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NOTICE AND REQUEST FOR COMMENT

Proposed Repeal and Replacement of National Instrument 44-101 *Short Form Prospectus Distributions*, Form 44-101F3 *Short Form Prospectus* and Companion Policy 44-101CP *Short Form Prospectus Distributions*

January 7, 2005

INTRODUCTION

We, the Canadian Securities Administrators ("CSA") are publishing for a 90 day comment period the following draft documents:

- amended and restated National Instrument 44-101 *Short Form Prospectus Distributions* ("Proposed NI 44-101");
- amended and restated Form 44-101F1 *Short Form Prospectus* ("Proposed Form 1"); and
- amended and restated Companion Policy 44-101CP *Short Form Prospectus Distributions* (the "Proposed CP");

(collectively, the "Proposed Rule").

The text of the Proposed Rule is being published concurrently with this notice and can be obtained on websites of CSA members, including the following:

www.albertasecurities.com
www.bcsc.bc.ca
www.msc.gov.mb.ca
www.gov.ns.ca/nssc/
www.osc.gov.on.ca
www.lautorite.qc.ca
www.sfsc.gov.sk.ca

The Proposed Rule is intended to replace the current short form prospectus distribution rule and related forms and companion policy (collectively, the "Current Rule") that came into effect in all CSA jurisdictions on December 31, 2000.

We are also proposing to make consequential amendments to certain other national instruments. Please see the CSA's Notice and Request for Comment "Consequential Amendments Arising from the Proposed Repeal and Replacement of National Instrument 44-101 *Short form Prospectus Distributions*: Amendments to National Instrument 44-102 *Shelf Distributions*, National Instrument 44-103 *Post-Receipt Pricing*, National Policy 43-201 *Mutual Reliance*

Review System for Prospectuses and Annual Information Forms and National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities*", which is being published concurrently with this notice.

We request comments by April 8, 2005. Target implementation of the Proposed Rule is July 2005. Depending in part on the comments received, the amendments proposed may be adopted in their entirety or in part.

BACKGROUND

Current Short Form Prospectus System

National Instrument 44-101 *Short Form Prospectus Distributions* ("Current NI 44-101") was implemented on December 31, 2000 as a reformulation and replacement of National Policy Statement No. 47 *Prompt Offering Qualification System* ("NP47"). The Current Rule prescribes conditions for the use of a short form prospectus to distribute securities to the public. The system was designed to enable qualifying issuers to respond more quickly and efficiently to market opportunities without diminishing the information and protection available to investors, by reducing the disclosure otherwise required to be included in a prospectus and streamlining the regulatory review of such prospectus. The short form prospectus, Form 44-101F3 (the "Current Form"), incorporates by reference, rather than restates, information contained in the issuer's annual information form ("AIF"), financial statements and other continuous disclosure ("CD"). In addition, Current NI 44-101 sets out qualification criteria that emphasize the filing and review of an initial AIF and prescribes additional requirements meant to enhance and update the CD requirements, as they existed in 2000, including requiring business acquisition financial statement disclosure.

Regulatory and Other Developments

The Current Rule is premised on the securities regulatory environment as it existed in 2000. Since then, there have been a number of important regulatory and technical developments affecting the information available to the public. Key regulatory developments include the following:

1. the adoption on March 30, 2004 of National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102");

2. the anticipated adoption early in 2005 of National Instrument 81-106 *Investment Fund Continuous Disclosure* ("NI 81-106", and together with NI 51-102, the "CD Rules"); and

3. the implementation and continued refinement of the harmonized CD review program (the "CDR Program")[1] by many CSA jurisdictions and the progress made by the CSA to enhance consistency in the scope and level of reviews carried out by staff across Canada.

NI 51-102 has enhanced and harmonized CD requirements for reporting issuers other than investment funds, and NI 81-106 will achieve the same result for investment funds. We

[1] See CSA Staff Notice 51-312 *Harmonized Continuous Disclosure Review Program*, dated July 16, 2004.

anticipate that issuers' CD will improve in response to the CSA's increased focus and allocation of resources on CD review. In addition, advances in technology, including the inception and growth of the Internet and the development of the CSA's *System for Electronic Document Analysis and Retrieval* ("SEDAR"), have enhanced investor access to CD. Because the requirements of and access to CD have been so enhanced, we believe that the public offering system for some issuers could be simplified without diminishing investor protection.

Purpose and Substance of the Proposed Rule

If adopted, the amendments reflected in the Proposed Rule will

- streamline the system established under the Current Rule;
- eliminate duplication and inconsistencies with the CD Rules; and
- modify eligibility, disclosure and other requirements in a manner consistent with other developments and initiatives of the CSA.

The proposed changes represent our attempt to more fully integrate the disclosure regimes for the primary and secondary markets. We have also attempted to address deficiencies or ambiguities in the Current Rule which we have identified over the past four years. Finally, we have proposed revisions to the qualification criteria that would allow more issuers that are compliant with the CD Rules to participate in the system.

Expansion of Eligibility

As part of this publication, the CSA is considering and seeking comment on an alternative and much broader set of basic qualification criteria in the short form prospectus system. This proposal is premised on the view that Toronto Stock Exchange- or TSX Venture Exchange-listed issuers who have an operating business and maintain up-to-date CD relating to this business should, regardless of their market capitalization or the amount of time they have been reporting issuers, be able to access the capital markets in a more efficient and streamlined manner based on their comprehensive public disclosure. This proposal is consistent with the 2000 Concept Proposal discussed below, and is set out in Proposed NI 44-101 as an alternative set of qualification requirements (referred to as "Alternative B").

The Integrated Disclosure System Concept Proposal

In January 2000, the CSA published a Concept Proposal (the "2000 Concept Proposal") for an Integrated Disclosure System ("IDS").[2] The 2000 Concept Proposal contemplated a streamlined offering system that was designed to fit within existing provincial securities legislation, but would require participating issuers to significantly enhance their CD. After publishing the 2000 Concept Proposal and receiving and reviewing comments on the proposal, the CSA focussed its attention on the harmonization and enhancement of CD requirements and CD review. This focus has resulted in the implementation of the CD Rules, which have enhanced CD requirements for all issuers. Many of the CD enhancements included in the 2000 Concept Proposal have been implemented through the CD Rules. Other enhancements contemplated in the 2000 Concept Proposal have and will be implemented through Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and Multilateral Instrument 52-110 *Audit*

[2] CSA Notice and Request for Comment 44-401, 51-401.

Committees (the "Audit Committee Rule"), and through the implementation and continued refinement of the CDR Program.

The establishment of this "new" CD regime creates a comprehensive national standard for CD for all reporting issuers in Canada and thereby forms an appropriate foundation on which to build an integrated disclosure system. In publishing the Proposed Rule, and particularly the proposed Alternative B qualification criteria, the CSA is proposing significant changes to the current short form prospectus system. These changes are consistent with, and in some cases derived from, the ideas expressed in the 2000 Concept Proposal and are supported by the comments received on the 2000 Concept Proposal.

Our goal in amending the Current Rule is to harmonize and integrate the short form prospectus regime with the new CD regime and to create, to the extent possible, a universal, seamless, integrated and expedited offering system consistent with the objectives underlying the 2000 Concept Proposal.

We received 23 comment letters on the 2000 Concept Proposal. Attached as Appendix A to this Notice is a summary of those comments together with our responses to the comments. Where applicable, our responses to comments will reference the changes we are proposing in the Proposed Rule. Later in this Notice under the heading "REQUEST FOR COMMENT - Next Steps in Prospectus Regulation" we address other potential changes to our prospectus regimes that are not reflected in the Proposed Rule. These include the potential elimination of the requirements for preliminary prospectuses and regulatory prospectus review as well as changes to the current rules governing the marketing of distributions.

Multijurisdictional Disclosure System

A short form prospectus prepared and filed under the Current Rule would generally qualify as a home jurisdiction document for an offering of securities under the U.S. multijurisdictional disclosure system ("MJDS"). We believe that the proposed changes to the Current Rule will not adversely affect the use of a short form prospectus as a home jurisdiction document under U.S. securities law. An issuer planning to use a short form prospectus as a home jurisdiction document must satisfy the general eligibility requirements of the MJDS registration statement forms in addition to being eligible to use a short form prospectus, and so none of the proposed changes to the qualification criteria in Part 2 of Proposed NI 44-101 should have any impact on the availability to issuers of the MJDS.

SUMMARY OF CHANGES TO THE CURRENT RULE

The Current Rule continues to be in force in all Canadian jurisdictions. If the Proposed Rule is adopted, it will replace the Current Rule. The most significant changes to the Current Rule are summarized as follows:

- Eliminating the AIF filing and acceptance procedure, as all reporting issuers, except *venture issuers* (as defined in NI 51-102), are now or will be subject to a mandatory AIF requirement under the CD Rules. Proposed NI 44-101 retains the requirement that an issuer - including a venture issuer - have a current AIF to be eligible to use the short form

prospectus distribution system, but effectively incorporates the AIF form and filing requirements provided for under the CD Rules.

- Eliminating the detailed requirements relating to significant acquisitions, as eligible issuers are now subject to a mandatory Business Acquisition Report ("BAR") requirement under NI 51-102.

