DAVIES WARD PHILLIPS & VINEBERG LLP

44th Floor
1 First Canadian Place
Toronto Canada M5X 1B1

Tel 416 863 0900
Fax 416 863 0871
www.dwpv.com

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BY E-MAIL

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

c/o

John Stevenson, Secretary
Ontario Securities Commission
Email: jstevenson@osc.gov.on.ca

Anne-Marie Beaudoin, Secrétaire
Autorité des marchés financiers
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Proposed Pre-Marketing and Marketing Amendments to the Prospectus Rules

We are writing to you in response to the request of the Canadian Securities Administrators (the "**CSA**") for comments (the "**Request for Comments**") in respect of the proposed amendments (the "**Amendments**") to National Instruments 41-101 and 44-101, the Companion Policies associated with those instruments and National Instrument 44-102 and National Policies 41-201 and 47-201, all as published on November 25, 2011. We appreciate the opportunity provided by the CSA to provide comments on these initiatives.

We are supportive of the CSA's efforts to modernize and clarify the current regulatory scheme applicable to marketing and pre-marketing a prospectus offering. However, we have significant concerns regarding a number of the practical implications of the proposed Amendments which, as drafted, conflict with certain practical realities of the capital markets. We also have serious concerns about how the proposed Amendments would work in a cross-border context, and note that divergences between Canadian and U.S. rules in this regard always have the potential to drive transactions and capital raising to the larger U.S. market.

Our references to the U.S. rules should not be taken as an indication that we propose that the CSA merely duplicate the U.S. regime in the Canadian context. There are clear distinctions between the prospectus regimes in Canada and the U.S. However, we believe that the marketing related rules adopted in the U.S. (as part of their securities offering reform in 2005) highlight the abundance of nuances that must be addressed when attempting to specifically regulate marketing initiatives in respect of a prospectus offering. The U.S. reforms demonstrated that significant consultation of all affected market participants is essential to establish a tailored approach that avoids impractical requirements or other unintended adverse consequences to the efficiency of one's capital markets. While we have identified in our comments a number of instances where the U.S. rules were tailored to avoid such consequences, and have suggested similar revisions to the Amendments for this purpose, by no means are our comments intended to be exhaustive of instances where the Amendments may conflict with the equivalent U.S. rules. They are merely intended to demonstrate that further consultation in respect of the Amendments is important to ensure that the final rules are workable, both from a Canadian and a cross-border context.

Further, as securities law practitioners we can provide perspective on many elements of the Amendments based on our experience as legal counsel to capital market participants in public offerings and our familiarity with the legal regime governing associated marketing activities. However, there remain many commercial, administrative and other elements to the Amendments on which we have not commented as market participants who are directly involved in the marketing of prospectus offerings are better positioned to assess them. Accordingly, the considered perspectives of investment dealers and other direct market participants are critical to ensure the final iteration of the Amendments do not unnecessarily impede the efficient operation of the Canadian capital markets.

Accordingly, we respectfully submit that the CSA further consult with a sufficiently representative sample of market participants and securities law practitioners in Canada, the United States and other relevant jurisdictions, and based on such consultation publish for comment an amended draft of the Amendments prior to implementing any amendments to the regulatory scheme applicable to marketing and pre-marketing prospectus offerings.

Term Sheets

Generally, we are supportive of additional permitted marketing communication in the context of a prospectus offering. We believe this is an important step in modernizing the marketing regime for Canadian prospectus offerings and bringing that regime in line with the regimes of other jurisdictions to facilitate multi-jurisdictional offerings. However, we do have some concerns with the practical implications of the limitations proposed on the use of term sheets, as well as potential conflicts in the rules governing term sheets and the corresponding U.S. rules for "free writing prospectuses".

Approval, Filing and Associated Requirements

One such concern is with the requirement that a term sheet be approved in writing and filed in advance of its use. It is unclear what policy rationale is served by requiring that term sheets be approved and filed in advance of their first use, particularly where the content must be included (or incorporated, as applicable) in the preliminary and final prospectus of an offering. Notably, Canadian investors may withdraw from their purchase within the two days following their receipt of the final prospectus. We submit that any limited benefit served by the requirement for the advance approval and filing of a term sheet is outweighed by the associated costs and administrative burden.

