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Alberta Securities Commission
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The Manitoba Securities Commission
Ontario Securities Commission
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Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland
Registrar of Securities, Northwest Territories
Registrar of Securities, Nunavut
Registrar of Securities, Yukon Territory

c/o Gordon Smith
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and

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Attention: Office of the Secretary

Dear Sirs/Mesdames:

Proposed Repeal and Replacement of National Instrument 45-106 "Prospectus and Registration Exemptions", Proposed Amendments to National Instrument 45-102 "Resale of Securities" and Proposed Amended and Restated OSC Rule 45-501 "Ontario Prospectus and Registration Exemptions"

This comment letter is provided to you by Osler, Hoskin & Harcourt LLP in response to the Request for Comments published at (2008) 31 OSCB (Supp-1) concerning the proposed repeal and replacement of National Instrument 45-106 "Prospectus and Registration Exemptions" ("NI 45-106"), proposed amendments to National Instrument 45-102 "Resale of Securities" ("NI 45-102") and proposed amended and restated OSC Rule 45-501 "Ontario Prospectus and Registration Exemptions ("OSC 45-501").

1. Section 1.1 of NI 45-106 – Definitions – "Accredited Investor"

In the definition of "accredited investor" in subsection 1.1(q), an accredited investor is defined as a person acting on behalf of a fully-managed account managed by that person if that person "in Ontario, is purchasing a security that is not a security of an investment fund." We cannot determine any policy reason for a carve-out in Ontario for investment fund securities and suggest that in the spirit of national harmonization it be deleted.

2. Section 1.1 of NI 45-106 – Definitions – " Accredited Investor"

In subparagraph (t) of the definition of accredited investor an accredited investor is defined as "a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors". We believe that this exemption should allow any investor which itself qualifies as an accredited investor to establish a wholly-owned subsidiary through which it may make an investment in reliance on this exemption. We are concerned, however, that the words "owners of interests, direct, indirect or beneficial", are unintentionally over-broad and may result in confusion or unintended results. For example, consider the case of a public company (the "Parent") which qualifies as an accredited investor that wishes to establish a wholly-owned subsidiary (the "Investment Subsidiary") for the purpose of making an investment in securities of another company. It would appear to be consistent with the policy and spirit of NI 45-106 for the Investment Subsidiary to be able to qualify as an accredited investor by virtue of the Parent's status, even though the Investment Subsidiary does not itself qualify under any other subparagraph of the definition, or, as a result of the restriction in Section 2.3(6), it is unable to rely on subparagraph (m) of the definition because it was formed for the purpose of making the investment. However, the phrase "owners of interests, direct, indirect or beneficial" is so broad that it could be viewed as including the shareholders of the Parent, who might be considered to indirectly be beneficial owners of interests in the Investment Subsidiary. The shareholders of Parent, because it is a public company, will not all themselves be "accredited investors" and, on this reading of the phrase, the Investment Subsidiary would not qualify as an "accredited investor" under subparagraph (t). We therefore recommend that the section be redrafted to state "a person in which all of the equity owners, except the voting securities required by law to be owned by directors, are accredited investors". If the definition were to be revised in this manner,

then the wording in subparagraph (t) would be consistent with Rule 501(a)(8) of Regulation D under the United States Securities Act of 1933, as amended, which addresses the corresponding concept in the definition of "accredited investor" under United States federal securities laws.

3. Section 2.2 of Division 4 of NI 45-106 – Definitions – "Consultant"

We suggest that the revisions to paragraph (e) of the definition of "consultant" be extended to not only include an employee of the consultant but an executive officer or director as well, so as to be consistent with the introductory wording of the definition of "consultant". Therefore, we suggest that paragraph (e) be amended to read "for a consultant that is not an individual, an employee, executive officer or director of the consultant, provided that the individual employee, executive officer or director spends or will spend a significant amount of time and attention on the affairs and business of the issuer or a related entity of the issuer". (emphasis added)

4. Section 2.5(2) and (3) of NI 45-102 – "Legending Requirements"

As an opening point, we are concerned with the CSA's approach to legending, which is to make it a condition of resale rather than a condition of the exemption. The problem with this approach is that the issuer has no incentive to ensure compliance with the legending requirements or the resale restrictions other than in response to pressure from prospective investors. The investor bears the risk of the issuer's failure to legend, which could easily occur by accident, resulting in the investor never being able to rely on section 2.5 of NI 45-102 to make resales. This is a problem with the legending requirement as it currently exists. We believe that the problem is exacerbated by the proposed revisions to NI 45-102 which introduce a new requirement that the issuer give notice of the resale restriction to the beneficial owner, in addition to legending the certificate itself.

