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LAWYERS

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Dear Sirs/Mesdames:

Proposed Amendments to NI 41-101 General Prospectus Requirements and Companion Policy 41-101CP (including proposed amendments to NP 41-201 *Income Trusts and Other Indirect Offerings*, NI 44-101 *Short Form Prospectus Distributions and Companion Policy 44-101CP, CP 44-102 to* NI 44-102 *Shelf Distributions*, NP 47-201 *Trading Securities Using the Internet and other Electronic Means*)

This letter is provided to you in response to the Notice and Request for Comments – Proposed Amendments to NI 41-101 General Prospectus Requirements and Companion Policy 41-101CP (including proposed amendments to NP 41-201 *Income Trusts and Other Indirect Offerings*, NI 44-101 *Short Form Prospectus Distributions and Companion Policy 44-101CP, CP 44-102 to* NI

44-102 *Shelf Distributions*, NP 47-201 *Trading Securities Using the Internet and other Electronic Means*) published on November 25, 2011. Defined terms used in the Notice and Request for Comments will be similarly used in this letter.

The responses provided in this letter were compiled following a "roundtable" discussion attended by representatives of the following investment dealers (alphabetically): Cormark Securities Inc., GMP Securities L.P., Paradigm Capital Inc., RBC Dominion Securities Inc., Scotia Capital Inc. and TD Securities Inc. (the "**Dealer Representatives**"). The responses aggregate the discussion points at this session, but are not necessarily views unanimously held by all of the Dealer Representatives or their firms.

SPECIFIC QUESTIONS IDENTIFIED FOR COMMENT

Testing of the Waters Exemption for IPO Issuers

1. **Would the proposed testing of the waters exemption for IPO issuers be of value to those issuers and their investment dealers. Would it allow issuer to obtain useful feedback from permitted institutional investors? Why or Why not?**

2. **Do you think the proposed testing of the waters exemption for IPO issuers will be used? Who would use the exemption most? Small issuers or large issuers? Or, would it be used equally by both?**

   The Dealer Representatives noted that initial public offerings are not typically launched in the absence of general feedback as to market appetite and a thorough assessment as to the potential success of the initial public offering. Investment dealers regularly gather general feedback from the marketplace through informal discussions with sophisticated accounts as to interest in certain types of issuers, without needing to provide issuer specific information. Typically these conversations involve identifying the industry, potential size of the transaction, geographical territory and commodity (for mining transactions) and market capitalization of the issuer. Additionally, many private issuers actively raise funds in the private markets and have sophisticated and/or institutional shareholders who are able to assess the market and provide direct feedback about a going public transaction.

   The Dealer Representatives indicated that, while information is being obtained, the proposed exemption would be of value in those instances where there is some question as to whether the market would sufficiently understand the business of the potential issuer or where the potential issuer is too dissimilar from other public companies in the Canadian market to obtain useful feedback without providing company specifics. This would be more likely in those instances where the potential issuer is a foreign company with a business or assets that are not familiar to the Canadian marketplace. This would be the case whether the issuer was small or large.

The Dealer Representatives supported keeping any "term sheets" used in testing the waters for IPO issuers out of the prospectus liability regime as the disclosures in such documents would, due to their preliminary nature, not necessarily have been subject to adequate or significant due diligence.

One Dealer Representative expressed concern about multiple testing the waters "term sheets" being used, resulting in potential abuses through differential disclosure. Some dealers may use a document containing overly promotional content that the issuer has not approved in an attempt to get a more positive response than other dealers competing for the same work. They recommend that any document used to test the waters that identifies or contains sufficient information to identify the issuer be approved in writing by the issuer and that the issuer provide that same document to any dealer that is testing the waters at approximately the same time.

Bought Deal Exemption

3. **Our proposals provide for the enlargement of bought deals up to a specified percentage. Should the specified percentage be: 15% of the original size of the offering (which corresponds to the existing 15% limit on over-allotment options), 25% of the original size of the offering, 50% of the original size of the offering, or, do you think another limit is appropriate in order to provide flexibility, yet prevent abuse of the bought deal exemption?**

Although divided in opinion, the prevailing view of the Dealer Representatives was that an "upsize" option of 50% of the original size of the offering provided the right balance between flexibility, which is often needed in order to accommodate excess demand or large orders that are difficult to "cut-back" (e.g., a smaller order may not impact a portfolio sufficiently), and continuing to provide discipline to underwriters in sizing bought deal transactions. Some Dealer Representatives were concerned that an upsize of less than 50% could provide structural discrimination against smaller issuers completing smaller transactions by unnecessarily limiting the absolute dollars that may be raised and eliminating certain institutional accounts who would participate only if allocated a relatively large order.

