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

Your reference

Our reference

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To the attention of:

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Dear Sirs/Mesdames:

Proposed Amendments to National Instrument 41-101 – *General Prospectus Requirements* and Companion Policy 41-101 CP To *National Instrument 41-101 General Prospectus Requirements*

This letter is submitted in response to the Notice and Request for Comments made by the Canadian Securities Administrators ("**CSA**") on Proposed Amendments to National Instrument 41-101 *General Prospectus Requirements* and Companion Policy 41-101CP *To National Instrument 41-101 General Prospectus Requirements* (the "**Companion Policy**") and related instruments and policies (collectively, the "**Proposed Amendments**"). We appreciate the opportunity to comment on this important initiative to clarify and extend permissible pre-marketing and marketing activities in connection with prospectus offerings. We have the following comments on the Proposed Amendments:

Testing of the Waters – Exemption for IPO Issuers

The Proposed Amendments would expressly permit non-reporting issuers, through an investment dealer, to determine interest in a potential initial public offering ("**IPO**"). Communication may only be made by the investment dealer with "permitted" institutional investors. We support the introduction of a "testing of the waters" exemption for IPOs. We are of the view that securities regulators should support the success of such offerings as they form an integral part of the capital markets. The process of going public is lengthy and expensive and to the extent that market interest may be tested prior to incurring some of these expenses, we believe it would be beneficial to issuers and the capital markets. This is especially true in today's more volatile markets.

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In response to your question regarding the utility of the exemption, it is our opinion that the exemption will be relied upon mainly by larger private issuers who:

1 have more information regarding their business and products in the public domain;

2 have an institutional shareholder base already; and/or

3 are able to attract the interest of an investment dealer(s).

Such issuers will likely have more investment interest in their securities such that underwriters may wish, as part of their activities to determine the viability of an IPO, to undertake such discussions. As the solicitation must be made through an investment dealer, the exemption may not be utilized by smaller issuers who have not generated the same level of interest from registered dealers. In addition, smaller issuers who do not have a public record may have difficulty relying upon the pre-marketing exemption to obtain any degree of comfort as to whether a subsequent IPO would generate interest in the market and be successful.

One of the conditions of relying on the exemption is that any written material must bear a legend that the material is not subject to liability under securities law. In the interests of investor protection, perhaps a reference should also be made to the fact that the information is subject to the disclosure contained in the prospectus. This is because investors should make their investment decision based on the prospectus, which is the principal disclosure document and will also reflect the fact that information may change due to the length of time that may elapse in an IPO between the initial contact with a potential investor and the date the prospectus is receipted.

Bought Deal Exemption

We support the introduction of an expanded bought deal exemption. We are of the view that insider tipping and trading do not often result from testing the waters given the nature of the institutions who are contacted by dealers. If insider trading does occur, it is submitted that it is best dealt with by enforcement action rather than restricting the ability of issuers to successfully raise capital. Insider trading concerns can also be effectively addressed by confidentiality undertakings. We have the following comments on the proposed exemption:

Definition of Bought Deal Agreement: We support the introduction of a definition of bought deal agreement which includes it not having a "market out" clause as this reflects the current market understanding of what constitutes a bought deal. It should be clarified that other clauses which may allow termination of a transaction are not prohibited, especially in light of proposed section 7.4(5) of National Instrument 44-101 *Short Form Prospectus Distributions*.

Enlargement of Bought Deal: We are of the view that it is not necessary to specify a percentage by which a bought deal can be enlarged following its initial announcement and any attempts to limit the ability of an issuer to enlarge the size of a bought deal based on legitimate market demand would, in our view, hamper the efficiency of Canadian capital markets and the attractiveness of the bought deal regime. We do not believe there are strong policy reasons to justify imposing such restrictions on issuers. The Request for Comments indicates that the rationale for such a limit is to avoid the possibility of a dealer entering into a commitment with an issuer for a small number of securities in order to avoid the general restrictions on pre-marketing and then increasing it at a later time. We think that this risk is overestimated. In our view, dealer reputation, the issuer not wanting to agree to incur expenses for a small offering and market forces will not result in this behaviour occurring with any regularity. The market ultimately will determine what the demand for certain securities will be and there is no policy reason to restrict it to a specified percentage if market demand exists. Therefore, no percentage should be set out or, in the alternative, a higher percentage should apply which would allow the market demand to be met.

One of the conditions of relying on the bought deal exemption is that any enlargement of the offering cannot be the "culmination of a formal or informal plan to offer a larger number of securities under the short form prospectus devised before the execution of the original agreement". We are of the view that this language is

vague and the condition will cause unnecessary uncertainty in the marketplace as to when a transaction can be enlarged. It is also highly probable that many dealers and issuers would hope that the deal would be well received and that discussions of a possible enlargement based on market demand could occur at the time of the initial agreement. Would this be construed as having an "informal plan" to increase the transaction at the time it is originally announced? The determination of the original size of a bought deal is always an estimate of what the market will in fact bear and the condition seems circular and unnecessary.