- Changing the requirements for auditor's consent letters and compilation reports and eliminating certain auditor's comfort letters as a result of the development of CICA Handbook section 7110 *Auditor Involvement with Offering Documents of Public and Private Entities* and the BAR requirements under NI 51-102.

- Clarifying certain issues and addressing questions that have arisen since the Current Rule came into force.

Summary of Proposed Amendments
The mandatory elements of the Proposed Rule are set out in Proposed NI 44-101 and Proposed Form 1. Proposed Form 1 also contains instructions to guide users. The Proposed CP provides explanation and additional guidance relating to Proposed NI 44-101 and Proposed Form 1.

Proposed NI 44-101
Part 1 Definitions and Interpretation of Proposed NI 44-101 identifies defined terms used in Proposed NI 44-101, Proposed Form 1 and the Proposed CP. A number of defined terms have been redefined with reference to NI 51-102 or, if applicable, NI 81-106, as the short form prospectus offering system is designed to build on the CD Rules. In addition, we have been able to remove a number of defined terms because we deleted a number of the substantive provisions of the Current Rule. Of particular note is the elimination of the significance tests for "significant acquisitions" and related provisions. We added the definition of "short form eligible exchange" in connection with the Alternative B qualification criteria, discussed below.

Part 2 Qualification to File a Prospectus in the Form of a Short Form Prospectus of Proposed NI 44-101 sets out the qualification criteria for issuers wishing to use the short form prospectus distribution system. The transitional provisions relating to NP47 that appear in Current NI 44-101 have been removed, as they became unnecessary with the passage of time.

We have included in Proposed NI 44-101 two alternative versions of Part 2. The first version ("Alternative A") represents a substantive continuation of the qualification requirements in the Current Rule after making amendments to harmonize those requirements with the CD Rules and other regulatory developments. Alternative B represents a significant shift in qualification requirements from the Current Rule.

Alternative A
Section 2.2 sets out the basic qualification criteria for eligibility to participate in the short form distribution system. They include being a SEDAR filer, having been a reporting issuer for the past 12 months in at least one jurisdiction in Canada, having filed all required CD documents, having a current AIF and current annual financial statements,

having a minimum market capitalization of $75,000,000 within 60 days of the date of filing the preliminary short form prospectus, and having filed a one-time notice of intention to be qualified to distribute securities under the short form offering system.

The adoption by most Canadian jurisdictions of the reporting issuer concept has allowed us to remove the separate qualification criteria that are included in the Current Rule for issuers who are based in a jurisdiction that does not have that concept. The following changes were also made to the basic eligibility criteria:

1. With the universal adoption of SEDAR, CD documents are accessible electronically to investors in other jurisdictions. SEDAR participation has been added as an eligibility criterion to ensure broad accessibility.

2. We have changed the 12-month "seasoning" requirement to tie into the date of filing the preliminary short form prospectus rather than the date of the most recent AIF. AIF filing deadlines are now imposed under the applicable CD Rule and so most AIFs will be filed once annually, whereas under the Current Rule an issuer could file an AIF at any time throughout the year. Accordingly, for practical purposes, the seasoning period requirement remains the same.

3. We added the requirement that the issuer have filed all required CD documents. This replaces section 10.6 of Current NI 44-101, which prohibits the filing of a preliminary short form prospectus or short form prospectus while the issuer is in default of filing or delivering to the regulator a document required to be filed or delivered under securities legislation. That prohibition is intended to ensure the completeness of the short form issuer's CD record and, in our view, is more appropriately framed as a qualification criterion.

4. We removed the provisions accelerating the filing deadlines for annual financial statements. The CD Rules have shortened the filing deadlines. Having the same filing deadlines for CD and prospectus purposes increases the integration of information available to primary and secondary market participants.

5. We continued the existing requirements to have a current AIF and current annual financial statements, but reframed those requirements to reflect the implementation of NI 51-102 and expected implementation of NI 81-106.

6. We added a one-time notice requirement to address the need for regulators and other market participants to be able to identify which filers are potentially short form issuers. This information is needed to, among other things, monitor the issuer's status under the CDR Program.

These changes to the basic eligibility criteria are generally reflected throughout the various other qualification criteria as well.

Section 2.3 of Proposed NI 44-101, like its counterpart in Current NI 44-101, provides alternative qualification criteria for an issuer that does not have a 12-month reporting

issuer history. It allows a "significant issuer" to participate in the short form prospectus system on the basis of a $300 million market capitalization.

Section 2.4 of Proposed NI 44-101 contains the qualification criteria for issuers of approved rating non-convertible securities.

Section 2.5 sets out the alternative qualification criteria for issuers of guaranteed non-convertible debt securities, preferred shares and cash settled derivatives. We amended this provision to permit U.S. credit supporters that do not have a $75,000,000 minimum market capitalization on an exchange in Canada, but who have non-convertible securities that have received an approved rating, to be eligible to act as credit supporters for issuers incorporated in a jurisdiction in Canada. Permitting these U.S. credit supporters to be eligible to act as credit supporters is consistent with the exemptive relief that the securities regulatory authorities or regulators have frequently granted in the past.

Section 2.6 provides the alternative qualification criteria for issuers of guaranteed convertible debt or preferred shares.

Section 2.7 is the alternative qualification criteria for issuers of asset-backed securities.

We removed section 2.8 of Current NI 44-101, which provides alternative qualification criteria following reorganizations. We incorporated its substance into section 2.9 of Proposed NI 44-101, which is discussed below.

Section 2.8 of Proposed NI 44-101 remains unchanged from section 2.9 of Current NI 44-101 and deals with calculation of the aggregate market value of an issuer's securities.

Section 2.9 of Proposed NI 44-101 provides exemptions from the requirements to have current annual financial statements and a current AIF for new reporting issuers and successor issuers. The exemptions further harmonize the Proposed Rule with the CD Rules. The alternative qualification criteria following reorganizations in Current NI 44-101 have led to many applications for exemptive relief and requests of staff for clarifications.

The exemptions are available to those issuers who are not otherwise exempt from the requirements under the CD Rules to file the documents in question, but have not yet been required by the passage of time to file them. The exemptions are conditional on the issuer having filed another disclosure document, such as a prospectus or an information circular, which includes the information that would have been required to be disclosed in the annual financial statements or AIF.

Section 2.9 also provides a successor issuer with an exemption from a portion of the seasoning period provided at least one of the participants to the reorganization that produced the successor issuer was a reporting issuer during the applicable period.

<u>Alternative B</u>

Alternative B in Proposed NI 44-101 would broaden access to the short form prospectus system by eliminating the seasoning requirement and the quantitative (size) requirement from the qualification criteria.

> <u>"*Seasoning*" *Requirement*</u>
>
> Alternative B is consistent with the CSA view that the other eligibility requirements, particularly compliance with all timely and periodic filing requirements under applicable securities legislation (including the CD Rules), are sufficiently rigorous that a seasoning requirement is not essential.
>
> We note that the 2000 Concept Proposal did not include a seasoning requirement as part of IDS because the proposed IDS would have required issuers to provide an enhanced standard of disclosure to secondary market investors that would also be available to investors in the primary market. With the implementation of the CD Rules and the CDR Program, which have superseded the enhanced standard of disclosure called for in the 2000 Concept Proposal, all reporting issuers are now subject to a level of CD and of CD reviews by their principal regulators that will support short form offering documents without imposing a seasoning period.
>
> <u>*Quantitative (Size) Requirement*</u>
>
> In developing Alternative B, the CSA rejected quantitative measures, such as an issuer's market capitalization, as a condition of eligibility. This is also consistent with the approach advanced in the 2000 Concept Proposal.
>
> Excluding issuers on the grounds of size alone is inconsistent with the CSA'S objective of broad market efficiency. Given the enhanced disclosure standards under the CD Rules, investors can benefit from the inclusion in the system of issuers of all sizes.

Although the CSA removed the seasoning requirement and the market capitalization requirement from the basic qualification criteria in Alternative B, it maintained a listing requirement. The basic qualification criteria are structured to allow most Canadian listed issuers to participate in the short form prospectus offering system, provided their disclosure record provides investors with satisfactory and sufficient information about the issuer and its business, operations and capital. The system would not, however, be available to an issuer whose principal asset is its exchange listing.

In Alternative B, through the definition of "short form eligible exchange", we have maintained the Canadian listing requirement that is in the Current Short Form Rule. We considered expanding eligibility to reporting issuers whose equity securities are listed only on a foreign exchange, provided that the foreign exchange's listing requirements ensured the issuer had a business and operations. However, we are not, at this time, proposing this additional expansion of eligibility. Based on the CSA's experience with the Current Short Form Rule, we do not believe that reporting issuers who are not listed on a Canadian exchange are likely to want to raise capital using the short form regime.

In Alternative B, the CSA have maintained a minimum approved rating requirement in the alternative qualification criteria based on the types of securities being issued (such as debt or asset-backed securities).

All other changes in Alternative B of section 2 are either consistent with the proposed changes in Alternative A or result from the removal of the seasoning or minimum market capitalization requirement.