Our first concern is that we do not envision a way for an issuer to get the notice into the hands of a beneficial owner. For example, if an investment manager is purchasing the securities for a fully managed account, the beneficial owner will never see a disclosure document or even a trade confirmation. Perhaps changing the requirement to deliver the notice to the "purchaser" rather than "beneficial owner" could address this concern.

Our second concern arises from the consequences of any failure of issuers to be able to deliver this notice to the investors. From the investor's perspective, if the investor ("beneficial owner") does not receive this notice then when the investor wants to sell the security at some future point in time, the investor is effectively subject to a permanent hold, because the investor was never provided with the notice from the issuer. We do not believe that this is an acceptable result for capital markets participants. We would therefore suggest either of the following two possibilities to remedy this problem. First,

and foremost, we would recommend eliminating the requirement to legend. It is a difficult requirement to comply with practically and operationally. Indeed, we have had experience that certain Canadian depositories will not legend securities deposited with them because they do not have a legal obligation to do so and are unwilling to take on the operational requirement to do so. Furthermore, we believe that the policy objectives of the legending requirement can be better addressed by a requirement, to be contained in NI 45-106 and as a condition to reliance upon the exemption, rather than contained in NI 45-102, that a notice be delivered to the purchaser by the issuer relying upon the exemption. This requirement could be satisfied by way of notice contained in a disclosure document or a subscription agreement, or by any other method an issuer chooses, and by requiring it to be delivered to the purchaser, addresses the difficulties with the requirement to notify the "beneficial owner" discussed above. Alternatively, the exemption could allow an issuer to legend a security if the issuer so chooses. In other words, the exemption would require either a delivery of notice to the purchaser or a legending of the security.

To the extent the option to legend a security is retained in NI 45-106, we would request that a clear statement be included in the instrument itself that after the expiry of the restricted period referred to in the legend, it can be removed (prior to the time of any trade, and even if no trade is then contemplated) without prejudicing the holder's right to make resales. It is our understanding that frequently, in the United States, as soon as a hold period has expired purchasers ask for the legend to be removed so that they are in a position to trade in the security immediately when they want to without, at the time of the trade, being subject to the risk of a delay in settlement because the legend has not yet been removed from the security.

5. Section 2.5(3)(i) of NI 45-102 – "Restricted Period"

The prescribed legend for non-reporting issuers is not an accurate statement of the holding period that will apply in most cases. In the vast majority of cases where a private company goes public, it will be by way of an IPO prospectus filed with one of the Appendix B jurisdictions. As a result, if the holder has held the securities for at least four months prior to the IPO they will be freely tradeable immediately following the IPO because of the provisions of Section 2.7, and the statement in the legend that there will be an additional four month restriction (flowing from the inapplicable "seasoning period" concept) is incorrect. Because of the way Section 2.7 operates, it is very confusing to state the law accurately in the legend, because most (but not all) IPO transactions will eliminate the application of the seasoning period requirement. To the extent that the legend requirement is retained, we would propose that the following legend might be more appropriate for a non-reporting issuer:

> "This is a security of an issuer that is not a reporting issuer in any jurisdiction of Canada. Unless permitted under securities legislation, the holder may not trade the security until the issuer becomes a reporting issuer and certain other conditions have been satisfied."

The certain other conditions are:

(1) If going public by IPO prospectus in an Appendix B jurisdiction, the security has been held at least four months and a day from the distribution date; and

(2) If going public any other way, at least four months and a day have elapsed since the later of the distribution date and the date the issuer became a reporting issuer.