In addition to extra costs and administrative burden associated with the approval and filing requirement, this requirement may also, in certain circumstances, significantly impede the efficient operation of the markets. For example, it would force the prior formal approval and filing of a term sheet that simply contains a description of the final terms of the securities in an offering. In a U.S. context, it is vital that this pricing term sheet be available for transmission to accounts immediately after pricing in order to confirm sales as it forms part of the "disclosure package" at the time of sale. A delay to permit the review, approval and filing of such a term sheet can create risk that investors who had informally committed to a particular offering may reconsider their decision as a result of that delay. To address this risk, the U.S. rules permit the filing of the pricing supplement as late as two days following this transmission. As noted above, we do not see the benefit of a prior filing requirement for term sheets given the information in the term sheet must be included (or incorporated) in the final prospectus.

After the Waiting Period

We note that, as part of the Amendments, the CSA is seeking to expressly regulate marketing during the period following the issuance of a receipt for a final prospectus. Current law limits distribution of marketing material during the waiting period by virtue of the prospectus requirement. There is, however, no equivalent limitation in the post final receipt period. Accordingly, we urge the CSA to conduct further consultation of market participants to understand the implications of the proposed Amendments and whether a

different marketing regime is appropriate during this post-receipt period than is proposed for the waiting period.

We believe that, at a minimum, exceptions from the proposed term sheet requirements should be made with respect to term sheets that simply set out the potential or actual terms of an offered security. As noted earlier, it is impractical to require that pricing supplements be approved and filed in advance of their first use. Accommodation should also be made for marketing a take-down off a shelf prospectus with a term sheet that simply sets out potential terms of the securities. While filing this term sheet may not be problematic, the proposed Amendments would require that a preliminary prospectus supplement also be filed in advance as the information in the term sheet must be disclosed in a prospectus filed on SEDAR[1] and this information would only be available in a preliminary prospectus supplement. This is at odds with current practice for Canadian shelf offerings (where only a final prospectus supplement is typically filed) and would unnecessarily delay solicitations of interest in a potential shelf take-down by a short form issuer, thereby defeating the efficiency of the shelf procedures.

Other Conflicts with Market Practice and U.S. Rules

There are other potential conflicts with market practice and the U.S. marketing rules. Some of these conflicts will stem from the requirement that *all* information in a term sheet be disclosed in both the preliminary[2] and final prospectus[3]. At a minimum, we submit that there should be a materiality threshold such that immaterial term sheet information need not be in the prospectus. Notably, under U.S. rules, a "free writing prospectus" may contain information that is additional to the registration statement in respect of the securities offering; it simply must not conflict with the information in that registration statement or the issuer's continuous disclosure record. We believe the CSA should give further consideration to what additional information may typically be included in a free writing prospectus and whether this additional information should be accommodated in the term sheet requirements of the Amendments.

We believe that, due to the breadth of the definition of term sheet, additional exceptions should be added to avoid the burden of filing every written communication regarding a distribution where there is no utility in each such filing being made. For example, term sheet will encompass underwriter generated Bloomberg screens and other underwriter communications that contain additional market or other offering specific information (such as comparisons of yield or other terms or metrics of comparable securities). We understand that this additional information would not generally constitute "issuer information" and, provided it is not distributed in a broad, unrestricted manner, would not

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1 Proposed paragraph 13.7(1)(c) of NI 41-101.

2 Proposed paragraph 13.5(1)(c) of NI 41-101 and equivalent paragraphs of the Amendments.

3 Proposed paragraph 13.5(3)(a) of NI 41-101 and equivalent paragraphs of the Amendments.

require a filing under applicable U.S. rules. Further, the U.S. rules exempt from the filing requirements any new materials that do not contain substantive changes from or additions to previously filed materials. As a practical matter, we submit that similar exceptions should be made in the Amendments.

Following further consultation with market participants, the CSA may identify other instances where the term sheet requirements inhibit the efficiency of the capital markets or impose significant administrative burden with no corresponding benefit in investor protection. The CSA may also identify additional circumstances that are not intended to be caught by these requirements for which clarification would be appropriate.

Modifications to Term Sheet Information

The Amendments require disclosure in a final prospectus or supplement where any statement in a previously provided term sheet has been modified or superseded[4] and set out a corresponding obligation to prepare and deliver a revised term sheet to highlight this where the statement was of a material fact[5]. We believe there should be an exception to these requirements where the modified information is simply to identify final terms of the offering. There will always be such a modification in marketed offerings where a term sheet with preliminary terms is provided and there is no utility in requiring delivery of a revised term sheet and disclosure to identify this type of modification.

