45-102").

We submit the following comments in response the Notice and Request for Comments published on February 29, 2008 ((2008) 31 OSCB (Supp-1)) on proposed NI 45-106 and proposed 45-102.

TORONTO
MONTREAL
OTTAWA
CALGARY
VANCOUVER
NEW YORK
LONDON
SYDNEY

Thank you for the opportunity to comment on these proposed changes. Our comments below have been organized as follows: Section A, consisting of comments on issues in respect of which you have specifically asked for further input; Section B, consisting of comments on proposed NI 45-106; and Section C, consisting of comments on proposed NI 45-102.

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. SPECIFIC REQUEST FOR COMMENTS

1. We support the proposed amendments to the private issuer exemption to allow issuers to rely on this exemption following certain types of transactions that would result in securities being beneficially owned by persons identified in s. 2.4(2) and 3.4(3) of the proposed NI 45-106 only (the "**Eligible Persons**"). We suggest, however, that the expanded availability of the private issuer exemption should not be limited only to transactions such as going private transactions but should be available following any type of transaction that results in the securities of the issuer, other than non-convertible debt securities, being owned solely by the Eligible Persons. For example, a private company/non-reporting issuer should also be entitled to rely on this exemption following a takeover bid, reorganization or other transaction that results in its securities, other than non-convertible debt securities, being beneficially owned only by Eligible Persons. The Companion Policy guidance relating to the proposed amendment to the private issuer exemption should therefore be sufficiently broad so as not to preclude such an interpretation of this proposed amendment.

2. We support the proposed amendments to the legending requirements in proposed NI 45-102 that will help to facilitate the electronic transfer and settlement of interests in securities. Following on the work done by the Uniform Law Commission of Canada, many jurisdictions in Canada have now proposed or adopted securities transfer legislation such as the *Securities Transfer Act* (Ontario), and equivalent legislation that has been adopted in Alberta, British Columbia, Newfoundland and Labrador and Saskatchewan, and that has been proposed in Quebec). One of the primary goals of this legislation is to facilitate the electronic holding, transfer and settlement of entitlements with respect to various types of financial assets, including securities. One of the stated purposes of this initiative is to modernize the Canadian framework for electronic transfer and settlement and to standardize our system with other developed capital markets, including notably, the framework facilitated by Article 8 of the *Uniform Commercial Code* in the United States. In this respect, the framework established in Canada under securities transfer legislation allows for the more efficient and reliable transfer and settlement of entitlements without reliance on any paper based issuances of securities or other paper-based evidence of entitlement or ownership. Corporate legislation, such as the *Business Corporations Act* (Ontario) and the *Business Corporations Act* (British Columbia) now also allows for the issuance of securities that are not represented by any certificates.

In this respect it is our view that the Canadian Securities Administrators (the "**CSA**") have an ideal opportunity to ensure that securities laws are also moving towards the goal of facilitating efficient and reliable electronic holding, transfer and settlement. The proposed amendments to the legending requirements in proposed NI 45-102 fall short of this goal in that the amendments retain the requirement to deliver a written notification to beneficial purchasers. This, in our view, represents a move in the opposite direction to what is being attempted to be achieved through the developments in securities transfer legislation and corporate law discussed above; developments that have dispensed with the need for any paper-based evidence of entitlement. As a practical matter, for securities that are dematerialized, uncertificated or certificated in global form only (and in such case, registered only in the name of the primary intermediary), issuers will not be in a position to directly deliver any type of paper-based legend notification to underlying beneficial purchasers. While we agree that it is reasonable to require issuers to notify purchasers of the applicable resale restrictions, through, for example, the relevant subscription or offering documentation, in our view it would be counter-intuitive to then require delivery of a paper-based notification after the fact. Concerns relating to the trading of securities prior to the expiry of a hold or restricted period would more appropriately be addressed through the facilities of the electronic system where transfer and settlement takes place. In this respect, the available technological options could be employed to designate restricted securities, through either separate CUSIP identification or other means (such as specific designations or markers as are employed by intermediaries in other jurisdictions). Please also see our additional comments in this respect on the proposed changes to NI 45-102 in Section C below.

