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Ladies and Gentlemen:

Proposed Pre-Marketing and Marketing Amendments to Prospectus Rules

- This letter is in response to the Notice and Request for Comment dated November 25, 2011 regarding the proposed amendments to the various pre-marketing and marketing provisions of the prospectus rules in Canada (the "**proposed rules**").[1] We appreciate the opportunity to comment on the proposed rules.

- We are supportive of the CSA's efforts to provide greater clarity with respect to the range of permissible pre-marketing and marketing activities in connection with prospectus offerings. For the securities law practitioner, advising on these activities has traditionally

[1] These amendments were published in the OSC Bulletin at (2011) 34 OSCB 11829. The following instruments and policies are proposed to be amended: (a) National Instrument 41-101 *General Prospectus Requirements* ("**NI 41-101**") and Companion Policy 41-101CP to NI 41-101; (b) National Policy 41-201 *Income Trusts and Other Indirect Offerings* ("**NP 41-201**"); (c) National Instrument 44-101 *Short Form Prospectus Distributions* ("**NI 44-101**") and Companion Policy 44-101CP to NI 44-101; (d) Companion Policy 44-102CP to National Instrument 44-102 *Shelf Distributions*; and (e) National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*.

required a significant amount of judgement, given the general nature of the Canadian rules and policies in this area. This has sometimes led to different views on the Street with respect to certain practices.

- As counsel to numerous issuers, investment dealers and investors, Osler, Hoskin & Harcourt LLP has had extensive involvement with public offerings of equity, debt and other securities. However, we note that, as legal counsel to our clients, we are only indirect participants in the capital markets. For this reason, our comments are more in the nature of observations from a legal perspective based on our experience advising on public offering transactions. We have not commented on certain questions identified by the CSA which involve primarily business, rather than legal, considerations (e.g., would the proposed "testing of the waters" exemption for IPO issuers be used).

- We have, however, highlighted in this letter what we believe are some possible unintended consequences of the proposed rules, as currently drafted. We have some concerns that many market participants may not fully appreciate the impact that these proposals will have on their activities. As a result, we would caution the CSA about implementing the proposed rules without at least publishing for comment a further amended version and obtaining comments from a sufficiently representative group of participants in the capital markets (particularly the investment dealers, institutional investors and retail investors who would be most directly affected by these changes).

A. Comments Relating to Bought Deals

1. *Proposed cap on upsizing a bought deal.*

- We have encouraged participants in the capital markets to comment on the proposal to cap the amount by which a bought deal can be "upsized" following launch to 15%, 25%, 50% or some other amount of the original size of the offering.[2] We acknowledge that the CSA, through its proposed cap and additional conditions on upsizing, is attempting to address the potential for misuse of the bought deal exemptions (e.g., underwriters committing to purchase $5 million of securities under a bid letter when the intended offering size is $100 million in an attempt to limit underwriting risk).

- We note that, in our experience, such misuse of the bought deal exemptions is extremely rare. We think it is unlikely that experienced senior management of an issuer would accept a purchase commitment from an underwriter on a bought deal that is materially below management's intended offering size and price. Similarly, we have not observed underwriters engaging in such a practice, which we would attribute in part to the competitive environment for underwriting securities offerings in Canada.

- As a result, we do not believe that any cap on upsizing a bought deal is necessary, as we view the potential for misuse of the bought deal exemptions to be very limited in practice.

[2] Question 3 of the specific questions in the proposed rules on which the CSA invited comments.

We support allowing an issuer seeking financing to determine whether the size of the underwriting commitment and pricing being offered are acceptable to it. If the CSA moves forward with implementing a cap, we would be in favour of a cap at the high end of the proposed range.

2. ***The conditions for upsizing a bought deal could be difficult to comply with and may preclude upsizing in many situations.***

- We have concerns regarding the provision in the proposed rules that would prohibit a bought deal from being upsized if doing so is "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".[3]

- This condition is presumably aimed at making sure that the upsized offering is the result of excess demand or over-subscription, rather than a means of circumventing the spirit of the bought deal rules by permitting solicitations of expressions of interest in securities for which there is no pre-existing purchase commitment by an underwriter.

- We note, however, that the wording of this condition is very broad, and it is not clear how market participants will be able to satisfy themselves that the condition is met in any specific situation.

