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Toronto, March 16, 2005

VIA E-MAIL

Mr. Blaine Young
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Alberta Securities Commission
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- and to -

Ms. Anne-Marie Beaudoin
(email : consultation-en-cours@lautorite.qc.ca)
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Autorité des marchés financiers
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Dear Sir and Madam:

RE: Request for Comments – Proposed National Instrument 45-106, Related Forms and Companion Policy – *Prospectus and Registration Exemptions*

This comment letter has been prepared in response to the request for comments on Proposed National Instrument 45-106, its related forms and Companion Policy 45-106CP – *Prospectus and Registration Exemptions* (the "Proposed National Instrument").

We strongly support the harmonization of prospectus and registration exemptions throughout Canada which will simplify the raising of capital and allow investors in all provinces of Canada, with limited exceptions, equal opportunity to participate in private placement transactions. We do, however, have a few specific comments on the Proposed National Instrument.

1. **Underwriter Exemption** – Section 1.5 of the Proposed National Instrument effectively removes the use of the accredited investor exemption and all other exemptions other than the underwriter exemption for an underwriter "acting as underwriter". We are of the view that given the broad definition of the term "underwriter" contained in the *Securities Act* (Ontario), this limitation is unnecessarily restrictive. It is unclear why such a restriction is deemed necessary – for instance, why should, as a matter of policy, an underwriter be denied the accredited investor exemption if the underwriter is prepared to comply with the conditions of such exemption, such as the payment of fees?

2. **Private Issuer Exemption** – We support the inclusion of the private issuer exemption and the proposed removal of the closely-held issuer exemption. We would, however, suggest that the Proposed National Instrument be amended to remove the requirement that a private issuer have restrictions on the transfer of its securities contained in its constating documents or a security holders' agreements. While this restriction is common in domestic Canadian companies, and most Canadian private issuers will likely include such a provision in their articles, many foreign private companies do not have similar restrictions on transfer contained in their constating documents as such transfer restrictions may not be necessary in their domicile. Foreign issuers may be required to include such a provision which is unusual for their jurisdiction of incorporation for the sole purpose of meeting the requirements of Canadian securities laws. To recognize the global nature of capital raising and to facilitate private placements by foreign issuers, we would suggest that this requirement be deleted or restricted to Canadian issuers.

   We would also propose that in determining whether there are 50 shareholders or less of the issuer, the reference should be to registered rather than beneficial ownership. Determining beneficial ownership, especially in the case of a sale by a shareholder as opposed to a treasury issue, may be difficult. The definition of private company contained in the *Securities Act* (Ontario) allows determination of the number of shareholders by reference to registered ownership.

   In subsection 2.4(1), we would suggest that the definition of family members in subsections (b), (c) and (f) be expanded to include in-laws. We note that this was the approach taken by the CSA in drafting the definition of immediate family member contained in Multilateral Instrument 52-110 – *Audit Committees*.

3. **Minimum Amount Investment** – Subsection 2.10 re-introduces an exemption for a minimum exemption of $150,000 in Ontario. We note, however, that the new exemption is less flexible in that it requires the purchase price to be payable in cash. The prior provision allowed securities to be issued for a *bona fide* future obligation, for example a promissory note. We would recommend that flexibility be retained in the new re-introduced exemption.

4. **Restrictions on use of Accredited Investor, Private Issuer and Minimum Investment Amount Exemptions** – Subsection 2.3(6) provides that the accredited investor exemption is not available if the "accredited investor" is "created" or "used primarily" to purchase securities under this exemption. Similar wording is used in the definition of private issuer and the minimum investment amount definition. We are concerned that this wording is extremely broad and has the potential to create uncertainty for investment vehicles seeking to rely on such exemptions in the further. Such wording is not currently contained in the accredited investor exemption or in the definition of private issuer. Clearer language needs to be adopted or guidance provided in the Companion Policy as to the intent of this language. We would suggest that the condition be deleted, or in the alternative, be replaced with a condition which states that the exemptions are not available in respect of a person "created solely for the purpose of becoming eligible to purchase securities in reliance on an exemption...".

5. **Friends, Family and Business Associates** – We are of the view that the exemptions in section 2.5 (*Family, friends and business associates*) and 2.7 (*Family, founder and control person – Ontario*) should be reconciled to provide harmonization of the exemption.

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This letter has been prepared by the securities law group of our Toronto office but does not necessarily reflect the views of all of its partners. If you have any questions concerning these comments, please contact Tracey Kernahan directly at (416) 216-2045 or by e-mail at tkernahan@ogilvyrenault.com or by fax at (416) 216-3930.

Yours very truly,

Ogilvy Renault LLP

TK/scw