More generally, it seems duplicative to require delivery of a revised term sheet to highlight any modification where the final prospectus will highlight the same. If the CSA is concerned with the prominence of the disclosure, we submit that this instead be addressed in the prospectus disclosure requirement.

Fair, True and Plain Standard

We also have concerns regarding the imposition of the "fair, true and plain" standard that the Amendments apply to term sheets[6]. We understand that liability on the information in a term sheet will arise from its inclusion (or incorporation) in the final prospectus. The misrepresentation standard applicable to the contents of the prospectus does not take into account the balanced requirement that the Amendments impose on a term sheet. Accordingly, it appears that enforcement of this requirement of the term sheet will fall on members of the CSA in the prospectus review process. We anticipate that the additional interaction with the members of the CSA (and any attendant revisions to the term sheet thereby required) may impose delay on the prospectus review and approval process. Further, in the context of a take-down from a shelf prospectus, there is effectively no

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4 Proposed paragraph 13.5(3)(b) of NI 41-101 and equivalent paragraphs of the Amendments.

5 Proposed section 13.5(5) of NI 41-101 and equivalent sections of the Amendments.

6 Proposed paragraph 13.5(1)(b) of NI 41-101 and equivalent paragraphs of the Amendments.

mechanism by which to enforce a balance component of the fair, true and plain standard, as prospectus supplements are not subject to regulatory review.

Further, we note that the proposed guidance for term sheets states that a term sheet would be "fair, true and plain" if, among other things, "it does not contain promotional language".[7] Under the proposed Amendments, this same standard would apply to road show materials (which are discussed further below). While potentially an issue for all term sheets, this is clearly problematic for road show materials which, by their very nature, are to promote interest in the securities being offered. This is true of all marketing materials, including the prospectus. We submit that this prohibition on promotional language be removed. More generally, we note that proposed paragraph 13.8(1)(b) of NI 41-101 and equivalent paragraphs of the Amendments would apply the fair, true and plain standard to all "disclosure in the road show," rather than limiting its application to written materials. It is unclear how this could be applied in practice and, accordingly, we submit that these paragraphs should be removed.

Road Shows

We support the CSA's efforts to provide clarity to the current marketing regime through rules that expressly acknowledge road shows are a permissible solicitation of expressions of interest. However, we have significant concerns regarding the proposed requirements in respect of the filing and content of road show materials and certain other proposed limitations in respect of road shows.

Filing Requirement

It is not clear from the proposed Amendments what "written materials" will be subject to the new road show requirements in clause (2) of section 13.8 (or the equivalent provisions of sections 13.9 through 13.11). While we understand that the U.S. rules exclude any real time communications at a live road show (including slides or other visual aids available only as part of that road show) from what they refer to as "written communications", the CSA's commentary to the Amendments suggests the Amendments would not provide a similar exclusion. Clarification is required on what constitutes written materials for purposes of these road show requirements.

Further, regardless of how "written materials" are construed, the proposed Amendments will nonetheless conflict with equivalent U.S. rules because communications made as part of a road show need not be filed under these U.S. rules, regardless of whether they are written or oral communications. In contrast, the Amendments will require filing all written materials provided in a road show. While we understand that the U.S. rules could require the filing of road show materials for an electronic road show (as this would constitute a "written communication") for an initial public offering of common or convertible equity,

[7] Proposed paragraph 6.5A(2) of CPI 41-101.

no filing is required where the issuer makes at least one version of a "bona fide" electronic road show available without restriction. We understand that, in these circumstances, the typical approach in the U.S. is to make such a "bona fide" electronic road show available rather than file the road show materials. The restricted access provisions of the Amendments would not permit this option in a cross-border IPO.

To be a bona fide version, we understand that a road show must include discussion of the same general areas of information as the other road shows for the same offering (to the extent those other road shows are written communications), but need not address all of the same subjects or provide the same information as those other road shows. Accordingly, while a bona fide version could exclude information that compares the issuer to other issuers (with respect to multiples or other valuation metrics), it could also exclude further information provided at other road shows for the same offering.