- When considering a bought deal, an issuer will typically have in mind an approximate offering size and offering price (expressed as a discount to the current market price) for its securities. As part of the pricing discussions with the issuer, underwriters may provide the issuer with a range of suggested alternatives for offering size and price. Depending on market conditions, an underwriter may on occasion recommend that the issuer launch a bought deal at a smaller offering size, with the possibility of upsizing, in order to increase the likelihood of a successful offering (one that will be "all sold", and ideally with excess demand so as to create market conditions that support the offering price), rather than take the risk that the market will not be able to absorb a larger offering at the same price per security.

- In our experience, such action is not motivated by the underwriters' desire to limit underwriting risk, but rather by a desire to facilitate a successful offering for the issuer. We understand that an issuer may be negatively impacted if its offering were to remain unsold, notwithstanding that the issuer receives the full amount of the net offering proceeds as a result of the underwriters' firm commitment to purchase the issuer's securities at the full offering price. (Among other reasons, an unsold offering may put downward pressure on the market price of the issuer's securities, adversely affect market perception of the issuer and negatively impact the ability of the issuer to raise capital in the future.)

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[3] Proposed section 7.4(2)(d) of NI 44-101.

- Discussions of possible upsizing in the event of excess demand are a normal feature of the pricing process on certain bought deals. We believe that such discussions facilitate certainty of financing for an issuer, rather than detract from it. However, the wording of the proposed condition on upsizing is very broad, and may be viewed as applying to the discussions that issuers and underwriters have regarding the interplay of offering price and offering size prior to launch. It is not at all clear when such discussions would amount to a "formal or informal plan" under the proposed rules and therefore prohibit an upsized offering.

- We believe that the proposed condition may introduce needless uncertainty regarding the ability to upsize a bought deal, and should not be necessary, particularly if the CSA moves forward with its proposal to cap the amount by which a bought deal can be upsized. We encourage the CSA to remove this condition from the proposed rules.

3. ***The proposed restrictions on terminating bought deal agreements may be incompatible with current market practice.***

- One of the long-existing policy rationales for allowing bought deals in Canada is to provide certainty of financing for an issuer. We therefore acknowledge the purpose behind the provisions in the proposed rules which seek to restrict when a bought deal agreement can be amended or terminated.

- We do not object to the CSA's proposal that a "bought deal agreement" not contain a market-out clause.[4] We believe that the overwhelming market practice in Canada for a bought deal would be for both the bid letter and the underwriting agreement to exclude a market-out clause.

- We are of the view, however, that the CSA should clarify whether the new term "bought deal agreement" refers only to the bid letter or also to the underwriting agreement itself. We note that the prevailing market practice in Canada for a bought deal is to use a bid letter to satisfy the requirement in current sections 7.1(a) and 7.2(a) of NI 44-101 that the issuer has entered into an "enforceable agreement" with the underwriters to purchase the securities that are the subject of the bought deal. The bid letter is typically entered into by the lead underwriter(s) on behalf of the full underwriting syndicate, and is then superseded or supplemented by a full underwriting agreement that is executed by all of the underwriters immediately prior to the time of filing the preliminary prospectus for the bought deal.

- The proposed rules appear to prohibit a "bought deal agreement" from being terminated unless all parties (including the issuer) decide not to proceed with the prospectus offering.[5] It is unclear how this provision would apply.

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[4] Proposed definition of "bought deal agreement" in section 7.1 of NI 44-101.

[5] Proposed section 7.4(5) of NI 44-101.

- We believe that this provision could be read to mean that there can be no "outs" in the bought deal agreement at all, although we presume this refers only to the bid letter itself rather than to the full underwriting agreement that typically supersedes or supplements the bid letter. (The underwriting agreement for a bought deal would customarily include "regulatory proceedings out", "disaster out", "material change out" and "compliance with conditions out" clauses. For a REIT or income trust issuer, a "tax change out" clause may also be included.)

- We note that many bought deal bid letters do not themselves contain the customary termination provisions contained in a bought deal underwriting agreement.[6] However, the purchase commitment in the bid letter is usually conditional upon the execution by the issuer and the underwriters of a mutually satisfactory form of underwriting agreement, which would then contain those customary termination provisions.

- In addition, it would be typical for a bought deal bid letter to have some form of "due diligence out" clause in the event that undisclosed, materially adverse information about the issuer is revealed during the underwriters' due diligence investigation prior to the time at which the full underwriting agreement is signed (this provision is not typically included in the full underwriting agreement).