Term Sheet Provision for Bought Deals

4. **The term sheet provision for bought deals provides that a bought deal term sheet could only be given to permitted institutional investors before the receipt of a preliminary short form prospectus. Should the rules also allow a bought deal term sheet to be given to retail investors before the receipt of a preliminary short form prospectus? Why or why not?**

The Dealer Representatives believe that the use of the phrase "term sheet" in the proposed amendments is potentially problematic as it appears to encompass a wider definition than is typically associated with the phrase. It was pointed out that nearly

every public offering makes use of a term sheet that simply states the basic factual terms of the proposed transaction such as price, total deal size, over-allotment terms, use of proceeds, jurisdictions of sale, commission, closing date etc. The information contained in the standard term sheet currently used in public offerings would generally be the information that is contained in the launch date press release reformatted into a factual table. If upon review of the term sheet, a potential investor expresses an interest, then, in accordance with the rules in NI 44-101, a prospectus is delivered to that potential purchaser.

The Dealer Representatives strongly recommend that the rules differentiate between this type of term sheet and the type of term sheet that would be permitted under the proposals, both in terminology and in regulation. The former is correctly called a "term sheet", while the latter should be given another name, such as "written marketing materials."

The Dealer Representatives thought that use of written marketing materials prior to the preliminary prospectus receipt would be uncommon in today's marketplace. The current experience is that written marketing materials other than the standard term sheet (as discussed above) are rarely used by investment dealers in soliciting expressions of interest in connection with a bought deal transaction. Further, due to the limited amount of time between the execution of an engagement letter and the filing of a preliminary prospectus any materials are likely to be limited in scope. As a result of this potential limited scope and a strong desire by the Dealer Representatives to not treat groups of potential investors differentially, the Dealer Representatives were of the view that any permissive rule in this regard should permit written marketing materials to be provided to <u>any</u> potential investor, not only permitted institutional investors. Limiting the permitted audience of the written marketing materials would legislate unequal access to information based on only apparent sophistication.

However, despite the preceding sentiments, the opportunity to use such enhanced marketing materials between the execution of the engagement letter and the filing of a preliminary prospectus is attractive and would be used in appropriate circumstances.

In light of the attempt to conform the marketing rules to market practice as much as is practicable, while seeking to pursue the policy goals of the premarketing rules, the Dealer Representatives strongly suggest that term sheets be expressly recognized as a document used by investment dealers, be expressly permitted to be used at any time after a public offering has been announced and that any such term sheet not be required to be included in, or incorporated by reference in, the relevant prospectus.

Comparables

5. **Our proposals would permit a road show for institutional investors to contain comparables even if the comparables were not contained in the prospectus and therefore not subject to prospectus liability. It has been suggested that**

institutional investors are better able to understand the nature of comparables and the risks related to comparables (e.g., "cherry picking") than ordinary retail investors and individuals who are accredited investors. Do you agree? Why or why not?

6. **Do you agree with our proposal that before attending a road show that may contain comparables, the investment dealer conducting the road show must obtain confirmation in writing from the institutional investor that they will keep the comparables confidential? Why or why not?**

7. **If comparables are included in a prospectus or a road show, should the prospectus rules prescribe a method for choosing comparables in order to reduce the risk of "cherry picking"? Should the rules contain measures that would foster the preparation of comparables which are fair and balanced or comparables which could assist an investor in determining if an offering was properly priced? What methods would achieve these goals? For example, should the CSA prescribe a template mandating the metrics used in compiling comparables or mandating how to pick a representative sample? If so, do you have suggestions for these templates?**

8. **If comparables are included in a prospectus or a road show, should the prospectus rules require additional disclosure to alert retail investors about the nature of comparables and how they can be "cherry picked" and misunderstood? What cautionary language and risk factors should be included? What other safeguards could we implement in order to reduce these risks?**

The Dealer Representatives were of the opinion that if comparables are to be provided, no class of potential investors should be denied access to the comparables. The concern was expressed that this legislates unequal access to information based on apparent sophistication. Comparables (and it is assumed in this discussion that these are traditional valuation “comps”) provide a reference point for the price that may be ascribed to the transaction. Although comparables are helpful in assisting potential purchasers understand relative pricing of an offering, the definitive pricing of any transaction is ultimately set by the forces of supply and demand and the independent assessment of institutional investors. Retail investors, who do not influence price, should be permitted to see this information to also understand reference points and metrics that underlie the pricing process.

The Dealer Representatives appreciate the concern that comparables can be “cherry picked” and that they may not be readily understood by the average retail investor. However, this criticism could be made with respect to many disclosures in a typical prospectus (such as highly technical or financial and accounting matters). It is appropriate to mandate cautionary language. However, comparables vary from issuer to

issuer and no simple rules could apply to their selection and presentation. Regulation of the manner in which comparables may be selected or presented may lead to rules that cannot be applied for particular issuers or that result in disclosures that do not serve the purpose for which they were originally intended.

The Dealer Representatives would like, should it be appropriate, to be able to choose to provide comparables in marketing materials to all potential investors and to redact such comparables from the marketing materials prior to filing on SEDAR. The valuation metrics for other issuers provides context, but are not material facts as regards the securities of the issuer. This conclusion is supported by the proposed differential treatment of retail investors.

