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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
Superintendent 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

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Dear Sir/Madame:

Re: Proposed Amendments to National Instrument 41-101 General Prospectus Requirements and Related Amendments

We are pleased to respond on behalf of CIBC World Markets Inc. ("CIBC") to your Notice and Request for Comment dated November 25, 2011 regarding the Canadian Securities Administrators' proposed amendments to National Instrument 41-101 *General Prospectus Requirements* ("NI 41-101") and related amendments (the "Proposed Amendments"). While we are supportive of some of the Proposed Amendments, we also have a number of concerns regarding others, based on the practical realities of our experience underwriting public offerings in the Canadian context. For the purposes of this comment letter, we have confined our comments only to those Proposed Amendments that are of greatest significance to, and which we believe most directly affect, our equity capital markets franchise.

1. Testing of the waters exemption for IPO issuers

We are generally supportive of the proposed amendments contained in subsection 13.4(1), which would provide a limited exemption to permit non-reporting issuers, through an investment dealer, to determine interest in a potential IPO through limited confidential communication with permitted institutional investors. We believe that one of the most significant deterrents preventing small and medium-sized issuers from accessing the Canadian capital markets is the substantial cost associated with filing a preliminary prospectus. As such, this exemption would be of particular value to junior and mid-tier issuers in Canada's diverse natural resources industry, as well as in other sectors, since it provides them with an opportunity to determine institutional interest in a potential public offering without incurring the significant expenses associated with filing a preliminary prospectus. We agree that the conditions set forth in this exemption appropriately address the issues of ensuring confidentiality and preventing a conditioning of the market.

2. Bought deal exemption – *Enlarging bought deal size and enlarging bought deal syndicate; bid letter termination*

We are generally supportive of the CSA's proposed amendments to Part 7 of NI 44-101, which permit enlarging the size of bought deals following the execution of the original bought deal agreement. We believe that the upper limit for this exemption should be 50% of the original size of the offering. This would provide the issuer with maximum flexibility to increase the offering size where investor demand warrants it without "resetting" the four business day period between signing the bid letter and filing the preliminary prospectus, while at the same time preventing abuses of the bought deal exemption.

We are also supportive of the proposed amendments to Part 7 of NI 44-101 that allow additional underwriters to join the bought deal syndicate following the execution of the original bought deal agreement. Again, we believe that this is appropriate in order to provide the issuer and the bought deal underwriting syndicate with marketing and distribution flexibility in responding to investor demand.

We are concerned, however, that any enlargement of the bought deal size or the bought deal syndicate is subject to the condition that such an enlargement "cannot be the culmination of a formal or informal plan . . . devised before the execution of the original agreement". We understand the CSA's concern that an investment dealer not circumvent the pre-marketing restrictions (and consequently the policy behind the bought deal exemption) by entering into the original agreement for a small number of securities in order to solicit investors without a preliminary prospectus, and then, after having obtained expressions of interest, entering into an amended agreement for a much larger amount. Having said that, we are concerned about the broad language currently used in the Proposed Amendments (i.e., section 7.4 of Part 7 of NI 44-101). What constitutes "a formal or informal plan . . . devised before the execution of the original agreement" in practice will be difficult to ascertain and/or prove -- both for ourselves as underwriters when we gauge the issuer's intentions, and for you as the regulator. Initial discussions between an issuer and the underwriters in the planning and formulation stages of any public offering are inherently dynamic – issues such as the potential range and size of the offering, and the potential investment dealers that may be interested in participating in the offering, are fluid and subject to change. Given the uncertainty and ambiguity present in ascertaining when a "formal or informal plan" actually existed, we believe that this condition may actually introduce more uncertainty into the enforcement of this provision, and thus adversely impact an underwriter's decision to rely on it. We would ask that the CSA consider revising the language of this condition.

Finally, we understand that the Proposed Amendments attempt to specify when a bought deal agreement can be amended or terminated. It would appear that the Proposed Amendments prohibit termination of a bought deal agreement unless all parties (the underwriter(s) *and* the issuer) decide not to proceed with a prospectus offering. While we agree that bought deal "bid letters" do not generally contain "market out" provisions, it is market practice for a bid letter to contain other conventional termination "outs", such as a "disaster out" and a "material adverse effect out" or "due diligence out". Additionally, the underwriters' bought deal participation is always subject to various *conditions* that are set forth in the bid letter, including (i) that the issuer and the underwriters execute a mutually acceptable form of underwriting agreement, (ii) that the issuer file and obtain receipt for a preliminary prospectus within four business days, and (iii) in some cases, certain stock exchange listing and/or rating agency conditions. Consistent with our market practice as underwriters, CIBC needs to have the ability to continue to negotiate and/or rely on these customary termination outs and conditions with any issuer. Under the Proposed Amendments, it is *unclear to us* whether these termination rights and conditions could be contained in the bought deal bid letter.

