STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

DIRECT DIAL : (416) 869-5596
DIRECT FAX : (416) 861-0445
E-MAIL : sromano@stikeman.com

BY TELECOPIER

December 20, 2004

Alberta Securities Commission
400-300-5th Avenue S.W.
Calgary, Alberta T2P 3C4

Attention: Blaine Young

Autorite des marches financiers
800 Square Victoria, Tour de la Bourse
C.P. 246, 22nd Floor
Montreal, Quebec H4Z 1G3

Attention: Anne-Marie Beaudoin

Ontario Securities Commission
20 Queen Street West
Suite 1800
Toronto, Ontario M5H 3S8

Attention: Mr. John Stevenson, Secretary

Ladies and Gentlemen:

Re: Comments on Proposed National Instrument 45-106 and Related Matters

This letter represents my personal and without prejudice comments (and not those of the firm or any client) with respect to proposed National Instrument 45-106 and related matters. They are in no particular order.

First, however, congratulations on achieving a (largely) harmonious instrument. The tale of concordance is also welcome.

It is however unfortunate that it took so long and was preceded by so many costly changes in the rules, especially in Ontario, where Rule 45-501 (and the associated Rule 45-102) have been changed repeatedly over the past few years, frequently requiring the costly development of new or amended precedents and an education process each time. It is a lesson in the process of rule-making that we are now returning to the private issuer and $150,000 exemptions, which a number of commentators pleaded repeatedly with the Commission to retain, to no avail at the time. In my view, these types of costs should be taken into account by the Commissions in proposing rules, especially where the rules will not be harmonized.

Some of my comments will also be addressed towards reducing the number of "Ontario carve-outs" to make it more harmonious, particularly where their impact is marginal, if any.

Also query the need for all this baffling private placement and resale-based complexity in a situation where Bill 198 liability for continuous disclosure is imminent. However, I will not belabour this point.

National Issues

1. The most important inappropriate change to the status quo (and also one that is not discussed in the request for comments, strangely, and thus may not be appreciated by many commentators) is the insertion of a new creation/use restriction on the $5 million entity branch of "accredited investor", in para. (m) of that definition. That does not exist today, and I expect that it will cause many problems. Its purpose is also not at all clear. Consider a small public company with $5 million in assets and no liabilities. Or consider a family trust, or a private investment vehicle, that does not meet, or as a result of births, deaths, changes in status of its investors or beneficiaries or otherwise no longer meets, the test set forth in para. (t) to the effect that all of its interest-holders are accredited investors. If it wishes to invest $2.5 million or more in a private placement, it cannot, because then the accredited investor will be "used primarily to purchase securities under these exemptions" as stated in s. 2.3(6). Surely this is not desirable. A $5 million vehicle is sophisticated, and merely because it wishes to buy into private placements it should not be precluded from doing so. Of course, the entity itself will be subject to securities laws in raising its own funds, so its investors are protected in any event. This restriction seems to serve no public policy and likely to cause substantial problems. I personally also do not understand what is wrong with creating a vehicle to invest in private placements, so the rationale of the first part of s. 2.3(6), re the "creation" restriction, is not clear to me. However, the "use" restriction is even less understandable.

2. In any event, the reference to "these exemptions" in s. 2.3(6)(b), if it will remain, should be limited to the s. 2.3 exemption, and not other exemptions in NI 45-106 or elsewhere.

3. Transitional exemptive relief should be provided to facilitate transactions (including private placements and control block distributions) that are underway under existing requirements when the new rules come into force.

4. Should para. (c) of the definition of "accredited investor" refer to voting shares, instead of voting securities? In para. (s), the "and" after (d) should be "or", I think.

5. In the definition of "private issuer" in NI 45-106, could options and convertible debt also be excluded, as these are unlikely to be subject to either the constating documents or agreements between or among security holders. Any restrictions would likely be imposed in the terms of the instrument or in another agreement between the holder and the issuer. Also, as noted elsewhere, should Ontario closely-held issuers be deemed to be private companies at the time of entry into effect of the rule?