In light of the above conflicts, we urge the CSA to reconsider the circumstances in which road show materials must be filed and the types of road show materials that must be filed. Instead of the road show requirements proposed in the Amendments, we propose that a model similar to that of the U.S. be adopted. However, if the CSA ultimately determines that road show materials must be filed in certain circumstances (such as in the case of an IPO), we submit that the filing requirement at least maintain some consistency with U.S. practice. Among other things, this might be achieved by requiring that only one "bona fide" version of those road show materials be filed.

Requirement to Include Information in Prospectus

Another source of conflict between the Amendments and the U.S. rules is that the Amendments would require that *all* information in a road show (with the exception of multiples and other information as to other companies for comparison purposes, where provided exclusively to "permitted institutional investors") be included in the prospectus[8]. We understand that there is no such requirement under applicable U.S. rules. This difference may arise by virtue of the liability regimes in Canada and the United States. In contrast with the Canadian prospectus regime, where disclosure must be part of the prospectus for statutory liability to attach, there are separate liability provisions under U.S. federal securities laws for disclosure outside of the registration statement that do not impose as strict a standard as the liability provision for misrepresentations in a registration statement. We understand that liability for road shows (and, more generally, information in free writing prospectuses) arises under these separate liability provisions under U.S. rules.

In a cross-border offering, the proposed Amendments will require road show and other disclosures to be part of the Canadian prospectus. As a U.S. version of the prospectus will

[8] Proposed paragraph 13.8(1)(c) of NI 41-101 and equivalent paragraphs of the Amendments.

form part of the U.S. registration statement, the stricter U.S. standard of liability will apply. While the Amendments contemplate an exception for the aforementioned "comparables" information, it is unlikely this exception will be broad enough to cover other market information not specific to the issuer that may be included in road shows (and other free writing prospectuses) but excluded from the U.S. registration statement. We submit it is not appropriate for an issuer to take strict liability for any such non-issuer information, given its nature, under applicable liability provisions for Canadian prospectuses or U.S. registration statements. This is information derived and available from other publicly available sources (including, among others, research reports) and is not material information specific to an issuer such that it should require prospectus level liability or disclosure. Accordingly, we urge the CSA to reconsider the types of information in road show materials and term sheets that must be included or incorporated, as applicable, in the preliminary and final prospectus for an offering.

Notably, the requirement that information in a road show be disclosed in the preliminary prospectus is not limited to written materials – it refers to "all information in the road show concerning the securities"[9]. As drafted, this would require the inclusion of any verbal communications in a road show (such as during the Q&A). We submit that only information in written road show materials (subject to the aforementioned exclusions) be required to be disclosed in the preliminary and final prospectuses. Otherwise, this would have a chilling effect on road shows – requiring, among other things, that the answer to every question be thoroughly scripted in advance and that questions go unanswered if there is any concern that the answer is not strictly within the text of the preliminary prospectus. In the context of a road show, for which there are significant timing constraints, this would be impractical. Further, as noted earlier in respect of term sheets generally, we submit that this requirement focus only on material information, as opposed to *all* information, and that the requirement be clarified to confirm it is sufficient that information in a road show is derivable from the information in the prospectus and need not be verbatim.

Permitted Institutional Investors

To the extent the Amendments are to provide for a distinction as between the types of investors that may, among other things, receive comparables information in a road show, we submit that the definition of "permitted institutional investor" is too narrow. While the feedback of investment dealers in Canada and the U.S. should be solicited for their views, it seems to us that it fails to include a number of typical road show attendees, including foreign investment funds and sophisticated corporate investors. Further, as a policy matter, it is unclear why this group of permitted investors should not include all accredited investors, who have been deemed sufficiently sophisticated to participate in private placements. Applying a new classification specific to certain marketing activities will surely result in substantial, additional administrative burden on investment dealers.

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[9] Proposed paragraph 13.8(1)(c) of NI 41-101 and equivalent paragraphs of the Amendments.

Other Comments

In light of timing constraints at a road show, we submit that an investment dealer should have the option of including the legend prescribed by section 13.8(4) of NI 41-101 (and the equivalent sections of the Amendment) in written road show materials provided to attendees rather than reading the legend at the inception of a road show meeting. Further, we submit that the legend used be substantially to the effect of the prescribed language rather than verbatim. Among other things, this would accommodate the use of equivalent language in cross-border offerings.