Enlargement of the Syndicate: The Proposed Amendments allow enlargement of the syndicate following the original agreement subject to certain conditions, including that the enlarged syndicate not be "the culmination of a formal or informal plan" to enlarge at the time of the original deal. In a bought deal the underwriter assumes, at the time of entering the agreement, the risk from the issuer that an issuance of securities will not sell. The fact that a dealer then chooses to manage this risk by entering into a syndication agreement with other dealers does not affect either the issuer or investors and therefore should not be a concern to securities regulators. In the interests of efficiency, one or two dealers (the "**lead underwriters**") will enter into the bought deal agreement with the issuer and will in fact contemplate a subsequent syndication. We do not understand the concern addressed by this condition. In our view any attempt to place restrictions on the ability to syndicate may hamper the efficiency of the capital markets and have a negative effect on the bought deal regime.

Sufficient Specificity

The Proposed Amendments include guidance in the Companion Policy as to when discussions between an underwriter and dealer have reached "sufficient specificity" such that a distribution of securities has commenced. The guidance indicates that a distribution commences when there have been discussions of sufficiently specificity that "it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or selling shareholder an underwriting of the securities". The guidance specifically provides that CSA staff do not agree that a distribution does not commence until a later time (for e.g. when an engagement letter is delivered to an issuer).

We are of the view that the guidance is not adequately flexible. The Guidance for Compliance with IDA (now IIROC) By-law 29.13 states that "At the latest, it [a distribution] will have commenced at the time the offer to underwrite is made to the issuer". We would submit that there should be mutuality of discussions (i.e. an intention of both the dealer and the issuer to proceed). While the first example cited in the Companion Policy does anticipate issuer approval, the second example refers to a situation where no indication of price range or other terms would have been given by the underwriter to the issuer and therefore there is no intention of the issuer to necessarily proceed. This guidance should be revised.

Term Sheet Provision for Bought Deals

The Proposed Amendments provide that a term sheet may be provided to permitted institutional investors prior to the filing of a preliminary prospectus for a bought deal. While it is unlikely individual investors will form part of a "testing of the waters" group in a bought deal, we believe it is not necessary to restrict delivery of the term sheet for a bought deal only to permitted institutional investors. This may allow, in limited circumstances, a more level playing field with respect to the allocation of securities which may occur prior to the filing of the preliminary prospectus. As the proposals contemplate the term sheet being incorporated into the prospectus, statutory liability will arise for its contents.

The proposals impose a new standard of disclosure for term sheets, that of "fair, true and plain" disclosure. Given that the Proposed Amendments require the term sheet to be contained or incorporated by reference in the prospectus which is subject to its own standard of disclosure ("full, true and plain") and given that the prospectus must be delivered and will attract liability for misrepresentations to investors purchasing pursuant to the prospectus, is there a need for a separate standard of disclosure for a term sheet and should the term sheet attract liability as a stand alone document? As currently drafted, the term sheet will be required to be filed on SEDAR and will attract liability to secondary market investors for any misrepresentation. This includes liability for any omission. As the disclosure is not "full" disclosure, it is difficult to see how this standard will be

interpreted. In our view, the term sheet and the prospectus should be seen as a single document for the purposes of assessing statutory liabilities. Unlike other documents incorporated by reference in prospectuses, such as, for example, financial statements, term sheets do not have their own specific purpose outside the context of an offering. Amendments to the secondary market regime would be necessary to ensure term sheets are not considered “documents” attracting liability by themselves. Finally, information contained in term sheets incorporated by reference in a prospectus will be subject to review by regulators. Accordingly, this review should discourage the publication of overly promotional term sheets.

Term Sheets

The Request for Comments proposes that term sheets be provided at the time of the preliminary prospectus to all investors both retail and institutional. We are in support of this proposal as it allows an investor to quickly identify the relevant facts of the offer. While the prospectus is the cornerstone disclosure document for any offering, communication methods have developed over time and there is more information available electronically to investors than ever before in making an investment decision. Again we reiterate the concern regarding a separate standard of disclosure for a term sheet and the need to impose liability in respect thereof.

Comparables

The Proposed Amendments allow comparables to be used at a roadshow for institutional investors even if they were not included in the prospectus. In this event the comparables would not attract liability if not included in the prospectus. The Request for Comment solicits views on whether comparables should be allowed to be provided to retail investors. We are of the view that while roadshows for individual investors are rare in Canada, we see no reason to restrict the availability of such information to retail investors. Comparables are currently provided to retail sales force registrants through green sheets. The Proposed Amendments further provide that roadshows for retail investors should not include comparables in the absence of prospectus liability. Comparables are not material information about an issuer that should require prospectus disclosure. In addition, comparables are based on publicly available information for which liability is not appropriate. Finally, reliance should be placed on the underwriters and the market to select appropriate methods of selection of comparables.

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This letter has been prepared by certain members of the Securities Law Group of Norton Rose Canada LLP but may not reflect the views of each of its members. If you have any questions concerning these comments, please contact Tracey Kernahan (416) 216-2045 (direct line) or by e-mail at Tracey.Kernahan@nortonrose.com, Solomon Sananes (514) 847-4411 (direct line) or by e-mail at Solomon.Sananes@nortonrose.com or Jamie Gagner (403) 267-9563 (direct line) or by e-mail at Jamie.Gagner@nortonrose.com.

Yours very truly,

"*Norton Rose Canada LLP*"

Norton Rose Canada LLP

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