- If a mutually satisfactory form of underwriting agreement cannot be agreed upon, or if the underwriters' due diligence investigation were to reveal undisclosed, materially adverse information about the issuer, the underwriters would be entitled to withdraw or terminate their underwriting commitment under the bid letter.

- Given the wording of proposed section 7.4(5) of NI 44-101, it is not clear whether these and other customary conditions in the bid letter[7] would be prohibited or unenforceable, since the failure to satisfy these conditions could result in the termination of a bought deal agreement without the consent of the issuer.

- Not including these conditions in a bought deal bid letter would be a significant departure from current market practice. Accordingly, we suggest that the CSA clarify that both the bid letter and the underwriting agreement for a bought deal may contain the customary

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6 Market practice varies in this regard. Some underwriters choose to include the full text of such termination provisions in the bid letter, while many do not.

7 It is typical for the underwriters' purchase commitment in the bid letter to be subject to other conditions, such as the issuer being eligible to file a short form prospectus, the issuer filing the preliminary and final short form prospectuses by certain dates, the issuer complying with securities laws and the securities offered being conditionally listed on a particular stock exchange. Some bid letters may also be "subject to syndication", meaning that the underwriters' purchase commitment will be withdrawn if the lead underwriter(s) are not able to syndicate the offering among other underwriters. In the event of a failure to syndicate, the bought deal will not be launched (e.g., there is no public announcement of the bought deal). We note that the lead underwriter(s) may achieve the same result by delaying the execution of the bid letter until after the full syndicate confirms its participation in the bought deal (in other words, the lead underwriter will not commit to purchase securities without the other underwriters confirming their participation as syndicate members). However, we believe that investment dealers prefer to explicitly state in a bid letter when a bought deal is subject to syndication, in part to highlight for the issuer the fact that its offering will not proceed if the offering cannot be syndicated.

termination provisions and conditions for a bought deal, which under the proposed rules would exclude a "market-out clause".

- We would also encourage the CSA to remove proposed section 7.4(5) of NI 44-101 and instead re-phrase the proposed rules to clarify that neither the bid letter nor the underwriting agreement for a bought deal may contain a "market out clause".

4. ***There are other proposed restrictions on amending bought deal agreements that may be incompatible with current market practice.***

Practice of Underwriting Agreement Superseding or Supplementing the Bid Letter

- The proposed rules would not allow a bought deal agreement to be amended in order to add additional representations, warranties, indemnities and conditions, unless the amended agreement is otherwise on the same terms as the original agreement and other restrictions are complied with.[8] It is not clear what is intended by this requirement in light of the fact that the term "bought deal agreement" may apply to both the bid letter and the full underwriting agreement (the full underwriting agreement, by superseding or supplementing the bid letter, may be considered to constitute an amendment to it).

- We would ask the CSA to clarify that the current practice of superseding or supplementing a bought deal bid letter with a full underwriting agreement (which will necessarily contain additional representations, warranties, indemnities and conditions beyond what is in the bid letter) would continue to be acceptable.

- We would point out that one of the reasons why the practice of using a bid letter to satisfy the "enforceable agreement" requirement in current sections 7.1(a) and 7.2(a) of NI 44-101 is that there is often not enough time to negotiate a full underwriting agreement prior to the launch of a bought deal.

- In contrast, bid letter terms and conditions have become relatively standardized in Canada, with the result that a form of bid letter may be agreed upon in a relatively short period of time. The four business day period following the launch of a bought deal and ending at the time of filing the preliminary prospectus provides additional time during which the full underwriting agreement may be negotiated, settled and executed by the issuer and all of the underwriters.

- We would strongly discourage any changes that would result in underwriters and issuers having to settle on and execute a full underwriting agreement prior to the launch of a bought deal in order to satisfy the proposed condition relating to the addition of representations, warranties, indemnities and conditions to the bought deal agreement. We therefore suggest that proposed section 7.4(4) of NI 44-101 be removed in its entirety.

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[8] Proposed section 7.4(4) of NI 44-101.

Restriction on Syndication

- The proposed rules prohibit adding a new underwriter to the syndicate if, among other things, this is "the culmination of a formal or informal plan to add that underwriter devised before the execution of the original agreement".[9] As noted above, most bid letters are executed by the lead underwriter(s) on behalf of the full syndicate, in the interests of speed in bringing the offering to market, with the full expectation that other underwriters will subsequently execute the full underwriting agreement.