We have removed the following portions of Current NI 44-101 from Proposed NI 44-101 for the following reasons:

1. Part 3 *AIF* of Current NI 44-101 mandates the form of AIF and sets out certain requirements and procedures relating to the filing of AIFs and supporting documents, and review and amendment of AIFs. These provisions have been superseded by NI 51-102 and its AIF requirements for reporting issuers other than investment funds, and will be superseded by the corresponding requirements in NI 81-106 for investment funds.

2. Part 4 *Disclosure in a Short Form Prospectus of Financial Statements for Significant Acquisitions* and Part 5 *Financial Statement Disclosure for Multiple Acquisitions That are Not Otherwise Significant or Related* – The financial statement disclosure requirements for significant acquisitions and multiple acquisitions have been replaced by reliance on the BAR requirements set out in the CD Rules. Proposed Form 1 requires the issuer to incorporate by reference any BARs filed since the beginning of the issuer's most recently completed financial year for which an AIF has been filed (either directly or through the incorporation by reference of the issuer's current AIF, which in turn incorporates by reference certain BARs). In some cases, if the issuer was not required to file a BAR, Proposed Form 1 requires comparable disclosure to be included in the short form prospectus. Although Proposed NI 44-101 does not generally accelerate the requirement to file a BAR, Proposed Form 1 requires a summary of significant acquisitions completed within 75 days prior to the short form prospectus for which a BAR has not been filed, and of certain proposed significant acquisitions.

3. Part 6 *Pro Forma Financial Statement Disclosure for Significant Dispositions* of Current NI 44-101 has been removed because the CICA has issued Handbook Section 3475 *Disposals of Long-Lived Assets and Discontinued Operations*, which expands the scope of disposition activities that require discontinued operations disclosure, thus requiring that the issuer's financial statements include the disclosure previously required by Part 6 of Current NI 44-101.

4. Part 7 *GAAP, GAAS, Auditor's Reports and Other Financial Statement Matters* of Current NI 44-101, which deals with generally accepted accounting principles, generally accepted auditing standards and other financial statement matters, has been deleted. These requirements have been included in National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* ("NI 52-107"), which is applicable to all issuers. The Part will be largely eliminated as a result of implementing consequential amendments to Current NI 44-101 relating to NI 52-107.

The remaining provisions will become unnecessary under Proposed NI 44-101 because of the new definition of *current financial statements*.

5. Part 8 *Audit Committee Review of Financial Statements Included in a Short Form Prospectus* has been replaced by a similar requirement under the Audit Committee Rule.

Part 3 Deemed Incorporation by Reference of Proposed NI 44-101 remains substantively unchanged from what is presently Part 9 of Current NI 44-101. It addresses the deemed incorporation by reference of filed and subsequently filed documents in a short form prospectus.

Part 4 Filing Requirements for a Short Form Prospectus of Proposed NI 44-101 contains provisions relating to the filing requirements and procedures for a short form prospectus and the distribution of securities under a short form prospectus that are substantially similar to the requirements set out in Part 10 of Current NI 44-101, but does reflect some changes. In particular,

1. We expanded the scope of the qualification certificate filed with the preliminary short form prospectus to certify that all previously unfiled material incorporated by reference into the short form prospectus is being filed with the preliminary short form prospectus. The filing of that material is no longer a qualification criterion but remains a filing requirement. The qualification certificate provides staff with an efficient way of confirming that the filing of the preliminary short form prospectus, including documents incorporated by reference, has been completed. We have also expanded the certificate to require the issuer to specify the qualification criteria it is relying on for eligibility.

2. We added a requirement, in connection with the filing of both a preliminary short form prospectus and a short form prospectus, that effectively accelerates the requirement under the applicable CD Rule to file certain material documents. This replaces the existing requirement to deliver all material contracts to the regulator and harmonizes the filing requirement with the CD Rule.

3. We removed the requirement to file technical reports and certificates prepared in accordance with National Policy Statement 2-B, *Guide for Engineers and Geologists Submitting Oil and Gas Reports to Canadian Provincial Securities Administrators*, because that instrument has been replaced by NI 51-101 *Standards of Disclosure for Oil and Gas Activities*. No additional filings are required.

4. We eliminated the requirement to file "other mining reports" with the short form prospectus, as those reports are already required to be filed with the preliminary short form prospectus.

5. We removed the requirement to file an auditor's comfort letter regarding unaudited financial statements with the final short form prospectus. CICA Handbook Section 7110 - *Auditor Involvement with Offering Documents of Public and Private Entities* sets out the auditor's professional responsibilities when the auditor is involved with a prospectus or other securities offering document and requires that the auditor perform various procedures prior to consenting to the use of its report or opinion, including reviewing

unaudited financial statements included in the document. Furthermore, the issuer is ultimately responsible for ensuring that the short form prospectus provides full, true and plain disclosure.

6. We added a requirement for the issuer to deliver to the regulators, no later than the filing of a short form prospectus, an undertaking to file the periodic and timely disclosure of certain credit supporters. Although the credit supporter is not, simply by providing the guarantee or alternative credit support, issuing a security, investors will nonetheless need periodic and timely disclosure relating to that credit supporter to make informed investment decisions in the secondary market.

7. We amended the provisions dealing with the language of documents to reflect and clarify current practice.

8. We replaced the prohibition, presently in section 10.6 of Current NI 44-101, against filing a short form prospectus while the issuer is in default of filing any required document under securities legislation, with a qualification requirement that all disclosure filings be up to date, as discussed above.

9. The requirement to make all material contracts available for inspection during the distribution has been eliminated. Material documents are now filed on SEDAR and therefore available for public inspection on a continuous basis.

Part 5 Amendments to a Short Form Prospectus of Proposed NI 44-101 addresses amendments to a short form prospectus, and largely continues the provisions of Part 11 of Current NI 44-101. We clarified the distinction between short form prospectuses and preliminary short form prospectuses for the purpose of that Part. The requirement to file an updated consent letter with an amendment has been revised to be consistent with the changes made to the filing requirements and to clarify that the consent must be dated the same date as the amendment. The provision relating to updated auditor's comfort letters was corrected to refer to the delivery, rather than filing, of a comfort letter.

Part 6, *Non-Fixed Price Offerings and Reduction of Offering Price Under Short Form Prospectus* of Proposed NI 44-101 is unchanged from Part 12 of Current NI 44-101.

Part 13 Circulars of Current NI 44-101 has been removed from Proposed NI 44-101. Part 13 generally provides that certain issuers can include their short form prospectus disclosure in a take-over bid, issuer bid or information circular, to satisfy the disclosure requirements of these circulars. We removed Part 13 because it merely restates what is already permitted under the applicable take-over bid and issuer bid forms when the issuer is entitled to use the short form prospectus system and Form 51-102F5 *Information Circular* permits all issuers to incorporate information by reference.

Part 7 Solicitations of Expressions of Interest of Proposed NI 44-101 provides relief on a national basis from securities legislation so issuers can solicit expressions of interest before filing a preliminary prospectus for a bought deal. It is substantially the same as Part 14 of Current NI 44-101, but extends the period within which the underwriting agreement must require the filing

of a preliminary short form prospectus from two business days to up to four business days. This change attempts to address the recurring situation in which issuers are unable to file a preliminary short form prospectus in time to receive a receipt no later than two business days after the execution of an underwriting agreement. Issuers and underwriters should be able to negotiate an appropriate period (up to a four day period) during which a preliminary prospectus must be filed and receipted. One consequence of this change is to extend the period during which pre-marketing of a bought deal can occur to up to four days. We have also eliminated the distinction between MRRS filings and non-MRRS filings.

Part 8 Exemption of Proposed NI 44-101 sets out the requirements for applications for exemptions and the manner in which the granting of an exemption may be evidenced, and remains substantially unchanged from Part 15 of Current NI 44-101. It has been amended to reflect the ability of the securities regulatory authority in Alberta to grant such exemptions, and to eliminate the transitional provisions relating to NP 47.

Part 9 Effective Date and Transition of Proposed NI 44-101 provides some transitional provisions to assist issuers in determining which version of the instrument to proceed under.

Appendix A has been updated with respect to contact information, the information to be provided for foreign residents, and to comply with new privacy legislation.

Form 44-101F1 ("Proposed Form 1")
Proposed Form 1 is the proposed form for a short form prospectus under the Proposed Rule.

Item 1 Cover Page Disclosure of Proposed Form 1 addresses required cover page disclosure. Several items have been added or moved:

1. We moved the requirement to state that information has been incorporated by reference in the prospectus from Section 12.4 of the Current Form to Section 1.3. This change places the statement on the cover page of the short form prospectus, rather than leaving its placement to the issuer's discretion. We believe that consistency in placement will be useful to readers of the short form prospectus, and reflects developing practice.

2. We moved the requirement, presently in Item 2.1 of the Current Form, to state the full corporate name and address of the issuer, to Item 1.5. This reflects our view that this information should be on the cover page.

3. We deleted certain requirements from Section 1.6 (Section 1.4 of the Current Form) relating to disclosure of securities issued or to be issued to the underwriters. They are now included in the proposed new underwriters' position chart in Section 1.10.

4. Section 1.9 (Section 1.7 of the Current Form) has been amended to require expanded disclosure relating to the implications of the absence of a market for the securities being distributed, where applicable.