3. Term sheet provision for bought deals and marketed offerings; road show provisions

We understand that pursuant to the Proposed Amendments, investment dealers will, subject to certain conditions, be permitted to provide a term sheet to a permitted institutional investor after announcing a bought deal, but before filing the preliminary prospectus four business days later. We also understand that the Proposed Amendments will contain provisions governing (i) road shows carried out during the waiting period following the filing of the preliminary prospectus, and (ii) the related road show "materials". Term sheets and road show materials would be subject to prospectus liability (statutory liability for misrepresentations).

We believe that the new provisions increase the administrative burden on the issuer and underwriters in connection with any corporate finance transaction, and more importantly, do not take into consideration some of the practical issues that we face on a day-to-day basis in our equity underwriting business. Specifically, we believe that these provisions are inconsistent with the realities of the syndication process for any public offering in the Canadian market, in that they fail to take into account the fact that *co-managers in an underwriting syndicate have no control or input over the form, substance or dissemination of ancillary documentation.*

To place this in a transactional context, we use our own experience as underwriters in the Canadian capital markets as a frame of reference. As with all other broker-dealers in Canada, there are some instances where CIBC is the *lead bookrunner* with respect to a bought deal or marketed offering. In those instances, CIBC, as an institution, works hand-in-hand with the issuer and has *full control* over the form, content and dissemination of all disclosure documents *from their inception*. Specifically, CIBC will provide input on the bought deal press release, the preliminary prospectus, and the final prospectus in order to ensure compliance with applicable securities laws.

The situation is very different in the case of offerings where CIBC is *<u>not</u> a bookrunner* (i.e., where we are a "*co-manager*" in the syndicate). An underwriter who is a co-manager will commonly receive an invitation to participate in a bought deal offering *considerably later* than when the bookrunners were first involved – in some cases, as late as shortly before the filing of the preliminary prospectus in the IPO context. In the bought deal context, the bookrunner may have had several days to familiarize itself with the issuer, its intentions, and the details of the offering, while co-managers are required to bring themselves up to speed under extremely tight timing constraints. In these situations, the only disclosure document that co-managers are provided with is the preliminary prospectus, and it is a perpetual challenge for the co-managers to review and sign off on even this document before it is disseminated. *More significantly*, given the late stage at which co-managers are asked to join a bought deal syndicate, they generally have *<u>no</u> input or authorship* over the drafting of the issuer's press release announcing the offering. For this reason, we are partial to the customary form that such press releases take -- i.e., very abbreviated and general disclosure regarding the nature of the offering, terms of the securities and use of proceeds.

If the term sheet provisions are adopted, then, in transactions where we are co-managers, we do not believe that we will have (or be granted) the opportunity to review or comment on term sheets before they are distributed. As a result, co-managers will not have an adequate opportunity to determine whether the disclosure in the term sheet is, in fact, *fair, true* and *plain*, as required pursuant to the Proposed Amendments. In short, we believe that ascribing prospectus-level liability to the co-managers for a term sheet that *only the bookrunners have drafted and/or reviewed and distributed* unfairly penalizes the co-managers in any offering. The realities of the syndication and distribution process dictate that the co-managers *will not* have had an opportunity to vet such a term sheet prior to its dissemination.

We believe that this issue will be exacerbated by the broad definition of "term sheet" in section 1.1 of the Proposed Amendments, which includes any "written communication regarding a distribution of securities under a prospectus that contains information on the issuer or the securities" other than "a prospectus, or a notice, circular, advertisement, letter or other communication referred to in section 13.1 that is expressly permitted by securities legislation". Arguably, this could include any email or ancillary communication from the lead bookrunners, *none* of which the co-managing underwriters will have an opportunity to review, but with respect to which *each* underwriter will have prospectus-level liability. We also believe that the explicit adoption of the term sheet provisions may tempt bookrunners to provide a *more in-depth description* of the terms of the offering than one would currently find in a generic bought deal press release. We firmly believe that a detailed description of any securities offering belongs in the prospectus, where it can be properly described and (if necessary) qualified. Explicitly allowing dealers to provide an initial "snapshot" of the offering in term sheet format increases the propensity for errors or omissions in such a description, especially for complex offerings where either the terms of the securities or the use of proceeds are novel or non-conventional. Again, we believe this disproportionately penalizes the co-managers, who did not draft the term sheet or comment on it before it was issued, yet bear prospectus-level liability along with the syndicate as a whole.