- Given that syndication of a bought deal (i.e., the process of the lead underwriter(s) inviting other underwriters to join the underwriting syndicate) often does not occur until shortly prior to launch (sometimes minutes before launch), it is in most cases impractical to have the bid letter signed by all of the underwriters since there is insufficient time to do so. Yet, in the situation where a bought deal is to be syndicated, there is clearly an intention prior to the time that a bid letter is signed to add additional underwriters and to specify the number of securities to be purchased by the additional underwriters.

- We note that this intention is usually evidenced by the listing in the bid letter of all of the underwriters, together with their purchase commitments on a several basis. However, only the lead underwriters(s) will sign the bid letter. The proposed condition in section 7.4(3)(a) of NI 44-101 would appear to prohibit this practice, since the intention to add other underwriters would constitute a "formal or informal plan" to do so devised before the execution of the original agreement.

- It is also unclear whether the proposed condition in section 7.4(3)(c) of NI 44-101 that the amended agreement (which adds other underwriters) be otherwise on the same terms as the original agreement would preclude the current practice of having the other syndicate members sign the full underwriting agreement, rather than an amended bid letter. This is because the full underwriting agreement will necessarily contain other terms in addition to what was contained in the original bid letter.

- We do not understand the regulatory concerns with the current practice, since the underwriters' commitment to purchase all of the offered securities from the issuer, once a bid letter is signed, is unchanged by the addition of underwriters to the syndicate. In light of the foregoing, we are suggesting that the CSA delete proposed section 7.4(3) of NI 44-101 in its entirety.

5. ***Term sheets for a bought deal may be sent only to permitted institutional investors before the preliminary prospectus receipt is issued.***

- Between the launch of a bought deal and when a receipt is issued for the preliminary short form prospectus, term sheets may only be sent to institutional investors falling

[9] Proposed section 7.4(3) of NI 44-101.

within one of the categories of "permitted institutional investor" under the proposed rules.[10]

- Although retail investors may receive a term sheet after a preliminary prospectus receipt is issued, we believe this will be of little practical benefit unless a portion of the offering is reserved for retail investors, as bought deals are generally fully allocated well before the preliminary short form prospectus is filed (typically by the morning after launch).

- We believe that retail investors should be entitled to receive term sheets on a bought deal prior to the time at which the preliminary short form prospectus is filed. We do not understand the policy rationale for limiting access only to permitted institutional investors[11], particularly when it is proposed that all information concerning securities in the term sheet must be included in the news release announcing the bought deal or the issuer's continuous disclosure record. We are not aware of any information in a typical bought deal term sheet that is appropriate only for institutional investors, and we note that a term sheet would be required to be included or incorporated by reference in the preliminary prospectus and the final prospectus in any event under the new term sheet provisions of the proposed rules.[12]

- The proposed rules would also require a copy of the preliminary prospectus to be sent to each permitted institutional investor that received the term sheet, whether or not that investor expressed interest in the offering or ultimately purchased securities.[13] We believe this is likely to impose an unnecessary compliance burden on underwriters, as no purpose is served by providing further information about an offering to an investor that has already decided not to participate in the offering. We would encourage the CSA to remove section 7.5(1)(g) of NI 44-101.

6. ***The proposed rules would require more disclosure in the launch press release for a bought deal compared to current practice.***

- The proposed rules would require all information concerning the securities in the bought deal term sheet to be included in the launch press release, unless that information has been disclosed by the issuer in a previously filed document.[14]

- For instance, some of the information in a typical bought deal term sheet that would need to be included in the launch press release under the proposed rules would include the stock exchange(s) where the issuer's securities are listed, the termination provisions for

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10 Proposed section 7.5(1) of NI 44-101. The proposed definition of "permitted institutional investor" is in amended section 1.1 of NI 41-101.

11 As a separate matter, we do not support having a separate definition of "permitted institutional investor" for the purposes of the proposed rules. See comment 17 in this letter.

12 Proposed section 7.5(3) of NI 44-101.

13 Proposed section 7.5(1)(g) of NI 44-101.

14 Proposed section 7.5(1)(d) of NI 44-101.

the underwriting commitment, the eligibility for investment of the securities for RRSPs, TFSAs and other registered plans and the underwriting fee.

- We note that current market practice is to not include this information, and therefore the adoption of these provisions will result in a change in the usual form of launch press release for a bought deal. We do not object to this aspect of the proposed rules, although it is unclear to us whether there is much added benefit to including all of the information in a bought deal term sheet in the launch press release.