5. We amended Section 1.10 (Section 1.8 of the Current Form) to include a chart describing the over-allotment, compensation and other options and securities to be distributed under

the prospectus or otherwise held by the underwriters and professional group. We believe that this chart will provide investors and other prospectus users with plain disclosure, in one central location, about the underwriters' securities compensation and position, most of which is already required to be disclosed in various parts of the Current Form.

6. We added Section 1.12 to require disclosure, in appropriate circumstances, concerning the ability of holders of restricted securities to participate in a takeover bids. This disclosure is consistent with requirements already in place in some jurisdictions.

Item 2 Name of Issuer and Intercorporate Relationships of the Current Form is deleted as it duplicates information now contained in the form of AIF under the applicable CD Rule.

Item 2 Summary Description of Business of Proposed Form 1 requires a summary description of the business, and is unchanged from Item 3 of the Current Form.

Item 3 Consolidated Capitalization of Proposed Form 1 is updated from Item 4 of the Current Form, and refers to financial statements filed under the applicable CD Rule. We have also removed the requirement in the Current Form to include the content of a news release disseminating financial information, as that requirement duplicates a requirement in Item 11 of Proposed Form 1.

Item 4 Use of Proceeds of Proposed Form 1 is updated from Item 5 of the Current Form, and in Subsection 4.2(2) mandates additional disclosure concerning use of proceeds. If more than 10 percent of the net proceeds of the distribution will be used to reduce or retire indebtedness that was incurred within the two preceding years, the issuer must identify the principal purposes for which the proceeds of the indebtedness were used and, if the creditor is an insider, associate or affiliate of the issuer, identify the creditor and the nature of the relationship to the issuer and the outstanding amount owed.

The language of this new requirement is identical to the language of Section 7.7 of Ontario Securities Commission Form 41-501F1 *Information Required in a Prospectus* and section 7.7 of Schedule 1 to Québec Policy Statement Q-28, *General Prospectus Requirements*. This type of disclosure is relevant for investors because making an informed investment decision requires an understanding of the extent to which a significant amount of the offering proceeds will be used to reduce or retire existing debt. It is also important for investors to be provided with details relating to debt that is incurred with a creditor that is an insider, associate or affiliate of the issuer.

The importance of this type of disclosure has come to our attention particularly in the context of income trust offerings, where investors typically make their investment decisions based on the ability of the issuer to provide a consistent stream of distributable cash. The ability of the issuer to generate that consistent stream may be affected by the amount and terms of existing debt, as well as by the extent to which an issuer will need to renegotiate that debt, or put alternate financing arrangements in place after the offering. An investor will be in a better position to make this evaluation if the information requested in Subsection 4.2(2) is provided. Although this issue came to our attention in the context of income trust offerings, we believe that the disclosure

is equally relevant in other offerings, as it will assist investors in all offering scenarios to better evaluate their investment decision.

Item 5 Plan of Distribution is an update of Item 6 of the Current Form and remains substantially unchanged. We have added to the disclosure requirements in respect of an offering with a minimum distribution such that if a minimum amount of funds is required under the issue and the securities are to be distributed on a best efforts basis, the short form prospectus must state that funds received from subscribers before the distribution is complete will be held in trust. If the minimum amount of funds is not raised, the funds will be returned to the subscribers unless the subscribers have given other instructions. We understand this is market practice and this should be disclosed in the short form prospectus. This is consistent with the requirement under long form prospectus offerings.

We have also moved into this item a requirement, presently in Item 8 of the Current Form, to disclose any constraints imposed on ownership of securities of the issuer in relationship to a required level of Canadian ownership.

Item 6 Earnings Coverage Ratios of Proposed Form 1 is amended from Item 7 of the Current Form to reflect the implementation of NI 52-107, to address recent changes to the accounting rules which may require certain debt obligations to be classified as current liabilities, and to clarify the requirements and the transition year expectations where there has been a change in year end.

Item 7 Description of Securities Being Distributed has been updated from Item 8 of the Current Form to harmonize with the CD Rules. In particular, the term "share" has been replaced with "equity security", and the issuer need not duplicate information concerning particular securities that is already included in a document incorporated by reference in the short form prospectus. Section 7.7 has been added to address disclosure concerning "restricted securities". These requirements are already part of the legislation in a number of CSA jurisdictions, and are consistent with provisions contained in NI 51-102. Section 7.9 has been expanded to refer specifically to stability ratings for securities, and is consistent with National Policy 41-201 *Income Trusts and Other Indirect Offerings*. Finally, Section 8.8 of the Current Form, which requires disclosure of constraints imposed on the ownership of securities, has been relocated to Item 5 *Plan of Distribution* as Section 5.9 of Proposed Form 1.

Section 7.6 requires issuers to disclose that a contractual right of action for rescission is available to holders of Special Warrants who receive underlying securities under a short form prospectus. Section 7.6 codifies existing requirements in many jurisdictions.

In *Item 8 Selling Securityholder* of Proposed Form 1, we removed paragraphs 6 and 7 from Section 8.1 (9.1 in the Current Form) because we do not consider them to be material information for an investor or prospective investor.

Item 9 Resource Property of Proposed Form 1 is amended to remove from Section 9.1 reference to the "old" form of AIF (current Form 44-101F1) that is being deleted as part of the amendments.

Item 10 Significant Acquisitions of Proposed Form 1 is amended from Item 11 of the Current Form to reflect the incorporation by reference of previously filed BARs. The requirement under NI 51-102 to file a BAR in respect of a significant acquisition is not accelerated. However, this item requires a summary to be provided of any significant acquisition that was completed within 75 days prior to the date of the short form prospectus and for which a BAR has not been filed, and of certain proposed significant acquisitions that meet an objective test of "highly likely". The issuer is also required to include in the short form prospectus the financial statements that would be required in a BAR if the transaction in question is a reverse takeover, or if the inclusion of the financial statements is necessary in order for the short form prospectus to contain full, true and plain disclosure. The maximum number of years for which historical financial statements must be included in a prospectus for a significant transaction is, accordingly, reduced to two, from the maximum of three years contemplated in the Current Form, consistent with the BAR requirement.

Item 11 Documents Incorporated By Reference is updated from Item 12.1 of the Current Form to provide for the mandatory incorporation by reference of the appropriate CD documents filed under the CD Rules. We also added a requirement in Section 11.1 to incorporate by reference any other disclosure document that the issuer is required to file under an undertaking to securities regulatory authorities. In identifying a gap or potential gap in an issuer's disclosure, either in a prospectus or CD, CSA staff may require the issuer to undertake to file a particular type of disclosure document on a one-time or continuous basis. Issuers are instructed to provide a list of the material change reports and BARs that are incorporated by reference, and a brief description of the subject matter of each report, in the interests of "plain" disclosure.

We added a requirement in Section 11.3 to provide substitute disclosure for issuers who are able to rely on the exemptions in Section 2.9 of Proposed NI 44-101 from the requirement to have a current AIF and current annual financial statements.

We added Section 11.4 to require alternative disclosure by an issuer in respect of a significant acquisition for which no BAR has been required to have been filed because the issuer was not a reporting issuer at the time of the acquisition.

Section 12.3 of the Current Form is deleted and its substantive requirement is addressed in Section 13.1 of Proposed Form 1 (see discussion below). Section 12.4 of the Current Form was moved to the cover page disclosure (Section 1.3). Paragraph 12.1(3) and Sections 12.5, 12.6 and 12.7 of the Current Form are removed. Other developments and amendments have rendered those sections unnecessary or inappropriate.

Item 12 Additional Disclosure for Issues of Guaranteed Securities of Proposed Form 1 requires disclosure about any applicable credit supporter of the securities being distributed, and is based on Section 13.2 of the Current Form. Section 13.1 of the Current Form is deleted because other amendments have rendered it unnecessary.

Item 13 Exemptions for Certain Issues of Guaranteed Securities of Proposed Form 1 is new and provides exemptions from the requirement to include disclosure in a short form prospectus about

both the issuer and any applicable credit supporter. These exemptions are similar to the exemptions from the requirement to provide financial statement disclosure relating to credit supporters under U.S. securities law.[3] The exemptions are based on the principle that, in certain circumstances, investors will either require only issuer disclosure or only credit supporter disclosure to make informed investment decisions.

Item 14 Relationship Between Issuer or Selling Securityholder and Underwriter of Proposed Form 1 is updated to reflect the implementation of National Instrument 33-105 *Underwriting Conflicts*.

Item 15 Experts is amended to exempt auditors of acquired businesses and predecessor auditors in certain instances from the requirement to disclose their interest in the issuer. We have eliminated the requirement that the issuer's auditor disclose its interests in the issuer if the auditor is independent of the issuer and there is disclosure of the independence. We have also clarified who the disclosure requirements relate to.

Item 16 Promoters of Proposed Form 1 is updated to harmonize with the corresponding disclosure requirement in NI 51-102.

In *Item 17 Risk Factors* of Proposed Form 1 we added an instruction to Section 17.1 to recognize that risk factors is now a required disclosure item under Form 51-102F2 (AIF).

Item 18 Other Material Facts is changed slightly to harmonize with other changes.