6. In section 2.2(3), the words "in Canada" should be added after "every security holder".

7. Query the rationale for sections 2.3(4) and (6). The latter seems particularly ill-advised, as noted above.

8. In section 2.4(3), should (i) or (j) as they relate to (h) also be covered?

9. In section 2.10(3), for similar reasons to those set forth above in respect of the $5 million accredited investor test, para. (b) should be deleted (and para. (a), if it should remain, should refer only to section 2.10). The requirement in section 2.10 for a cash payment to use the $150,000 exemption should not require any more than $150,000 in cash to be paid, at the time of usage. In other words, one should be able to invest $400,000 represented by $150,000 in cash and $250,000 via a commitment. See also section 3.10 of CP 45-106.

10. Section 2.11(1)(b)(i) needs to reflect the possibility of an accidental failure to deliver to every securityholder, for whatever reason. Also, no particular securityholder's approval is required typically, just the class, so the wording may be inaccurate.

11. Should section 2.12(1) also refer to securities or other property, including cash?

12. Section 2.16 does not clearly apply to both the tender to a take-over bid by a target shareholder, and the issuance of securities by a bidder in exchange in a securities exchange bid. In fact, ss. 2.15 suggests that the tender process is not

covered for a take-over bid (i.e. issuer bids are treated differently for some reason), while section 2.17 suggests that "under" a bid may refer to a tender and not the bidder's issuance of a security. Some clarification appears to be warranted.

13. In section 2.23, does this suggest that a single trustee of an income trust or other similar issuer, which has several trustees, controls the trust? If so, it should probably be adjusted.

14. In section 2.24(4), should paras. (2) and (3) also be covered?

15. I would request the retention of section 2.30. Much time and expense has been wasted in determining available exemptions in intra-corporate family situations over the past few years in Ontario, and this exemption is used frequently in the formation stage of companies. It would be a shame to lose another useful exemption that has no investor protection effects.

16. The word "dividend" in section 2.32(2) should say "dividend or distribution", to cover non-corporate issuers and be consistent with para. (1).

17. In section 2.34, while issuances of shares to an underwriter are caught, the exercise of options or warrants, including special warrants, are not. Presumably this is intended, on the basis that the securities being sold should be covered in a prospectus (absent an available exemption) but compensation securities should not?

18. Query whether it is appropriate from either an investor protection or from a foreign relations perspective (including international treaty obligations) to require foreign government debt, but not Canadian government debt, to be rated as is the case under section 2.35.

19. In section 2.43(1)(b), I recommend adding "of the issuer" after "existing security holder", as in (a). Could the policy give some guidance as to what is required under section 2.43(2)(b) to satisfy a regulator?

20. Should section 3.6(1) not cover CNQ, as well as other marketplaces, in a competitive markets scenario? Also, designation seems sufficient, without the need for their rules to be "substantially similar". They could be different, and still acceptable.

21. Section 3.7(b) is too limiting and does not accord with what occurs in practice today. Many commentators, including representatives of registered dealers or advisors, comment in newspapers without falling clearly into these very narrow exemptions. They may not give advice solely through such media, they may give advice through radio or TV or the emerging free newspapers, or in books, etc. These should be reworked to extend to cover these common situations in order

to accord with market reality. The legitimate investor protection issue is presumably unqualified and unregistered people pushing securities for compensation from the issuer (or a broker), and that should be addressed without unduly restricting freedom of expression and without discouraging educational and informative discussions.

22. Section 4.2 (2) should also exclude the need to comply with para. (1)(c).

23. In section 8.1(1)(a), should it be clarified that the securities referred to are the initially acquired securities?

24. In Form 45-106F1, if industries are to be specified, should service industries, distribution industries, retail sales businesses and food service businesses, among others, be covered? Also, is a explicit privacy consent necessary (as referred to in Form 45-106F1) where the disclosure is required by law? See also Form 45-501F1 in Ontario.

25. The application of NP 48 to the various exemptions in NI 45-106 should be clarified, hopefully by confirming that (as its terms, as set out in its Appendix A, suggest) it is of no force and effect with respect to any of them.

