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February 23, 2012

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
Superintendant of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8

Anne-Marie Beaudoin
Secrétaire
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montreal, QC H4Z 1G3

Dear Sir/Madame:

Re: Proposed Amendments to Prospectus Marketing Rules

Thank you for the opportunity to comment on the proposed amendments to the pre-marketing and marketing rules for prospectus offerings.

By way of introduction, our firm is one of the leading plaintiff securities class action firms in Canada. While we act in a broad range of shareholder rights litigation, the focus of our practice is representing institutional and retail shareholders in securities class actions arising out of disclosure violations by issuers, their directors and officers, and other market participants. We have been and are counsel to the plaintiffs in numerous class actions in which claims for prospectus and secondary market misrepresentation have been asserted under

section 130 and Part XXIII.1 of the Ontario *Securities Act*, and the equivalent provisions of the Securities Acts of the other Canadian provinces and territories.

We have reviewed the proposed amendments with a focus on ensuring that adequate remedies are available to investors under the civil liability provisions of securities legislation where misrepresentations are made in prospectuses and related marketing materials.

As a general comment, we strongly endorse the approach of attaching civil liability to term sheets and written road show materials. The fact is that these materials can and do play a critical role in the marketing of securities to the public. Because such materials do in fact influence investor decisions, civil consequences should attach to misrepresentations that are contained in such materials. The risk of civil liability will incentivize issuers and underwriters to ensure that the disclosures in such documents are not materially misleading. The following comments are aimed at improving the language in the proposed rules and filling some potential gaps in the rules.

1. Under the proposed rules, where "written materials" are "provided" to investors attending a road show, those written materials must be included in, or incorporated by reference into, the prospectus. It is unclear whether the term "provide" would capture situations in which investors were shown written materials during a road show but not permitted to retain copies. For example, a PowerPoint presentation may be shown to investors at a road show meeting without hard copies being provided, or hard copies of the presentation may be provided with the copies being returned at the conclusion of the meeting. In our view, issuers should not be permitted to avoid liability where written materials are misleading through the simple expediency of refusing to provide a hard copy of the materials to investors. Accordingly, the language in the proposed rules should be broadened to encompass situations where written materials are shown to investors. The same comment applies to the term sheet provisions, which also use the term "provide".

2. The proposed amendments to the prospectus forms (Forms 41-101F1, 41-101F2 and 44-101F1) address the inclusion in, or incorporation by reference into, the prospectus of term sheets, but do not address the inclusion or incorporation of written road show materials. As stated above, the proposed rules require that written materials provided to investors attending a road show be included in, or incorporated by reference into, the prospectus. Therefore, the changes to the prospectus forms should address these written materials, in addition to term sheets.

3. The proposed rules also contemplate that the road show materials will be filed on SEDAR. However, the proposed changes to the provisions dealing with the documents

to be filed in connection with prospectuses (sections 9.1 and 9.2 of NI 41-101 and sections 4.1 and 4.2 of NI 44-101) only address the filing of term sheets. Accordingly, the proposed amendments should be modified to address the filing of written road show materials.

4. The proposed amendments to NI 41-101 relating to road shows only address road shows taking place "during the waiting period", "after a receipt for a final prospectus, or any amendment to the final prospectus, is issued" and "after a receipt for a final base shelf prospectus, or any amendment to the final base shelf prospectus, is issued". The rules do not address road shows conducted in connection with a bought deal after the announcement of the bought deal but before the issuance of a receipt for a preliminary short form prospectus. The rules should regulate the conduct of road shows in this phase of the bought deal when expressions of interest are being solicited, including the requirement that any written road show materials be filed and included in, or incorporated by reference into, the prospectus, thereby attracting civil liability. This would simply place marketing efforts during this phase of the bought deal on the same footing as marketing efforts during the other phases of a prospectus offering.

5. We do not see a clear justification for not attaching civil liability to information in road show materials provided to permitted institutional investors that compares the issuer to other issuers ("comparables"). It unfairly places the burden on such investors to independently verify the accuracy of the comparables, rather than requiring the issuer to ensure that the disclosure is fair, true and plain, failing which liability will attach. Further, to the extent that comparables are disclosed to retail investors, they would attract statutory civil liability. We do not see a clear basis for making the civil liability provisions available to retail investors in respect of comparables but not to permitted institutional investors.

We look forward to reviewing subsequent versions of the rules.

Yours truly,

Siskinds LLP

Per:
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