Item 20 Reconciliation to Canadian GAAP of the Current Form is deleted because these requirements, as well as those presently included in Part 7 of Current NI 44-101, have been superseded by the implementation of NI 52-107 and the new definition in Proposed NI 44-101 of *current financial statements*.

Item 20 Certificates of Proposed Form 1 is updated from Item 21 of the Current Form to correct the language of the certificates in light of the amendments and developments elsewhere. We added Section 20.5 to clarify that the rules concerning the dating of prospectuses applicable to other types of prospectuses apply to short form prospectuses.

The Proposed CP

The Proposed CP provides information relating to interpretation of Proposed NI 44-101 by securities regulatory authorities, and its application. It has been updated to reflect the changes made to the Current Rule, as described above. In some cases, changes have been made to the companion policy to reflect experience with the rules over the past four years.

[3] Rule 3-10 of Regulation S-X.

RELATED AMENDMENTS
We are also proposing consequential amendments to a number of national instruments in conjunction with the implementation of the Proposed Rule to make those instruments consistent with the changes we have proposed to the Current Rule. We are publishing a separate Notice relating to those proposed amendments.

AUTHORITY FOR PROPOSED NATIONAL INSTRUMENT - ONTARIO
The following provisions of the Ontario *Securities Act* (the "Ontario Act") provide the Ontario Securities Commission ("OSC") with authority to adopt the proposed National Instrument and Forms.

Paragraph 143(1)13 of the Ontario Act authorizes the OSC to make rules regulating trading or advising in securities to prevent trading or advising that is fraudulent, manipulative, deceptive or unfairly detrimental to investors.

Paragraph 143(1)16 of the Ontario Act authorizes the OSC to make rules varying the application of the Ontario Act to establish procedures for or requirements in respect of the preparation and filing of preliminary prospectuses and prospectuses and the issuing of receipts therefor that facilitate or expedite the distribution of securities or the issuing of the receipts, including, requirements in respect of distribution of securities by means of a prospectus incorporating other documents by reference and requirements in respect of pricing of distributions of securities after the issuance of a receipt for the prospectus filed in relation thereto.

Paragraph 143(1)20 of the Ontario Act authorizes the OSC to make rules providing for exemptions from the prospectus requirements under the Ontario Act and for the removal of exemptions from those requirements.

Paragraph 143(1)39 of the Ontario Act authorizes the OSC to make rules requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by the Ontario Act, the regulations or the rules and all documents determined by the regulations or the rules to be ancillary to the documents, including preliminary prospectuses and prospectuses, proxies and information circulars and take-over bid circulars, issuer bid circulars and directors' circulars.

ALTERNATIVES CONSIDERED
The purposes of the amendments contemplated by the Proposed Rule are (i) to streamline the short form system, (ii) to eliminate inconsistencies with the CD Rules, and (iii) to expand eligibility into the short form system and thereby create an even more integrated, simplified and less onerous offering system for reporting issuers. One alternative means of achieving these purposes is to leave the Current Rule unamended but to grant exemptive relief on a case by case basis. Given the extent and breadth of the changes contemplated in the Proposed Rule, we believe that amendment of the Current Rule is the optimal way to achieve these purposes.

Another alternative is to create a separate offering system which issuers could access in the alternative to the Current Rule in the manner contemplated in the 2000 Concept Proposal. We focussed on amending and expanding the short form system because we believe that the

continued evolution of the current short form offering regime should be our priority. As discussed above, based on public commentary, we will continue to seek to enhance our prospectus offering regimes, as needed, either through amendments to the short form regime or through the introduction of alternative offering systems.

UNPUBLISHED MATERIALS

In proposing Proposed NI 44-101, Proposed Form 1 and Proposed CP, the CSA have not relied on any significant unpublished study, report or other material.

ANTICIPATED COSTS AND BENEFITS

The CSA expect that the amendments contemplated in the Proposed Rule will further enhance efficiency of accessing capital for short form eligible reporting issuers. Harmonizing the short form system with the CD Rules will eliminate costs of public securities offerings. There will be greater clarity regarding the application of the Proposed Rule and reduced circumstances requiring exemptive relief. To the extent that the amendments require additional disclosure, this disclosure will benefit investors to an extent that the benefit will outweigh the costs of these new requirements.

REQUEST FOR COMMENT ON THE PROPOSED RULE

We request your comments on Proposed 44-101, Proposed Form 1 and the Proposed CP. The comment period expires on April 8, 2005. In addition to any comments you wish to make, we invite comments on the following specific questions:

Proposed Qualification Criteria - Alternative A or Alternative B?

<u>Questions</u>

1. The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out as Alternative B?

Other Aspects of the Proposed Rule

<u>Questions</u>

2. Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market? If not, why not? Please also suggest alternatives to this requirement.

3. Is each of the exemptions in Item 13 of Proposed Form 1 appropriate? If not, why not? Are there any other exemptions we should include? If so, why? Is each of the conditions to the exemptions in Item 13 of Proposed Form 1 necessary to ensure that investors have all the information they need to make informed investment decisions? If not, why not? Are there any other conditions we should include? If so, why?

4. Does Item 15 of Proposed Form 1 accomplish its objective, which is to ensure disclosure of any ownership interests that would be perceived as creating a potential conflict of interest on the part of an expert? If not, what changes should be made to the parameters?

REQUEST FOR COMMENT ON POSSIBLE FURTHER CHANGES IN PROSPECTUS REGULATION

Background - Preliminary Prospectuses and Regulatory Review

On a distribution of securities, the securities legislation in all CSA jurisdictions, unless an exemption applies, requires or provides for:

- the filing of a preliminary prospectus;
- the issuance by the regulator of a receipt for the preliminary prospectus;
- the delivery of the preliminary prospectus to potential investors;
- the review of the preliminary prospectus by the regulator to determine if a receipt will be issued for the final prospectus;
- the filing of the final prospectus and the issuance by the regulator of a receipt therefore;
- the delivery of the final prospectus to the investor before the entering into of an agreement of purchase and sale; and
- a right of withdrawal and rights of rescission and damages in respect of any misrepresentation in the prospectus.

As discussed above, the Proposed Rule is our attempt to integrate the CD Rules with the short form prospectus regime within current statutory parameters. The 2000 Concept Proposal, which was also based on current legislation, also required a preliminary prospectus filing and regulatory review. However, we believe that as issuers and other market participants become more accustomed to the new CD Rules and if other proposed enhancements are adopted, including secondary market liability, our prospectus regime could evolve even further and more profoundly.

We are considering an offering system whereby certain eligible issuers could access public capital based solely on the filing of a final prospectus. This system would not require issuers to file a preliminary prospectus or obtain a receipt for their final prospectus. This system would require simply:

- the filing of the final prospectus without the issuance of any receipt by the regulator;
- the delivery of the final prospectus to a potential investor before entering into an agreement of purchase and sale with an investor; and
- a right of withdrawal and rights of rescission and damages if there is a misrepresentation in the prospectus.

The prospectus would still be required, through incorporation by reference or otherwise, to provide full, true and plain disclosure of all material facts relating to the securities proposed to be distributed and would have to comply with a prescribed form.

Such an offering system would further enhance capital markets by allowing issuers quicker and more certain access to capital without regulatory intervention. This type of offering system could not be implemented under the current securities legislation in some jurisdictions. As a result, some jurisdictions would have to make legislative amendments before this system could be implemented.

<u>Questions</u>

General

5. Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?

Qualification Criteria

6. If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include additional qualification criteria and restrictions, such as the following:

   - a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;
   - a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and
   - a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.

   Do you think these are appropriate?

Marketing Restrictions

As discussed in the attached summary of comments, the Proposed Rule does not include any substantial changes to the current prospectus offering marketing regime. If the CSA moves forward with a prospectus offering system that does not require the use of a preliminary prospectus, and so eliminates the waiting period between preliminary and final prospectuses, we anticipate that we would permit marketing prior to the filing of a final prospectus regardless of whether the transaction was a bought deal. However, because of our concerns about improper use of undisclosed information about an offering, we would not permit marketing until after public disclosure is made that an offering was pending. The current shelf prospectus regime allows an unallocated prospectus to be utilized to distribute equity securities but requires a press release be issued immediately when the issuer forms a reasonable expectation that an equity offering may proceed. We note that the unallocated shelf system is not significantly utilized for equity offerings other than in cross-border or exchange offerings. We also note the concerns raised in comments to question 11 and question 25 of the 2000 Concept Proposal about the potential for premature disclosure of a pending offering.

7. Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by issuers and dealers? If so, should the press release or public notice be required on "the issuer forming a reasonable expectation that an offering will proceed" or on some other event?

HOW TO PROVIDE YOUR COMMENTS

Please provide your comments by April 8, 2005 by addressing your submission to the securities regulatory authorities listed below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

You do not need to deliver your comments to all of the CSA member commissions. Please deliver your comments to the three addresses that follow, and they will be distributed to all other jurisdictions by CSA staff.

Jo-Anne Bund, Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
4th Floor, 300 – 5th Avenue S.W.
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Charlie MacCready, Co-Chair of the CSA's Prospectus Systems Committee
Ontario Securities Commission
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Anne-Marie Beaudoin
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800, square Victoria
C.P. 246, 22e étage
Montréal, Québec H4Z 1G3
Fax: (514) 864-6381
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If you are not sending your comments by e-mail, please send a diskette containing your comments (in DOS or Windows format, preferably Word).