The issues regarding co-manager liability are even more pronounced with respect to the road show provisions contained in the Proposed Amendments. In those offerings where we are co-managers, we have no input over road show materials, and in many cases, *are not even provided with these materials* prior to their use in the road show itself. In actuality, as co-managers, it would *not* be customary for us to participate in the bookrunners' road show process. Based on customary marketing and syndication practices, we do not believe that the co-managers of any offering will have (or be granted) the opportunity to determine whether all information contained in the road show is (i) contained in the preliminary prospectus or (ii) fair, true and plain. Again, it is our view that ascribing prospectus-level liability to road show materials penalizes the co-managers of any public offering disproportionately and unjustifiably. This concern is exacerbated by the use of the generic term "written materials" in proposed sections 13.8 and 13.9 of NI 41-101, which could arguably include email or other ancillary communications, none of which the co-managing underwriters will have any input on (or even be aware of).

Identical arguments to those set forth above hold true with respect to any term sheet that a bookrunner may choose to distribute following the filing of the preliminary prospectus in a fully marketed (IPO) offering.

The syndication mechanics we have described reflect the processes that have traditionally been in place for any Canadian capital markets offering, and if the Proposed Amendments were to be adopted, we do not believe these processes would change in any material respect to address the concerns set forth above. We should add that, unlike in the United States, where the much larger number of investment dealers gives issuers flexibility in determining which dealers participate in their offering syndicate, in the Canadian context, the selection is far more limited. There are fewer broker-dealers in Canada, and to complete any mid to large sized offering in the Canadian capital markets, an issuer often requires the majority of dealers in the country to participate in the syndicate. For the same reasons, broker-dealers do not always have the same commercial flexibility to "take a pass" on the limited number of larger offerings that are undertaken in the Canadian market simply because they are not comfortable with the disclosure practices adopted by the lead bookrunners on that transaction. Nevertheless, if the term sheet and road show provisions are adopted, we believe that underwriters may be dissuaded from participating in a syndicate as co-managers if they are forced to take on prospectus-level liability on ancillary documents with respect to which they customarily have no input or involvement. The risk of incurring this additional liability may affect an underwriter's willingness to join certain underwriting syndicates, which, in the Canadian context, could ultimately impact the issuer's unbridled access to capital markets financing.

In the event that the CSA chooses to move forward with the Proposed Amendments, CIBC would ask that the CSA consider amending the road show and term sheet provisions so that prospectus-level liability for misrepresentations in these materials is *bifurcated* – i.e., *only* those broker-dealers that were *bookrunners* for the transaction in question, and therefore directly involved from the outset of the offering in the drafting, review, and dissemination of term sheets and road show materials, should be subject to statutory liability for a misrepresentation in such documents. Such a construct would accurately reflect the syndication realities of the offering process, and involvement (or lack thereof) of underwriters in reviewing ancillary documentation based on their syndicate position.

Given the threshold questions raised in our submission above, we have not addressed the CSA's questions as to (i) whether, in addition to institutional investors, "a bought deal term sheet should be given to retail investors before the receipt of a preliminary short form prospectus", and (ii) the use and regulation of comparables in road show presentations. However, it is our view that differentiating between institutional road shows and "retail" road shows in the Proposed Amendments is not relevant in the Canadian context, because practically speaking, Canadian underwriters do not carry out road shows for retail investors.

4. Shelf prospectus take-down – Companion Policy 44-102CP to National Instrument 44-102 Shelf Distributions

We believe it would be very helpful if the CSA could explicitly confirm in Companion Policy 44-102CP the current industry understanding that the prohibition against pre-marketing under applicable securities laws *does not apply* in the event that the issuer has filed and received a receipt for a base shelf prospectus.

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We want to emphasize that we take our obligations as underwriters very seriously and are well aware of the restrictions imposed by securities legislation and market practice concerning communications made during a "distribution". CIBC believes that, in general, the existing statutory regime governing pre-marketing communications adequately addresses the marketing needs of underwriters, and serves the dual purpose of protecting investors yet allowing for access to, and the efficient functioning of, the Canadian capital markets. We are also of the view that, in their current form, the "term sheet" and "road show" amendments and related liability ramifications have the potential to negatively impact underwriting syndicate participation, and ultimately, an issuer's access to the capital markets.

We appreciate the fact that the CSA has solicited feedback on the Proposed Amendments from all investment dealers, and do not feel that it would be appropriate to implement the Proposed Amendments without the completion of a thorough, consultative discussion between the CSA and all market participants. CIBC World Markets Inc. would be pleased to continue to participate actively and in-person in any such meetings or consultation.

We trust the foregoing is satisfactory and would be pleased to answer any questions you might have.

Yours truly,

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