7. ***A term sheet for a bought deal must be approved in writing and filed on SEDAR before it can be used.***

- Under current bought deal rules, the launch press release must be issued and filed on SEDAR prior to the commencement of solicitation activities. For timing reasons, this is typically handled by the lead underwriter on behalf of the issuer. Under the proposed rules, the term sheet would also need to be approved in writing by the issuer and the underwriters and filed on SEDAR before the term sheet is provided to permitted institutional investors.[15]

- We anticipate that investment dealers will want to ensure that compliance with the proposed rules will not result in a delay in their ability to send term sheets to investors immediately following launch in accordance with current market practice.

- In this regard, we would ask the CSA to consider whether approval in writing of the term sheet by all of the underwriters should be necessary, given that market practice is for the lead underwriter(s) to negotiate and finalize the form of term sheet with the issuer. Obtaining the written approval of all of the underwriters on the term sheet (even by way of return e-mail) could result in unnecessary delays in the context of a bought deal.

- As a practical matter, we anticipate that the new requirement to file the term sheet on SEDAR before the term sheet is sent will result in the lead underwriter also filing the term sheet at the same time as the press release in order to be in a position to be able to distribute the term sheet immediately upon launch.

B. Comments Relating to Road Shows

8. ***All information in a road show during the waiting period must also be included in the preliminary prospectus.***

- Under the proposed rules, all information in a road show during the waiting period must also be disclosed in the preliminary prospectus, with the exception of comparable company information, which may only be disclosed to permitted institutional investors.[16]

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15 Proposed section 7.5(1)(e) of NI 44-101.

16 Proposed section 13.8(1)(c) of NI 41-101. Similar requirements are contained in proposed sections 13.9(1)(c), 13.10(1)(c), 13.11(1)(c), 13.12(1)(c) and 13.13(1)(c) of NI 41-101.

We understand that the CSA believes this is largely consistent with current Canadian practice for a road show. However, the proposed rule is very restrictive and requires that "all information" in the road show also be in the preliminary prospectus, rather than focusing only on material information.

- This requirement would appear to apply not only to the presentation material itself (e.g., slide decks) but to all verbal communications made during the presentation. We do not believe that it would necessarily be helpful to investors, or aid in their protection, to prevent management from being able to answer questions during a road show simply because the answers go beyond what is contained in the preliminary prospectus.

- We note that the proposed rules permit a road show to summarize information from the prospectus or to include graphs or charts based on numbers in the prospectus.[17] However, we think it would be preferable for the CSA to be more general in allowing road show materials to contain information derivable from the prospectus as well as general market information not specific to the issuer.[18] It would also help for the CSA to clarify that immaterial differences in the manner of presentation of the information from the prospectus would be permissible in a road show.

- We also have one other technical concern with the requirement that "all information" in a road show be disclosed in the prospectus. We are aware of certain Canadian issuers of guaranteed securities (typically debt securities) who prepare a short form prospectus and incorporate by reference in the short form prospectus the U.S. public company filings of the credit supporter of the Canadian issuer. In many cases, the credit supporter is not the ultimate parent company of the Canadian issuer, but rather is the finance subsidiary of the ultimate parent company.

- We understand that road show materials used for offerings by these types of issuers may contain information about the ultimate parent company (since this is publicly available information) in addition to information about the credit supporter. This is because the financial performance of the parent company is also seen as relevant with respect to the securities of the Canadian issuer being offered. Under the proposed rules, this practice would be prohibited unless the information about the ultimate parent company is included or incorporated by reference in the prospectus of the Canadian issuer. We understand this is not current market practice, and would ask the CSA to consider changing the proposed rules to accommodate the practice of including parent company information in a road show in these circumstances.

- We encourage the CSA to ensure that comments on this aspect of the proposed rules are received from a sufficiently representative sample of Canadian investment dealers and institutional investors before the CSA moves forward with implementation.

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17 Proposed section 6.14(2) of Companion Policy 41-101CP.

18 See for instance section 5.1 of NP 41-201 which states that green sheets should be limited to information included in, or directly derivable from, the prospectus (the exceptions are information about the basic terms of comparable offerings and general market information not specific to the issuer).

9. ***Administrative matters relating to road shows.***

- The proposed rules require that an issuer provide written authorization to the investment dealer to conduct the road show.[19] We question whether this is necessary given that it is typically senior management (often the CEO, CFO and others) who present at a road show. The issuer's approval is therefore implicit in management's attendance with the lead underwriter(s) at the road show. The requirement for written authorization does add an additional compliance obligation for the working group on a prospectus offering.