We cannot keep submissions confidential because securities legislation in certain provinces requires that a summary of the written comments received during the comment period be published.

QUESTIONS
Please refer your questions to any of:

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APPENDIX
SUMMARY OF WRITTEN COMMENTS RECEIVED ON THE CONCEPT PROPOSAL FOR AN INTEGRATED DISCLOSURE SYSTEM

Background
On January 28, 2000 the CSA published the 2000 Concept Proposal for comment. The comment period expired on June 1, 2000. The CSA received submissions from the 23 commenters identified in Schedule 1, including three whose submissions were received following the expiry of the comment period.

The questions contained in the Notice to the 2000 Concept Proposal and the CSA responses to the comments are provided below. The CSA responses are in italics. The numbers below correspond to the question numbers in the Notice to the 2000 Concept Proposal.

Generally, our responses to comments reference the proposed changes to Current NI 44-101 that are described in the Notice and Request for Comment (the "Notice") to which this appendix is attached.

A. IDS Eligibility

1. Reporting Issuer in All Jurisdictions

Question
1. Should reporting issuer (or equivalent) status in all CSA jurisdictions be a condition of IDS eligibility? What are the advantages and disadvantages of this approach? Would requiring all-jurisdiction reporting issuer status be a deterrent to IDS participation? If so, why?

Comments
No commenters supported all-jurisdiction reporting issuer status as a condition of IDS eligibility. Seventeen commenters specifically indicated that they opposed this condition.

Their concerns included the following:

- the increased costs of obtaining and maintaining reporting issuer status in all CSA jurisdictions;
- the increased complexity and administrative burden of complying with local reporting issuer requirements in all CSA jurisdictions;
- smaller issuers would be deterred from participating in the system; and
- the possibility of increased translation costs.

Also, seven commenters questioned the need for universal reporting issuer status given that the adoption of SEDAR has resulted in ready access to public documents filed in any one jurisdiction.

Some of the commenters suggested the following alternatives:

- implementing a condition that the issuer be a reporting issuer in any one of four principal jurisdictions: British Columbia, Alberta, Ontario, or Quebec, or in a main jurisdiction;
- amending the condition so that an issuer must be a reporting issuer in at least one Canadian province and file through SEDAR;
- amending the condition so that an issuer must be a reporting issuer only in those jurisdictions in which it distributes securities, but possibly granting the other "non-reporting jurisdictions" the right to "opt-in" to any IDS review undertaken by a jurisdiction, in which an issuer is reporting; and
- permitting an issuer to obtain reporting issuer status in each jurisdiction by filing its last two years of public disclosure documentation previously filed in a "Uniform Act" jurisdiction or in the United States, together with an AIF or a Form 10-K, and not mandating translation in Quebec except in those circumstances where it is currently required.

One commenter, although opposed to the condition, noted that this condition would recognize the reality that physical boundaries cannot contain secondary market activities. However, on balance, the commenter thought that issuers should be able to choose the jurisdictions in which they report without being denied access to IDS.

Response
The reasons for an all-jurisdiction reporting issuer status condition have largely been addressed by the implementation of the CD Rules, which harmonizes CD requirements across all Canadian jurisdictions. Accordingly, the CSA believe that all-jurisdiction reporting issuer status is not a necessary qualification criterion for an expedited offering system. Proposed NI 44-101 eliminates the qualification criterion under Current NI 44-101 to be a reporting issuer or equivalent in each local jurisdiction and replaces it with criteria that an issuer: (1) be a reporting issuer in at least one jurisdiction in Canada; (2) be an electronic filer under National Instrument 13-101 System for Electronic Document Analysis and Retrieval (SEDAR) *("NI 13-101"); and (3) have filed with the securities regulatory authority in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed in that jurisdiction under applicable securities legislation.*

Question

2. Do you agree with the CSA's approach to language requirements under the IDS? If not, why not? Should IDS issuers be obligated to translate all continuous disclosure filings in jurisdictions in which they have previously filed a prospectus (IDS or otherwise) or in which they have a substantial investor base? If so, how would you suggest the CSA define "substantial investor base" for this purpose? Would the imposition of such a requirement be a significant disincentive to IDS participation? Do issuers normally provide investors on a voluntary basis with translated continuous disclosure documents to accommodate their language preferences?

Comments

Two commenters supported the proposal to adopt the approach taken under the short form prospectus system with respect to translation, whereby the prospectus and CD incorporated by reference are filed in the language(s) appropriate to the jurisdictions in which the IDS prospectus is filed.

Five commenters opposed requiring translation of CD, due to the costs.

One commenter suggested that companies should be required to provide translations only when they have a minimum percentage of shareholders being of a language group (French or English) to warrant it.

With respect to the CSA defining "substantial investor base," one commenter believed that because Canadian fund managers, other than mutual fund managers, are not required to identify the companies they have invested in (contrary to the situation in the United States), companies do not know the identity of many of their shareholders.

One commenter recommended, in the event that the CSA determines that a "substantial investor base" test is necessary, the adoption of the test utilized by the SEC in regard to "foreign private issuers," which is that 50% of the beneficial shareholders are resident in the jurisdiction.

One commenter recommended that the requirements to translate CD documents be subject to exemptions depending upon the size of the issuer, the overall size of the offering, or the size of the portion of the offering in the province(s) requiring translation. The commenter was concerned about costs and translation resources of smaller issuers.

One commenter suggested that obligating an IDS issuer to translate all CD filings in jurisdictions in which they have previously filed a prospectus or in which they have a substantial investor base would be a significant disincentive to IDS participation and such decisions should remain at the discretion of the IDS issuer. This commenter argued that many larger issuers and issuers with a substantial investor base voluntarily provide investors with translated CD documents to accommodate their language preferences.

One commenter stated that unless there is a substantial investor base in Quebec, there is little benefit in requiring translation of documentation. If an issuer is not already a

reporting issuer in Quebec, it is unlikely that it will have a substantial investor base there and translation is less important.

Response
The CD Rules now prescribe the language of documents required to be filed under those instruments. Proposed NI 44-101 amends the provisions in Current NI 44-101 dealing with the language of documents to reflect and clarify current practice. Generally, a short form prospectus and any CD documents incorporated by reference must be filed in the language(s) appropriate to the jurisdictions in which the offering is made.

Question
3. Although the proposed IDS would harmonize the continuous disclosure requirements for participating issuers across Canada, differences in other reporting issuer requirements would continue to exist. Would this pose a significant burden on issuers? If so, why?

Comments
Three commenters stated that a significant burden would be placed on participating issuers. The following key points were raised:

- The impact of differences in exemptions, hold periods and required documentation is even more significant in the case of junior issuers because these issuers often suffer from limited financial resources and will therefore be unable to opt into the IDS. This would be counter to the IDS goal of encouraging broad participation.

- Given the added disclosure provided by issuers participating in the IDS, and that this information is available nationally via SEDAR, it would not be prejudicial to amend the current securities legislation and rules to allow hold periods to commence running provided that the issuer is either a reporting issuer in that particular jurisdiction or is an IDS participant. This will encourage IDS participation and improve public disclosure levels without imposing unnecessary additional burdens on issuers.

- The CSA should establish national standard forms for CD, such as a national standard form of information circular or form for disclosure of sales from control persons, as well as a national standard in regard to the timing of filing of such forms, and for the timing of filing of insider reports.

- The CSA should hasten their efforts to harmonize all reporting issuer obligations in all CSA jurisdictions in anticipation of the introduction of the proposed IDS.

- The mere fact that an IDS issuer must comply with the regulatory rules of thirteen individual jurisdictions will be a consideration for potential participants.

One commenter did not believe that issuers currently find the differing CD requirements across Canada to be a significant burden and, in any event, did not see why this would be more of a problem under IDS than at present.

<u>Response</u>
Most of the concerns raised by the commenters have been addressed through the implementation of the CD Rules, which have harmonized the CD requirements for all issuers across Canada. Other concerns have been addressed through the implementation of Multilateral Instrument 45-102 Resale of Securities *("MI 45-102").*

2. "Seasoning" Requirement

<u>Question</u>
4. Should "seasoning" be included as a condition of IDS eligibility? If so, what would be an appropriate seasoning period? Should the imposition of a seasoning requirement be dependent upon an issuer's revenues, assets or market capitalization?

<u>Comments</u>
No commenters supported the inclusion of seasoning as a condition of IDS eligibility. Eight commenters agreed with the CSA proposal not to impose seasoning as a condition.

One commenter agreed that, given advances in information technology and the high disclosure standard under the IDS, there is no significant additional benefit to be derived from imposing seasoning as a condition.

Another commenter stated that one advantage of the IDS is that investors are provided with more timely and complete information about the issuer; this information should be available for all issuers, not only the ones who have been reporting for a prescribed period.

Two commenters mentioned that requiring a fixed time period prior to IDS eligibility provides no certainty that an issuer will become better known in the market as there is no certainty that the issuer will develop an analyst or institutional following.

<u>Response</u>
Alternative A of Proposed NI 44-101 does not substantively change the seasoning qualification criterion under Current NI 44-101.