SECTION B. SPECIFIC COMMENTS ON PROPOSED NI 45-106

PART 1: DEFINITIONS AND INTERPRETATION

1. Definition of "accredited investors": Paragraphs (q) in the definition of the term "accredited investor" should be reviewed in light of proposed registration trigger and other amendments to registration requirements under the CSA's proposed National Instrument 31-103 *Registration Requirements* ("**NI 31-103**" or the "**Proposed Registration Regime**"). In this respect, we note that paragraph (q) should also contemplate persons exempt from registration under the securities legislation of a foreign jurisdiction.

2. Definition of "approved credit rating": The definition of "approved credit rating" refers to the definition under NI 81-102 *Mutual Funds* and has posed significant difficulties for the distribution of commercial paper since the definition of an "approved credit rating" in NI 81-102, requires, among other things, that (a) the rating assigned must be "at or above" certain ratings, and (b) the security must not have been assigned a rating by any "approved credit rating organization" that is not an "approved credit rating". Given that the requisite rating thresholds in NI 45-106 are not equivalent among the rating agencies and that correlation among ratings are imperfect, a number of issuers have had to apply for (and have obtained) exemptive relief in order to rely on the prospectus and registration exemptions contained in NI

45-106 for the distribution of commercial paper that has been assigned the requisite approved rating by at least one approved credit rating agency (see for example, *In the Matter of John Deere Credit Inc. and John Deere Limited,* MRRS decision document dated April 11, 2006). This relief typically contains a sunset clause resulting in the expiry of the relief upon amendments to NI 45-106. We submit that the CSA should take this opportunity to amend the definition of "approved credit rating" in order to codify the relief that has been typically granted for commercial paper in order to make the exemption available where a rating at or above the designated approved credit rating is issued by one of approved credit rating agencies or any of their successors.

3. Definition of "founder": The exemption for a founder, control person and family – Ontario contained in s. 2.7 of proposed NI 45-106 is often relied upon for issuances of securities of newly created entities and to incorporate subsidiaries and holding companies required for various types of corporate structures. In this respect, the definition of "founder" can be problematic in that at the time of incorporation there is no active involvement in the business of the issuer as the issuer does not carry on a business. The definition of "founder" should be clarified to contemplate theses types of distributions by limiting the application of the definition to persons that are involved in the "founding, organizing or substantial reorganizing of the business" at the time of the trade, as opposed to the business of the issuer.

PART 2: PROSPECTUS EXEMPTIONS

4. Section 2.4 – private issuer: Please see our comments in Section A above with respect to the proposed new paragraph 2.4(1)(c)(ii).

5. Section 2.7 – founder, control person and family – Ontario. Given the proposed amendments to s. 2.4 (private issuer) to expand the availability of the exemption to grandchildren, we submit that grandchildren should also be added to list of persons enumerated under s. 2.7(c) (founder, control person and family – Ontario).

6. Section 2.8 – affiliates. In our view, the exemption should be expanded to apply to the distribution by an issuer of a security of its own issue or of an affiliate to another affiliate, of the issuer purchasing as principal, in order to facilitate transfers among affiliates.

7. Section 2.14 – securities for debt. In our view, the exemption should not be restricted to reporting issuers but should also apply to the distribution by any type of issuer of a security of its own issue to a creditor to settle a bona fide debt of the issuer. We see no policy reason to differentiate between reporting and non-reporting issuers in this respect. Preclusion of non-reporting issuers means that such issuers need to find another exemption for the purposes of making a distribution to creditors. Such other exemption may not be available or may involve the filing of a report of trade and consequently the payment of fees, which, in our view places an undue additional burden on non-reporting issuers.

8. Section 2.32 – Distribution to a lender by a control person for collateral. In our view this exemption should be expanded to apply to a distribution of a security of an issuer to a lender, pledgee, mortgagee or other encubrancer from the holdings of a control person for the purpose of giving collateral for a bona fide debt of the control person or of the issuer. Most personal property security legislation in Canada generally provides that a debtor includes a person who pledges collateral to secure a debt of another person. Accordingly, when a control person pledges shares of an issuer to a lender as security for an obligation of that issuer to assist the issuer, while a direct obligation may exist between the control person pledging the shares and the lender there is no requirement for this under personal property security legislation. We submit that this exemption should therefore allow for the distribution of securities from the holdings of a control person for a debt of the control person or of the issuer in order to allow for some greater flexibility. Preclusion of the debt of the issuer means that the parties to a lending transaction need to find another exemption for the purposes of a pledge of shares by the control person or may have to create a direct debt obligation, that otherwise may not have been created, between the control person and the lender in order to fit within the exemption. Another exemption may not be available or may involve the filing of a report of trade and consequently the payment of fees, which, in our view is inappropriate for the pledging of shares in a lending transaction.