OTHER COMMENTS ON THE PROPOSED AMENDMENTS

1. Amendments to "bought deal agreements"

Generally, a bought deal is launched on signing of a "bought deal letter", which is typically a short document that contains the underwriter's commitment to purchase, obliges the issuer to file the prospectus within the prescribed timeframe and details the termination provisions. This document is superceded by a standard underwriting agreement, which is more detailed.

The proposed amendments do permit the addition of representations, warranties, indemnities and conditions. However, it is not clear if this is an attempt to change current practice or to accommodate the current practice. The definition of "amend" includes "amend and restate" so this is likely not a change. This should, nonetheless, be clarified. In addition, it should be permissible to permit additional covenants in an amendment to a bought deal letter.

2. Use of the words "term sheets" to refer to marketing materials

As discussed above the majority of public offerings make use of a standard term sheet that simply reformats the factual terms of the transaction such as price, total deal size, over-allotment terms, use of proceeds, jurisdictions of sale, commission, closing date etc., previously disclosed in the launch date press release. If upon review of the term sheet, a potential investor expresses an interest in potentially participating in the transaction, then, in accordance with the rules in NI 44-101, a prospectus is delivered to that potential purchaser.

The Dealer Representatives recommend that the rules differentiate between this type of term sheet and the type of term sheet that would be permitted under the proposals, both in terminology and in regulation. The former is correctly called a "term sheet", while the latter should be given another name, such as "written marketing materials."

3. Definition of "permitted institutional investor"

The Dealer Representatives were of the opinion, to the extent that the rules retained a regulatory distinction, that the definition of "permitted institutional investor" was too narrow. Permitted institutional investors would be permitted access to term sheets at an earlier stage than retail investors and access to road shows that excluded retail investors. However, "non-investment fund" funds, sophisticated corporate investors and foreign analogues to Canadian investment funds would also be denied access to earlier term sheets and to certain road shows. There should be no reason to exclude any potential investor that meets the definition of "accredited investor" in Canada or the United States. To the extent that distinctions are made, this is one that has already been made from a policy perspective (for private placements) and one that would not impose substantial additional compliance costs that would come from applying an additional classification scheme to an investment dealer's clients.

4. **Definition of "road show"**

The definition of "road show" requires that one or more executive officers of the issuer be in attendance at the road show for it to be a "road show". This may result in certain road shows not qualifying. For example:

- Some structures involve a new entity being incorporated to acquire an operating business. There may only be a limited number of executive officers at the issuer level, with additional executive officers at the operating business. A road show that involved only the latter would not qualify.

- A director is not an "executive officer". A road show that involved only a director of the issuer would not qualify.

The Dealer Representatives believe that the definition should contemplate alternative arrangements such as these, and others that might arise if the person attending the particular road show does not fall within a definition that has been crafted for other uses. This could be accomplished by adding the phrase "or other representative of the issuer" in the definition.

5. **Guidance on "fair, true and plain"**

The proposed guidance for 44-101CP states that a term sheet would be "fair true and plain" if:

- it is honest, impartial, balanced and not misleading;

- it does not give undue prominence to a particular fact or statement in the prospectus (or, in the case of a term sheet under paragraph 7.5(1) of NI 44-101, a document referred to in paragraph 7.5(1)(d) of NI 44-101);

- it does not contain promotional language.

The Dealer Representatives were of the opinion that this guidance is impractical as currently drafted. By their nature, marketing materials are for marketing. They are not, as is recognized, full disclosure, but rather would be limited to key selling features, the issuer's purported positive attributes and financial highlights. In creating this summary, it would be open to question whether the facts therein are given undue prominence, if for no other reason, than simply because it is a summary only.

Similarly, this guidance assumes that prominence itself can be assessed. Does it relate to its location in the term sheet? Does it relate to the manner in which selected information is summarized in the term sheet? Does it relate to which line items are included in a financial summary in the term sheet? Too much uncertainty results from this guidance.

Further, as each potential investor receives a prospectus from which the information comes, it is uncertain what "undue" prominence means in the context of the complete package of documents being given to the investor (or why it should matter).

The "prohibition" on promotional language is potentially problematic as well. A prospectus for a marketed offering will often contain promotional language – in addition to a liability document, the prospectus is a selling document, as are other marketing materials, used to encourage and facilitate the sale of the securities being offered. Promotional language should not contain untruths or misrepresentations but should not otherwise be prohibited. To suggest that promotional language that is in a prospectus could not be used in written marketing materials is difficult to understand and it is suggested that this cannot be the intention.

It is submitted that written marketing materials do not need this additional guidance given that statutory liability for misrepresentations attaches to these documents. The Dealer Representatives are familiar with the concept of misrepresentation. The overall prospectus liability regime should meet any investor protection concerns. The guidance should simply remind issuers of this fact, including the second branch of the definition regarding omissions of material facts necessary to make a statement not misleading in the context in which the statements are made.

Yours truly,

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