Alternative B of Proposed NI 44-101 eliminates seasoning as a qualification criterion. The Notice includes general questions relating to Alternative B.

<u>Question</u>
5. Are there any advantages or disadvantages of a seasoning requirement not discussed above?

<u>Comments</u>
One commenter suggested that an advantage could potentially be created in the area of due diligence. A seasoning period in which the issuer proves its ability to release timely, accurate information may increase the comfort level of underwriters and professional

advisors. Despite this, however, the commenter felt that seasoning should not be imposed as an IDS eligibility criterion.

Response
Please see the response to question 4 above.

3. Quantitative (Size) Requirement

Question
6. Should the IDS impose quantitative IDS eligibility criteria? If so, what should these criteria be, and why?

Comments
No commenters were in favour of imposing quantitative eligibility criteria. Ten commenters supported the CSA proposal not to impose any quantitative eligibility criteria in IDS.

One commenter stated that imposing quantitative eligibility criteria would present problems with respect to compliance and monitoring for junior resource issuers whose business is characterized by changes in asset positions based on periodic acquisitions and dispositions of property, as well as changes in commodity prices. In general, this commenter stated, it is very important that information about junior issuers be available to the public.

The same commenter suggested that, in lieu of a size test, courses regarding CD obligations be available to educate smaller issuers regarding the standard of CD which is expected.

One commenter stated that smaller issuers have much more incentive to participate in IDS than a prompt offering qualification system ("POP") issuer because the relative advantage is greater.

Response
Alternative A of Proposed NI 44-101 does not substantively change the quantitative qualification criterion under Current NI 44-101.

Alternative B of Proposed NI 44-101 eliminates size as a qualification criterion. The Notice includes general questions relating to Alternative B.

Question
7. Do larger issuers provide a higher quality of disclosure than smaller ones? Please explain.

Comments
Four commenters stated that larger issuers generally do have a higher quality of disclosure. Reasons given were that larger issuers tend to have more experienced and qualified accounting departments, tend to be followed by financial analysts, have greater

resources and may be required to meet higher standards by sophisticated investors. One of these commenters cited a Toronto Stock Exchange ("TSX") survey supporting this position and said that the quality of disclosure may be improved by imposing higher standards. Another commenter cited a Canadian Investor Relations Institute member survey suggesting that larger issuers have superior disclosure standards and submitted a Survey Report as an appendix to its comments. One of the commenters did not believe that the smaller issuers are incapable of compliance, particularly if measures are taken to harmonize the rules nationally and rationalize filing fees. This commenter added that issuers under the IDS will have an incentive to maintain a strong and up-to-date disclosure base in order to be in position to act quickly on capital market opportunities.

One commenter stated that issuer size is one of a number of factors affecting the quality of issuer disclosure. Other factors include issuers' financial and human resources and reliance on capital markets to meet ongoing financing needs. The quality of issuer disclosure does not correspond directly to issuer size.

Another commenter suggested that disclosure for smaller issuers might in fact be superior to that of larger issuers, simply because all relevant details about a smaller issuer are much easier to provide than for a larger issuer. For example, in the natural resources sector, an issuer's asset base might well consist of a single, or relatively few, mines, projects or properties.

Response
We acknowledge the comments received and have considered them in developing Alternative B of Proposed NI 44-101.

Question
8. Do you believe that the "analyst following" argument is relevant in today's markets? Please explain.

Comments
Two commenters indicated that analyst following is important. One of these commenters remarked that it will become even more critical in the future as securities regulations move away from requirements for physical delivery of documents. The second commenter stated that analyst reports offer comparative industry analysis which is not available as part of an IDS issuer's disclosure base and can provide a useful "filter" of the vast amount of information available in respect of an issuer.

Another commenter stated that, while analyst following may encourage issuers to maintain and improve their disclosure, the analyst following argument should not lead to size restrictions on IDS eligibility.

Another commenter indicated that there is some logic to the analyst following argument since empirical studies carried out in the United States indicate that the two most important factors in creating an efficient market for an issuer's securities are the number of analysts following the issuer and the liquidity of the issuer's securities. However,

analyst following is not necessarily related to market capitalization or size. There is also a correlation between the type of industry and the number of analysts following an issuer.

Another commenter stated that, since only about 1,000 of about 3,500 listed companies in Canada have an analyst following them, if an analyst-following quantitative IDS eligibility standard were used, about two-thirds of listed companies would be ineligible; the same fraction of the listed company population that would benefit most from initiatives to foster better disclosure practices.

One commenter suggested that investors are increasingly directly seeking and analyzing information themselves rather than relying on analysts. Some market participants have expressed concern that analysts are not always objective and are often not providing timely information. This commenter submitted that the IDS could be viewed as an alternative to or an improvement upon analyst following, minimizing the necessity of analyst following so that it should not be used as an eligibility requirement for IDS participation.

Response

We believe that the presence or absence of analyst following should not influence policy development given advances in information technology that facilitate widespread and timely dissemination of CD to investors.

B. IDS Continuous Disclosure

Question

9. Are there any disclosure items that should, or should not be, included in the proposed IDS AIF or QIF?

Comments

One commenter generally supported the upgrading of the disclosure requirements of reporting issuers and the proposed modifications to the AIF. This commenter also generally supported the requirement to file a quarterly information form (the "QIF"). However, this commenter also noted that the QIF requirement for a reconciliation to Canadian generally accepted accounting principles ("GAAP") would be more onerous than the current SEC requirements and recommended that the proposed reconciliation requirement be dropped.

Two other commenters were also of the view that the reconciliation of interim financial statements to Canadian GAAP should not be required. One of these commenters said that the reconciliation of annual financial statements to Canadian GAAP and GAAS is adequate to meet the needs of Canadian investors. The other opined that reconciliation of interim financial statements to Canadian GAAP is of limited use to investors and represents a substantial cost to issuers, as well as being more onerous than the U.S. requirements for foreign private issuers.

Another commenter supported the requirement for reconciliation to Canadian GAAP.

One commenter was not in favour of an MD&A or an ongoing update of supplementary information forms ("SIFs") in the quarterlies, since this constitutes a significant increase in administrative time and cost and involvement of internal and external accountants and lawyers. This ultimately hinders the involvement and thoughts of management on important information to be given to the public.

One commenter suggested that the IDS AIF and QIF should include items that are relevant to junior issuers, and emphasized that the System for Shorter Hold Periods for Issuers Filing an AIF (the "SHAIF System") and the accompanying AIF form do not. This commenter recommended that the following items be included:

- disclosure requirements in relation to available funds and proposed use of funds;
- disclosure of milestones or significant events required to accomplish the business objectives of the issuer together with a comparison of performance with previously stated milestones;
- risk factor disclosure, such as reliance on a limited number of customers or suppliers, reliance on key employees, environmental, economic or political conditions, significant competition and illiquidity or instability in the trading of the issuer's securities;
- disclosure in relation to any current relationships or relationships within the last 12 months between the issuer and any investment dealer or registrant and any investor relations consultant or market maker;
- summary tabular disclosure of the number and type of securities outstanding at the end of the last fiscal year and all sales of securities outstanding at the end of the most recent fiscal year; and
- disclosure of securities outstanding that are subject to resale restrictions, including hold periods, escrow and pooling arrangements.

<u>Response</u>
The AIF and MD&A content requirements are now prescribed in the CD Rules. Neither the CD Rules nor Proposed NI 44-101 require QIFs. However, the CD Rules do impose certain interim reporting requirements.

Under NI 51-102, all non-investment fund reporting issuers are required to file interim and annual MD&A, and non-investment fund/non-venture issuers are required to file an AIF. The AIF requirements in NI 51-102 have been upgraded from the requirements of Form 44-101F1 AIF, and include disclosure of risk factors and escrowed securities. Also, disclosure of outstanding share data is required in MD&A under NI 51-102.

Under NI 81-106, investment funds are required to file AIFs and Management Reports of Fund Performance. The AIF requirements of NI 81-106 have been drawn from the

requirements of Form 44-101F1 AIF and adapted to address disclosure issues appropriate to investment funds.

Canadian GAAP reconciliation requirements are now prescribed in NI 52-107.

The SHAIF System has been revoked and replaced by MI 45-102.

Question

10. Are there any other continuous disclosure enhancements that should be included as part of the IDS? If so, should these enhancements be extended to all issuers?

Comments

One commenter suggested that, if a restructuring is in progress, each QIF filed prior to completion of the restructuring activities should contain current period, year-to-date and cumulative analyses of exit costs, impairment provisions, other costs relating to restructuring, and remaining accruals.

One commenter stated that aside from the adoption of standard national forms, the proposed CD enhancements in the IDS system are adequate. This commenter stated that these enhancements should not be extended to all issuers until the pilot period has expired and the effects on issuers who have chosen to participate have been ascertained.

Another commenter recommended that the CSA carefully monitor whether the IDS leads to enhanced disclosure in Canada's capital markets during the proposed pilot period and beyond.