We do not believe that putting these other conditions in the text of the legend itself is necessary, especially as a layperson will not be able to ascertain which condition applies or whether it has been satisfied.

6. Subsections 2.5(2)5 and 2.5(2)6 of NI 45-102 – "Restricted Period"

We question whether there remains any policy reason for retaining the requirements in this resale requirement that there must have been "no unusual effort… made to prepare the market or to create a demand for the securities" and "no extraordinary commission or consideration… paid… in respect of the trade". If a shareholder, for example, has acquired 6% of an issuer's shares in the market and a further 2% by way of a private placement, the effect of subsections 2.5(2)5 is that the holder will forever be subject to different rules respecting the manner in which resales can be made of its entire 8% position, even though the applicable hold period has long since expired. The shareholder could only sell up to 6% in a block trade involving an extraordinary commission, and would be required to rely upon a different method to dispose of the remaining 2%. Although we understand the historic rationale for these restrictions, we propose that it would be timely to reconsider whether they remain necessary or appropriate.

7. Section 2.14 of NI 45-102 – "First Trades in Securities of a Non-Reporting Issuer Distributed Under A Prospectus Exemption"

This resale exemption is, among other things, intended to allow Canadian holders of securities of foreign issuers that are not reporting issuers in Canada to resale their securities in a foreign market if the level of Canadian ownership of the foreign issuer's securities is below a prescribed threshold. There is a two part test, requiring both that fewer than 10% of the number of securities be held in Canada, and that fewer than 10%

of the number of holders be in Canada. The difficulty is that private placement purchasers from foreign issuers cannot and will not know with certainty whether these tests were satisfied on the distribution date after giving effect to the completion of the distribution (as is required by the test). Furthermore, foreign issuers often will not have this information either, because they often do not know their level of Canadian beneficial ownership and no one will know how much of the deal is actually being sold into Canada until after the allocations have been completed. We therefore suggest a new section 2.15 be added to facilitate resales by Canadian shareholders of securities of non-Canadian non-reporting issuers outside of Canada. Instead of requiring the 10% / 10% test to be met in such cases, we propose that for securities of a foreign issuer, with no connection to Canada other than private placement sales to Canadian investors, those purchasers should be allowed to resell those securities outside of Canada as long as there is "no substantial trading market" for them in Canada. We recognize that imposing certain other conditions and restrictions may also be appropriate as a policy matter. However, we submit that any conditions which are imposed should be ones that a Canadian investor can assess and determine compliance with without requiring information from the foreign issuer, especially as the foreign issuer may well not have that information available, or be willing or able to obtain it for the Canadian investor's benefit.

8. Section 2.8 of NI 45-102 – Exemption for a Trade by Control Person

We note that the effect of the proposed amendments to subsections 2.8(4) and (5) are that a selling securityholder may not file a new Form 45-102F1 until such time as the current Form 45-102F1 has expired. We further note that once a Form 45-102F1 has been filed, the control person, or other eligible entity, must wait a full seven days before effecting a trade in the marketplace. Given that executive officers and directors of a reporting issuer are generally subject to very small windows within which they can trade in any event, waiting a full seven days after filing a Form 45-102F1 seems to us, in this day and age, to be unduly restrictive, particularly in light of the amendments to subsections 2.8(4) and (5). We would therefore submit that the time period during which the control person must wait to trade after filing a Form 45-102F1 be reduced to two days from seven days if the amendments to subsections 2.8(4) and (5) are to come into force.

9. OSC 45-501 – Section 6.5

We are very pleased that, in the interests of harmonization, section 6.5 of the current OSC Rule 45-501 has been deleted in proposed OSC 45-501.

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We are pleased to have had this opportunity to provide you with our comments on the proposed amendments. If you have any questions or comments please contact Robert Lando at 212.991.2504, Desmond Lee at 416.862.5945, Michael Innes at 416.862.4284 or Craig Wright at 613.787.1035.

Yours very truly

OSLER, HOSKIN & HARCOURT LLP

JS:vkl