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Securities Commission of Newfoundland and Labrador

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Superintendent of Securities, Yukon Territory

Superintendent of Securities, Nunavut

c/o

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Dear Sirs/Mesdames:

**Proposed Amendments to National Instrument 41-101 (NI 41-101), National Instrument 44-101 (NI 44-101), National Instrument 44-102 (NI 44-102) and National Instrument 81-101 (NI 81-101)**

This letter is provided to you in response to the Notice and Request for Comments – Proposed Amendments to NI 41-101, NI 44-101, NI 44-102, and NI 81-101 published at (2011) 34 OSCB (Supp-4). Defined terms used in the Notice and Request for Comments will be similarly used in this letter.

## **KEY PROPOSED AMENDMENT GENERALLY APPLICABLE TO ISSUERS**

### **1. Foreign experts submission to jurisdiction:**

We acknowledge the policy basis for the proposed extension of the requirement to file a non-issuer's submission to jurisdiction and appointment of an agent for service form to foreign experts, and appreciate that CSA Staff are soliciting comments on this potential change. In this regard, we have the following observations on this aspect of the proposal.

Firstly, given the potential impact of this change on firms and individuals that act as qualified persons in the mining context, we think it is important that this proposal dovetail with the recent beneficial amendments to National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* (“NI 43-101”) and National Instrument 44-101 – *Short Form Prospectus Distributions* (“NI 44-101”).<sup>1</sup> As the CSA noted when those amendments were published for comment, qualified persons often work in remote locations and can be unreachable on short notice. The proposed change would appear to require a submission to jurisdiction form to be signed by a qualified person and filed each time a long form or short form prospectus is filed, even if the qualified person would otherwise not be required to provide an updated written consent (e.g., in a situation where the issuer is relying on the exemption in section 4.2(8) of NI 43-101 from the requirement to file an updated technical report). Accordingly, the proposed change would appear to run counter to some of the efforts of CSA Staff to reduce the burden on an issuer in the transactional context.

Secondly, we believe it is essential for CSA Staff to obtain comments on the proposed change from the consulting firms and other outside firms and individuals that act as qualified persons, since they are the persons who would be directly affected by the proposed change. For instance, it is unclear whether this change would affect such qualified persons' view of their potential liability exposure under Canadian securities laws, which in turn could impact the fees which outside qualified persons charge to issuers for their involvement in a transaction (e.g., for reviewing the disclosure summarizing the technical report, providing a consent, participating in due diligence sessions, etc.). While this change directly affects qualified persons, it could also indirectly affect issuers if transactions were to be impacted by the need to obtain a submission to jurisdiction form for a prospectus offering and if any incremental costs for doing so were to be passed on to the issuer.

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<sup>1</sup> For example, we refer to the recent amendments to NI 43-101 providing exemptions from the requirement to provide updated certificates and consents of qualified persons in respect of previously filed technical reports that are still current and meet applicable independence requirements, as well as the recent amendments to NI 44-101 allowing for the consulting firm that employed a qualified person to provide a consent for a technical report, in place of the qualified person, such as in a situation where the original qualified person is no longer with the firm.

## 2. **Time to file final prospectus:**

Based on our experience, we believe that the existing 90 day period and proposed new 180 day total period of time permitted to file a final prospectus in section 2.3 of NI 41-101 should not negatively impact a typical Canadian public offering. We note that the current 90 day period can sometimes be too short in the context of cross-border public offerings, such as in the case of an initial public offering in Canada and in the United States where a long form registration statement is being filed. This is because it can take longer than 90 days for an issuer to clear comments in the United States on its long form registration statement.

We think the 90 day period and proposed 180 day total period in section 2.3(1.2) is generally long enough to account for the time to clear comments in the United States, but we note that issuers may continue to require exemptive relief from time to time on cross-border offerings where the review of the corresponding registration statement in the United States will not allow for the Canadian final prospectus to be filed within the prescribed timeframes in Canada.

## **KEY PROPOSED AMENDMENTS APPLICABLE TO INVESTMENT FUNDS**

### 1. **Leverage disclosure:**

We note that split share offerings do not consider preferred shares to be leverage like bank borrowings to which limitations are attached by a contract for example. The leverage is obtained by virtue of the ranking of these shares in the capital structure and there is no minimum or maximum amount of leverage required by their terms. The actual amount of leverage from time to time can vary dramatically based on the value of the portfolio after issuance. Accordingly, we do not believe this disclosure should apply to the preferred shares or securities of split corporations or trusts.

We thank you for the opportunity to provide our comments on the proposed amendments. If you have any questions or comments please contact Desmond Lee at 416-862-5945 or Andrew Aziz at 416-862-6840 concerning the proposed investment funds amendments.

Yours very truly,

***Osler, Hoskin & Harcourt LLP***

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