- The proposed rules would only allow investors, registered individuals and representatives of the issuer to attend a road show.[20] While we acknowledge the CSA's concern with members of the media attending a road show, we note that it may be appropriate for other members of the working group for a prospectus offering to attend the road show, such as members of the road show consulting firms engaged by the issuer, legal counsel, etc.

- The proposed rules would require an investment dealer to verbally read a prescribed disclaimer at the commencement of every road show.[21] Although we defer to other market participants on this aspect of the proposed rules, we understand that there are often multiple meetings with different investors on each road show date, such that the time for management to present in each meeting is limited (typically 20 to 30 minutes, excluding questions). We submit that the reading of the proposed disclaimer will take valuable time out of each meeting, and would ask the CSA to consider whether the disclaimer could be placed in the road show materials and referred to by the investment dealer without a full reading.

10. ***Use of comparables.***

- The CSA has asked for comments on four specific questions relating to the use of comparable company information in a road show, including whether there should be rules aimed at reducing the risk of "cherry picking" comparables. It is our hope that other participants in the capital markets will provide the CSA with views on these questions, since we are less well-positioned, as legal counsel, to comment on matters such as whether institutional investors are better able to understand the nature and risks of comparables and what the implications would be of asking institutional investors to keep comparables confidential.

- We would view the obtaining of confidentiality commitments from institutional investors with respect to comparables in a road show as an unnecessary compliance burden on investment dealers conducting road shows for which there is not a significant corresponding benefit from a public policy perspective. We are unaware of any reason

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19 Proposed sections 13.8(1)(d), 13.9(1)(d), 13.10(1)(d), 13.11(1)(d), 13.12(1)(d) and 13.13(1)(d) of NI 41-101.

20 Proposed sections 13.8(1)(f), 13.9(1)(f), 13.10(1)(f), 13.11(1)(f), 13.12(1)(f) and 13.13(1)(f) of NI 41-101.

21 Proposed sections 13.8(4), 13.9(4)), 13.10(4), 13.11(4), 13.12(4) and 13.13(4) of NI 41-101.

why institutional investors would share the details of comparables obtained during a road show, although we defer to other market participants on this aspect of the proposed rules.

- We also believe that it would be impractical to attempt to prescribe rules relating to the selection and preparation of comparables for road show purposes, and would encourage the CSA to consider how the use of comparables is regulated in other jurisdictions before proposing any rules in this regard.

11. ***It is unclear whether a slide deck for a road show would always need to be filed on SEDAR and included or incorporated in the prospectus.***

- For the typical road show which occurs during the waiting period, the proposed rules would prohibit an investment dealer from providing "written material" to an investor attending a road show, other than the preliminary prospectus and any amendment, unless the written material is treated as a term sheet under the proposed rules.[22] This would mean filing the written material on SEDAR and including or incorporating by reference the written material in the prospectus.

- It is not clear whether the filing requirement applies when investors are shown the written material but are not allowed to keep a copy of it. For example, a road show slide deck may be shown on screen during an in-person meeting, or may be handed out for viewing only during the meeting with all copies collected afterwards, or presented through the internet in a format that does not allow for printing or downloading.

- We submit that written road show materials such as a slide deck should be filed on SEDAR and otherwise treated like a term sheet only if they are being provided in a form that can be retained by investors, and not when they are merely being shown to investors. We understand that the practice in the United States is for dealers to take back from investors any hard copies of slide decks distributed during a road show presentation. It is unclear why written materials such as a road show slide deck should be filed on SEDAR and otherwise treated like a term sheet if they are being provided in a form that cannot be retained by investors. We understand that road show materials are rarely, if ever, filed on EDGAR (see our comments below).

- As a separate matter, we assume that written road show materials would not need to be translated into French in order to comply with French language requirements in the province of Québec (since written road show materials do not constitute a prospectus), unless those materials are provided in a form that can be retained by investors, in which case they would be treated as a term sheet under the proposed rules and would need to be included or incorporated by reference in the prospectus.

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[22] Proposed sections 13.8(2) and 13.9(2) of NI 41-101. Similar provisions are contained in sections 13.10(2), 13.11(2), 13.12(2) and 13.13(2) of NI 41-101.