While best addressed by participants that conduct the road shows, we believe it would be appropriate to expand the list of permitted attendees of a road show (in proposed paragraph 13.8(1)(f) of NI 41-101 and equivalent paragraphs of the Amendments.) to include any representatives of the underwriters and other members of working group in respect of the offering that might attend.

Bought Deals

Upsizing

As noted earlier, we are supportive of the CSA's efforts to codify current best practices for upsizing bought deals. However, we have concerns regarding the drafting of certain elements of the associated rules which may lead to unintended consequences.

Among these are the requirement in proposed section 7.4(5) of NI 44-101 that a bought deal agreement not be terminated unless the parties decide not to proceed with the offering. On its face, this suggests that underwriters could not exercise their customary termination rights under the agreement. While we agree it is appropriate that the bought deal agreement not contain a "market out", it is not commercially practicable to require that underwriters proceed without the termination rights customary of a firm commitment. Accordingly, we submit that proposed section 7.4(5) be removed.

Additionally, the requirement of proposed section 7.4(4) of NI 44-101 could be read to preclude the typical practice of superseding a bought deal bid letter with a full underwriting agreement as the bid letter may not include all of the representations, warranties, indemnities and conditions that are within the full underwriting agreement. To require that a full underwriting agreement be negotiated prior to the launch of a bought deal would be inefficient and would impose a higher standard than is required in respect of a marketed offering (in which the underwriting agreement is finalized at pricing, well after the inception of the waiting period). Accordingly, we submit that proposed section 7.4(4) be removed.

Further, we submit that the CSA remove proposed section 7.4(3) of NI 44-101, which prohibits adding a new underwriter to a syndicate if, among other things, the addition is

part of formal or informal plan devised prior to executing the original bought deal agreement. Syndication of a bought deal often occurs after signing the bid letter, and is generally contemplated at the time of signing. In addition to being in conflict with market practice, it is unclear what benefit is provided by the prohibition as additions to the syndicate do not diminish the commitment to purchase all of the securities that are the subject of the bought deal agreement. Accordingly, we submit that proposed section 7.4(3) be removed.

Finally, we do not believe that a cap on upsizing a bought deal is necessary, particularly in light of the other proposed requirements for an upsizing which should adequately guard against any upsizing that is a misuse of the bought deal exemption.

Term Sheets

The proposed Amendments would limit the distribution of bought deal term sheets, in the period between launch and the preliminary receipt, to permitted institutional investors. We submit that there should not be any such limitation as it does not serve a purpose, particularly where all information to be included in the term sheet must be included in the press release launching the bought deal or otherwise in the issuer's continuous disclosure record.

Comparables

With respect to the specific questions posed in the Request for Comment in respect of comparables, we have the following views.

While we appreciate the concern of the CSA that comparables may be "cherry picked", we see no reason why these disclosures should be singled out as many other offering related disclosures are also subject to this risk. Additionally, what are appropriate comparables will vary in each case; applying a "one size fits all" approach to the companies or metrics that may be used for comparison cannot work. Accordingly, we do not believe that any method should be prescribed for choosing or presenting comparables nor do we believe that other safeguards are necessary beyond those generally governing disclosure in connection with an offering.

As previously noted, because the information is derived from publicly available sources, we believe that issuers should not be mandated to include in their prospectus any comparables and other publicly available market information included in written road show materials and other term sheets. For the same reason, we see no reason to require that road show attendees agree in writing to keep this information confidential. This would be a significant administrative burden for limited or no benefit. Further, it may be impractical to obtain such agreements from certain investors.

Other Comments

We expect that, upon further consultation with market participants, the CSA will identify a number of instances where the proposed Amendments are in conflict with the internal processes of investment dealers, and where compliance will be impractical or impose a burden that outweighs the intended benefit. Accordingly, we have not focused on these issues and instead urge that the CSA further consult with market participants for their views.

Further, as we are hopeful that the CSA will publish for comment an amended draft of the Amendments prior to implementing any amendments to the marketing rules, we have not focused on comments of a more technical nature. We do however note that a number of rules specific to shelf offerings have been included within NI 41-101. We submit that it would be more appropriate for these to be included within NI 44-102.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned at 416.863.5537 (Rob Murphy) or 416.863.5517 (David Wilson).

Yours very truly,

(signed) Robert S. Murphy & David T. Wilson