PART 3: REGISTRATION EXEMPTIONS

1. Application.

   (a) As currently contemplated under the Proposed Registration Regime, persons or companies that need to apply or re-apply for the appropriate category of registration have until six months after the instrument comes into force to apply. In certain circumstances, the registration requirements under the Proposed Registration Regime will not apply to persons who apply within such six month period until their registration is either accepted or rejected. If proposed NI 45-106 comes into force six months after the coming into force of proposed NI 31-103, there may be gap in the time period between the removal of the registration exemption in NI 45-106 and the registration of certain registrants under NI 31-103, thereby leaving them no exemptions to rely upon until their registration is accepted or rejected.

   (b) As the restriction on the availability of Part 3 of NI 45-106 will not be effected until six months after the coming into force of NI 31-103, Section 6.6 should also not be effective until six months after the coming into force of NI 31-103 as a person in British Columbia relying on a registration exemption would still be operating under the current framework of NI 45-106 until such time.

   (c) The application of Part 3 is proposed to be restricted to British Columbia and Manitoba only after the six months of the coming into force of NI 31-103,

however, it appears that s. 3.03 should continue to apply in New Brunswick as well.

PART 6: REPORTING OBLIGATIONS

1. Section 6.1(2).

Section 6.1(2) requires a report of trade to be filed in the jurisdiction where the distribution takes. In contrast, Instruction 1. in Form 45-106F1 as proposed to be amended states that if a distribution is made in more than one jurisdiction the issuer/underwriter must complete a single report identifying all purchasers and file that report in each of the jurisdictions where the distribution is made. Item 7 of Form 45-106F1 states that the table in that item must be completed for each Canadian and each foreign jurisdiction where purchasers of securities reside. In addition to the inconsistencies among these provisions and instructions, there are also a number of issues raised by these requirements. As set out in Section 6.1(2), the report of trade is required to be filed in each jurisdiction where a distribution takes place. As stated in section 1.4 of the proposed Companion Policy 45-106CP, a distribution or trade can occur in more than one jurisdiction. Whether a distribution or trade occurs in the local jurisdiction is a matter to be determined in accordance with the securities laws of that particular jurisdiction. As far as we understand them, the securities laws of most provinces and territories in Canada generally provide that a distribution occurs in the jurisdiction if the purchaser is resident in that jurisdiction or is otherwise subject to the laws of that jurisdiction. We do understand however that in some jurisdictions, such as Alberta and British Columbia (and in certain circumstances, Quebec), the distribution may be deemed to occur in those jurisdictions if the purchaser is resident there or if the issuer has the requisite connection to one of those provinces. If a purchaser is not resident in the local jurisdiction, and in the case of Alberta, British Columbia and Quebec the issuer is also not connected to the local jurisdiction, we question whether it is appropriate to require disclosure of purchasers outside of the local jurisdiction in Form 45-106F1.

If a distribution is not taking place in the local jurisdiction we fail to see any regulatory or policy reason why the regulator should be provided with information regarding purchasers over whom it does not have any jurisdiction. To the extent there is a policy reason to require such disclosure, in our view, it would be appropriate for the CSA to explain what that reason is and to consider whether any benefit accruing from such disclosure is adequately offset by the additional burden that it imposes. This is of particular of concern in the case of private placements by foreign issuer. For example, if a foreign issuer is undertaking an exempt offering in a number of foreign jurisdictions, including Canada, by virtue of Item 7 and Instruction 1 of Form 45-106F1, it would be required too disclose information regarding each foreign purchaser to each applicable Canadian regulator. In addition to the questionable value of such information, in our view, it is also questionable whether the issuer would have the authority to request or require purchasers in foreign jurisdictions to agree to the disclosure of such information to Canadian regulators; purchaser over whom Canadian regulators would not otherwise be able to exercise any