12. ***The new road show requirements will create a significant impediment for Canada / U.S. cross-border IPOs.***

- It is not clear whether the proposed rules would require written road show materials to be filed on SEDAR (see our comments above). We note that the proposed companion policy provisions discussing road shows for cross-border IPOs appear to be premised on the assumption that this means that an electronic road show will constitute "road show materials" that must be filed on SEDAR, even if the content cannot be downloaded or printed.[23]

- The CSA suggests that cross-border IPO issuers will no longer be required to apply for the type of exemptive relief previously granted in Canada for cross-border IPOs (and such relief will no longer be granted absent unusual circumstances) because issuers will be able to file on SEDAR the same road show materials that they are permitted to file on EDGAR.

- As the CSA points out, for an internet road show for an IPO, the U.S. requirement is that road show materials either be filed on EDGAR or be "made generally available without restriction" through electronic means. The CSA appears to be under the impression that road show materials are typically filed on EDGAR in the United States, and that the need for the previously granted exemptive relief stemmed from a concern that the public availability of the road show materials on EDGAR would violate Canadian marketing restrictions, as the SEC's EDGAR website is available worldwide, including to Canadian investors.

- In fact, we understand that road show materials are rarely, if ever, filed on EDGAR. U.S. underwriters typically insist on making a *bona fide* version of the road show available to the public without restriction for the express purpose of avoiding the alternative requirement to file the road show on EDGAR.

- Although we understand a number of commercial services allow investors in the United States (and elsewhere, including Canada) to view the road show, access is always limited to viewing only, with no capability for investors (or others) to print or download the content, or access it after the permitted viewing period expires.

- U.S. underwriters are generally concerned that they would be subject to a significantly higher risk of frivolous and ultimately unmeritorious lawsuits being brought against them and the issuer by the active U.S. plaintiff securities litigation bar if a record of the contents of the road show slides and script is made permanently available on EDGAR.

- Any road show materials that are required to be filed on SEDAR in Canada will also be permanently available to the U.S. securities class action bar, and we anticipate that U.S. underwriters would raise the same concerns about that result in the context of a cross-border IPO. Further, because the proposed rules will still require restricting access to

[23] Proposed section 6.13(3) of Companion Policy 41-101CP.

electronic road shows in Canada (even if only for the purpose of verifying the identity of the viewers), the U.S. rules will require that a *bona fide* version of the road show must also be filed on EDGAR. The result will be a significant change from current U.S. IPO practice.

- We are concerned that this change from current practice may create a disincentive for IPOs to be conducted on a cross-border basis. We anticipate that U.S. issuers and underwriters will be reluctant to participate in a cross-border IPO unless road show content which is protected from downloading and printing is exempt from any SEDAR filing requirement, and the CSA continues to provide exemptive relief to allow unrestricted access to such road shows in Canada so that they may continue to be exempt from the SEC's EDGAR filing requirements.

C. Miscellaneous Comments.

13. *Distribution of term sheet with the prospectus.*

- For prospectus offerings other than a bought deal, the proposed rules require an investment dealer to provide a copy of the prospectus with a term sheet when the term sheet is provided to a potential investor.[24] We note that this requirement may not reflect current investment dealer practice and may be difficult for investment dealers to comply with.

- We understand that term sheets are typically e-mailed to investors by members of an investment dealer's sales force, while prospectus delivery is typically handled by a separate distribution centre of an investment dealer (usually located at separate premises from the sales force, depending on the size of the dealer), or may in some cases may be outsourced by the dealer to a service provider.

- We further understand that the prevailing dealer practice remains to deliver paper copies of prospectuses in order to fulfil a dealer's statutory obligation to deliver a prospectus.[25] As a result, term sheets are typically delivered by e-mail by personnel within an investment dealer that are usually different than the group responsible for delivery of prospectuses in paper form.

- As a result of the foregoing, we anticipate that it would be difficult to comply with the requirement in the proposed rules to provide a copy of the preliminary prospectus, final prospectus or amendment (as applicable) with the term sheet, since these documents are typically delivered separately and in different formats (the prospectus in paper form and the term sheet in electronic form).

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[24] Proposed sections 13.5(1)(g), 13.6(1)(g) and 13.7(1)(g) of NI 41-101.

[25] There is no similar statutory obligation to deliver a term sheet, and so there is no concern that delivery of a term sheet by e-mail would be insufficient for securities law purposes.