NI/MI 45-102

26. It has always troubled me that, following a merger transaction, such as an amalgamation of two issuers, public securityholders are subject to "ordinary course" resale restrictions such as those contained in ss. 2.5(2)(5) and (6) or NI/MI 45-102. This seems inappropriate from a policy perspective.

27. Section 2.8(2)(5) of NI/MI 45-102 does not refer to a pledge, and in my view it should be clarified, in order to avoid any confusion, that it does not apply to pledgees, as the term selling security holder in the form is sometimes used to describe pledgees as well.

28. What will happen, as a transitional matter, to underwriters from a resale perspective who took options or other securities under the accredited investor exemption in effect today?

CP 45-106

29. If Ontario does not wish to adopt the friends and family or offering memorandum exemptions, so be it, but it should not then in my view also effectively restrict Ontario-based issuers from using those exemptions by adding provisions such as s. 1.4 of CP 45-106. This will hurt their capital-raising competitiveness vis-à-vis non-Ontario competitors without in any way being relevant to investor protection. In fact, given the overall similarity of the requirements in the various provinces, and where they are different the

consciously different policy choices made by the applicable regulator, it is unclear why as a policy or constitutional matter any jurisdiction should seek to regulate the raising of capital by companies in its territory from investors in other Canadian jurisdictions. A better approach than s. 1.4 of CP 45-106 would be for each jurisdiction to either confirm the interpretation that the place of residence of the investor determines the exemptions available, or alternatively if they are worried about capital-raising outside Canada, to grant an exemption to issuers based in their jurisdiction in respect of capital-raising in other Canadian jurisdictions. In any event, the "coming to rest" analysis in Interpretation Note 1 should be referred to for Ontario purposes. This applies to other provinces also, where they diverge from national approach. See also section 3.2 in CP 45-501 in Ontario.

30. Section 1.8 of CP 45-106 should be restricted to the $150,000 exemption.

31. Section 4.2 of CP 45-106 should also refer to the Bankruptcy and Insolvency Act.

Ontario Issues

32. The non-Canadian adviser qualification to para. (q) of the accredited investor definition seems a bit strange. It is hard to see how a non-registered adviser could be acting as an adviser to a client in Ontario without being in breach of the law, save and except for the "permitted client" list or other tight constraints set forth in OSC Rule 35-502. Accordingly, given the restricted nature of these clients and activities, what exactly could the OSC be concerned about? By deleting this carve-out, uniformity would be increased without any apparent investor protection impact.

33. I welcome the return of the private issuer exemption, as the closely held issuer exemption was quite unworkable. However, what will happen from a resale perspective to persons who acquired securities under the closely-held issuer exemption? Also, issuers that are now closely-held issuers should be deemed to be private issuers, I suggest, as at the date of entry into force of the new rule.

34. The promoter resale rule was adopted in OSC Rule 45-501 without much notice or comment, and is somewhat difficult to fathom from a policy perspective. Why should a former promoter who now holds only a small percentage of the company and has no ongoing involvement in its affairs be subject to a prospectus requirement forever? It seems unnecessarily complex, and unwise, to continue this state of affairs under section 2.15 and Appendix G forever for promoters who acquired securities during the short period that these provisions have been in effect. Five or ten years from now, it will be hard to determine what exemption should apply, and little benefit (and much complexity) seems likely to result from continuing this situation. The founder concept seems much more appropriate policy-wise.

35. While the request for comments suggests that the term "COATS security" (Reg. s. 152) would be changing, I did not find any reference to that in the body, perhaps through oversight?

36. Preferably the "private issuer" definition in Ontario (see the MI 45-102 amendments) would return to its roots and refer to registered holders, as it is not always possible to know the beneficial ownership of securities, even in private company situations, given personal issues such as family breakdown, the establishment of new relationships, divorce and death. It is also a bit unclear why joint registered holders are deemed to be a single beneficial owner, as they may jointly hold (such as in a trust situation) for a number of beneficial owners.

Thank you for considering these comments.

Yours truly,

Simon Romano

SAR/he