jurisdiction. We submit that the reporting requirement should not be any broader than as currently set out in Section 6.1(2). The issuer/underwriter should therefore be able to choose to file the same report in all Canadian jurisdictions where distributions have taken place or separate reports identifying the distributions that have taken place in each specific Province or Territory. Issuers should not be required, by virtue of the instructions to the form, to provide information to a regulator regarding distributions that have not taken place within the jurisdiction of that regulator, and in particular, foreign issuers should not be required to disclose particulars about purchasers who otherwise have no connection to the exempt distribution that takes place in a Canadian jurisdiction. To the extent such disclosure is appropriate and justifiable, the requirement should be contained in NI 45-106 itself and not in the instructions to Form 45-106F1 so as to avoid inconsistency or interpretation issues.

2. Section 6.6(1).

As per our comment in relation to Part 3 above, since a person relying on a registration exemption prior to the expiry of six months after the coming into force of NI 31-103 will still be operating under the current framework of NI 45-106, this provision should also not be effective until such time.

COMMENTS ON PROPOSED COMPANION POLICY 45-106CP

PART 1: INTRODUCTION

3. We question whether, by virtue of s. 3.03 of NI 45-106, reference to New Brunswick should also be included in addition to Manitoba and British Columbia.

4. Multijurisdictional distributions or trades. Please see our comments under Part 6, paragraph 1, above.

PART 3: CAPITAL RAISING EXEMPTIONS

5. Section 3.2. We question whether the commentary in section 3.2 should be retained in NI 45-106 in light of the change in the registration trigger and registration regime under proposed NI 31-103. If the commentary is retained, it should be conformed to rules regarding the business trigger for registration as will ultimately be contained NI 31-103 and its related commentary.

6. Section 3.6 (5) - private issuer. Please see our comments under Section A, paragraph 1 above.

7. Section 4.2(3) - business combination and reorganization – exchangeable shares. Our comment is with respect to the additional text proposed to be added to the very last sentence of this section. We would suggest that, in order to avoid any confusion on whether the exemption is available for the exchange of exchangeable shares that

occurs some time after the original transaction, the sentence as proposed to be amended should read as follows: "[a]ccordingly, additional exemptive relief is not warranted in circumstances where the original transaction was completed in reliance on these exemptions."

SECTION C. COMMENTS ON PROPOSED NATIONAL INSTRUMENT 45-102

1. Section 2.5 (2) 3.1 - Restricted Period.

Please see our comments under Section A, paragraph 2, above. As stated in our comments above, the requirement to advise purchasers of the resale restrictions that apply to exempt distributions should not unduly hamper the efficient transfer, trading and settlement of securities and interests in securities through electronic settlement facilities. In this respect, to the extent that there is a policy concern to justify making the first trade of privately placed securities conditional upon notifying a purchaser of the applicable resale restrictions, it would more appropriately be addressed by requiring the issuer or seller to notify the purchaser of the applicable resale restrictions. Issuers could then choose to discharge their obligation in the most appropriate and adequate manner, including notification through the relevant subscription or offering documentation or through any agent involved in the transaction on behalf of the purchaser.

The term "beneficial security holder" is also not defined for these purposes. Similarly, subsection 2.5(3) should not refer to the date of issuance of a security certificate or delivery of a written notification, but should provide an exemption from the legend or notification requirements in Items 3 and 3.1 where the underlying security is issued at least four months after the distribution date. As currently proposed, subsection 2.5(3) is vague and in that it does not specify delivery in accordance with s. 3.1 and does not adequately account for various ways in which securities may be legally issued in Canada, including directly held securities (which may be dematerialized, uncertificated or certificated) and indirectly held securities (which may also be dematerialized, uncertificated or certificated, in which case the registered holder only would be named on the books of the issuer or on the certificate representing the securities, and all other holders would hold security entitlements through their proximate intermediaries only). We note in this respect that the proposed changes to Section 1.7 of the proposed Companion Policy are more consistent with the method in which electronic transfer and settlement is effected through the indirect system.

We submit that subsection 2.5(3) should also be expanded to clarify that, upon expiry of the restricted period, a purchaser has the right to exchange a security certificate that is marked with a legend for a new certificate that does not carry a legend.

Thank you for the opportunity to comment on these proposals.

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

Andrew Grossman
Ramandeep K. Grewal