- In addition, we note that, where an offering of securities is to be made pursuant to an issuer's shelf prospectus, the proposed rules appear to require an investment dealer to provide a copy of the base shelf prospectus with the term sheet where the prospectus supplement is not yet available (i.e., after launch of an offering but before the end of the two business day period for delivery).[26]

- For an offering of securities made pursuant to an issuer's shelf prospectus, under current practice, the term sheet would be sent on its own after launch of the offering, while both the base shelf prospectus and the shelf prospectus supplement would be sent together to investors within the allowable two business day period. We submit that there is little added benefit to be gained by requiring a base shelf prospectus on its own to be delivered to investors with a term sheet, and this additional delivery requirement will impose an additional compliance burden on investment dealers.

14. ***Requirement to send a revised term sheet.***

- The proposed rules require a revised term sheet to be sent to investors that received an original version of the term sheet in certain circumstances, namely when the subsequent preliminary short form prospectus, final prospectus, shelf prospectus supplement or amendment (as the case may be) modifies a statement of a material fact that appeared in the original term sheet.[27]

- We believe this is unnecessary given that the language of the proposed rules contains the standard "modifying or superseding" language that allows the subsequent preliminary prospectus, final prospectus, shelf prospectus supplement or amendment (as the case may be) to modify or supersede the contents of the earlier term sheet.

- We submit that one of the hallmarks of the Canadian prospectus offering regime is that investors are considered to make their investment decision on the basis of the disclosure in the final prospectus (notwithstanding that there may have been changes in disclosure since the preliminary prospectus). Investors are then given a two day right to withdraw from their purchase of securities after having received the final prospectus. Accordingly, even if certain statements of a material fact in the original term sheet are modified or superseded by the subsequent version of the prospectus document, a purchaser is ultimately making its investment decision on the basis of the disclosure in the final prospectus.

- We believe the requirement to send a revised term sheet highlighting modified statements of a material fact together with the subsequent version of the prospectus document would

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[26] See section 13.7(g) of NI 41-101, which requires the investment dealer to provide a copy of the final base shelf prospectus, and any amendment to the final base shelf prospectus, and any applicable shelf prospectus supplement or preliminary form of shelf prospectus supplement with the term sheet. In other words, if the shelf prospectus supplement is not yet "applicable", the wording suggests that the final base shelf prospectus should be provided on its own with the term sheet.

[27] Proposed sections 13.5(5), 13.7(7) of NI 41-101 and section 7.5(5) of NI 44-101.

be difficult to comply with since, as noted in our comments above, the responsibility within a dealer for delivery of term sheets and prospectuses may reside in separate groups, or in some cases separate firms if the dealer has outsourced the prospectus delivery function.

- We note, however, that there is limited substantive disclosure about the issuer in a term sheet for a prospectus offering, and so it may be less likely that a subsequent version of the prospectus document would modify a statement of a material fact that appeared in the original term sheet. The one exception is information regarding offering price and offering size, as we understand that term sheets for a marketed offering will refer to the pricing and sizing range. We understand that, in the event that the pricing and sizing range for a marketed offering were to change from that indicated in the original term sheet, investment dealers would typically send a revised term sheet to potential investors with the modified information. However, this revised term sheet is sent independently of the final prospectus.

15. ***French translation of term sheets.***

- Given the requirement in the proposed rules to include or incorporate by reference a term sheet in an issuer's preliminary prospectus or final prospectus (as the case may be), we assume that a term sheet would need to be translated into French in order to comply with French language requirements in the province of Québec. We note that this would be a change to current practice.

16. ***Definition of permitted institutional investor.***

- We note that the definition of permitted institutional investor in the proposed rules is narrower than the definition of accredited investor under Canadian securities laws, and notably excludes registered advisers and dealers and high net worth individuals.

- While we do not believe that the narrower definition of permitted institutional investor is warranted in light of the manner in which the definition is used throughout the proposed rules, we note that the CSA has also issued its Consultation Note inviting public comment on the accredited investor definition, among other matters.[28] Accordingly, we would support the use of the accredited investor definition instead of the proposed permitted institutional investor definition throughout the proposed rules until there are further developments in response to the Consultation Note. In proposing the narrower definition of permitted institutional investor, it appears that the CSA has taken a view on some of the matters that it has asked for comments on in the Consultation Note without the benefit of input on the Consultation Note.

[28] CSA Staff Consultation Note 45-501 – *Review of Minimum Amount and Accredited Investor Exemptions – Public Consultation* dated November 11, 2011.

We thank you again for the opportunity to provide our comments on the proposed rules. If you have any questions or comments, please do not hesitate to contact Desmond Lee at (416) 862-5945.

Yours very truly,

"Osler, Hoskin & Harcourt LLP"