Response

Most of the CD enhancements proposed in the 2000 Concept Proposal are now required under the CD Rules, Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings *("MI 52-109") where applicable, and the Audit Committee Rule where applicable. These instruments apply to all reporting issuers, subject to certain exemptions. With respect to the comment on restructurings, NI 51-102 requires disclosure (including financial statement disclosure) of business acquisitions. Also, if a restructuring involves securities being changed, exchanged, issued or distributed, Form 51-102F5* Information Circular *requires the same disclosure as required in a prospectus (including financial statement disclosure).*

Question

11. Are there any specified events that should, or should not, trigger the filing of an SIF?

Comments

Three commenters suggested the following additional events should trigger the filing of an SIF:

- restructuring, debt defaults, substantial modifications of debt agreements, violations of debt covenants, issuance of securities or options to acquire securities via private placements or other prospectus exemptions, events that raise questions as to the ability of the issuer to continue as a going concern; and

- listing of an issuer on an exchange or market or the quotation or trading by an issuer in a particular market, including the NASD OTC Bulletin Board or the NQB Pink Sheets; the suspension, delisting, or removal of quotation of an issuer from such market.

One commenter stated that some of the events listed would fall within the definition of "material information" under National Policy Statement 40 *Timely Disclosure* and the timely disclosure requirements of the TSX, both of which require issuers to send press releases about material information. This commenter added that the extent of an issuer's operations, the maturity of an issuer, the size of an issuer's balance sheet and other factors are important in assessing the value of filing a SIF to disclose many of the events listed in the IDS proposal.

Five commenters offered the following suggestions as to which events should *not* trigger the filing of an SIF:

- a probable prospectus offering or business combination, since the thresholds of "reasonable expectation" and "probable" are ambiguous and because, in many cases the disclosure may be premature, or may jeopardize negotiations with the target; premature announcement of an offering may also affect the reputation of the issuer; announcement should be deferred until an agreement in principle is struck;

- change in an issuer's chairperson; and

- the imposition of a penalty by a Canadian securities regulatory authority (at a minimum there should be a de minimis exception to the SIF filing requirement for penalties of this nature).

Four commenters recommended that triggering events for filing an SIF be restricted to those events which constitute a "material change" in respect of the issuer. One of these commenters noted that, by introducing a prescribed list of triggering events, the IDS may lead to unnecessary expense for issuers and create "noise" in the marketplace by requiring the public dissemination of non-material information.

One commenter said that they found no good reason to depart from the current materiality standard and had concerns with "probable" acquisition or disposition standard.

One commenter asked whether these could be tied into the material change requirement to make it just one issue for companies to deal with.

One commenter suggested that the SIF should be excluded and made part of the QIF. They stated that if the SIF is not going to replace the material change report, it's a duplication of filing.

One commenter stated that this is an enforcement problem that cannot be solved by forcing issuers to make "too fine" or "too early" a judgment, particularly in the context of business combinations and dispositions of assets or a business.

One commenter stated that it is imperative that a clear, more definitive explanation of what constitutes materiality be developed, and recommended that the definition adopted by the U.S. Supreme Court in TSC Industries Inc. v. Northway Inc. be utilized. Specifically, the commenter recommends that the definition include a change in the business, operations, capital assets or affairs of the issuer that, when considered in the total mix of the information made available, would be important to a reasonable investor in making an investment decision. According to this commenter, the concept of materiality should not, as the definition in most Canadian securities legislation currently does, encompass information that in effect results in change when that change was not reasonably foreseeable. Two commenters supported the immediate introduction of the SIF.

One commenter indicated that press releases are a quicker, more effective way of disseminating information to the public and are required under the TSX rules for disclosure of material information.

Response
The CD Rules do not require SIFs, but do require reporting issuers to file a news release and a material change report if a material change occurs in their affairs. Guidance concerning what constitutes a material change may now be found in National Policy 51-201 Disclosure Standards*.*

We believe the definition of "material change" and requirements to issue news releases are addressed in the CD Rules or though other CD requirements. Our goal is simply to integrate the short form offering regime with our CD regime. Proposed Form 1 requires an issuer to incorporate by reference into a short form prospectus all material change reports since the end of the financial year in respect of which the issuer's current AIF is filed. Proposed Form 1, like other prospectus forms, requires that a short form prospectus contain full, true and plain disclosure of all material facts relating to, and in Quebec not to make any misrepresentation likely to affect the value or market price of, the securities to be distributed. We have not included in Proposed NI 44-101 a separate requirement for SIFs because imposing disclosure requirements beyond the material change disclosure obligations imposed under the CD Rules would be inconsistent with our objective of creating a seamless, integrated and expedited offering system that is harmonized with the requirements of the new CD regime.

<u>Question</u>

12. As an alternative to requiring the filing of an SIF for changes in an IDS issuer's name and auditor as outlined in Part III.C.1(a)(iii) of the Concept Proposal, should an IDS issuer's SEDAR profile (which could include such information) be included in its IDS disclosure base? Given that an issuer's SEDAR profile is a changing document, an IDS issuer would disclose these changes by filing an amended copy of its SEDAR profile under cover of an SIF.

<u>Comments</u>

One commenter said that an SIF with an amended SEDAR profile is adequate for a change in name. This commenter, however, did not think this approach would suffice for a change in auditor. This commenter anticipated that proposed National Instrument 52-103 *Change of Auditor* ("Proposed NI 52-103") would carry forward the disclosure requirements of National Policy Statement 31 *Change of Auditor of a Reporting Issuer*.

One commenter said that the issuer should be given a choice whether to file a SIF disclosing its change of name or auditor and an amended SEDAR profile under cover of a SIF.

One commenter supported including an issuer's SEDAR profile in its IDS disclosure base and commented that such inclusion would be a practical way to update changes in corporate information and increase the reliability of issuers' SEDAR profiles.

One commenter supported this method for disclosure of changes to an issuer's name and auditor, but stressed that if the SEDAR profile is to become part of an IDS issuer's disclosure base generally, the contents of the profile should be examined to ensure that no unintended consequences result.

<u>Response</u>

An issuer's SEDAR profile is not part of its CD base under the CD Rules and the CSA have concluded that it is not appropriate to incorporate it by reference into a short form prospectus. Nevertheless, we remind issuers of their obligations under NI 13-101 to promptly amend their SEDAR profiles and under National Instrument 55-102 System for Electronic Disclosure by Insiders (SEDI) *to amend their SEDI profiles when there is a change in the information provided. The CSA acknowledge the general comment concerning the reliability of issuers' SEDAR profiles. We have undertaken some steps, and may consider other regulatory action, to ensure compliance with the requirements of NI 13-101.*

Proposed NI 52-103 has been superseded; change of auditor requirements are now set out in the CD Rules.

<u>Question</u>

13. The CSA propose to require IDS issuers to file SIFs containing prospectus-level disclosure about all completed business combinations within 75 days. Is the 75 day deadline appropriate? Are there business combinations for which the 75 day deadline or the prospectus-level disclosure requirement cannot be met?

<u>Comments</u>
One commenter stated that, based largely on experience with similar Form 8-K filing requirements in the United States, the 75 day time period seems sufficient.

One commenter supported the proposal, but only for pro forma financial information concerning the completed business acquisition; any higher standard of disclosure in such a short time period could impose an undue and unjustified burden on the issuer.

One commenter supported the 75 day deadline but stated that the CSA should grant relief upon reasonable requests by IDS issuers requiring additional time to prepare such disclosure.

One commenter suggested that the 75 day deadline may be too short for significant transactions involving certain business combinations, and would likely be problematic where transactions involve foreign issuers.

Two commenters expressed that the requirement for a post-closing SIF is unnecessary, since the issuer will almost certainly prepare and file a QIF for a fiscal quarter which ends during the 75 day period. The current standard that only material changes should be made mandatory for all reporting issuers should be maintained to avoid redundancy and confusion.

<u>Response</u>
NI 51-102 now requires disclosure of significant acquisitions in a BAR, not a SIF. The time period for filing a BAR is 75 days after the date of acquisition. The CSA agree with the commenters who suggested the 75 day period for filing a BAR is appropriate and will be sufficient in most circumstances. Also, the 75 day filing period represents a further move toward harmonization of Canadian and U.S. requirements.

Proposed Form 1 does not specifically require an issuer to incorporate a BAR by reference in respect of significant acquisitions completed within 75 days prior to the date of the short form prospectus, unless the issuer has already filed a BAR in respect of the acquisition. Proposed Form 1 also does not require an issuer to incorporate a BAR by reference for probable significant acquisitions. However, the issuer must include a summary of these significant acquisitions or probable significant acquisitions in the short form prospectus. The issuer must also include applicable financial statements if the acquisition or proposed acquisition is a reverse takeover or if inclusion is necessary to ensure the short form prospectus contains full, true and plain disclosure of all material facts relating to, and in Quebec, disclosure of all material facts likely to affect the value or the market price of, the securities being distributed. The CSA generally presume that issuers must include financial statements to satisfy these disclosure standards if any of the significance tests set out in NI 51-102 is satisfied at the 40% level.

<u>Question</u>
14. The CSA believe that IDS AIFs and QIFs should be delivered to investors in compliance with existing statutory requirements. As discussed in Part III.E of the Concept Proposal, the CSA would permit the delivery of all IDS disclosure

documents by electronic means in accordance with the principles set out in National Policy 11-201 *Delivery of Documents by Electronic Means*. Should alternative methods of delivery of IDS AIFs and QIFs be permitted under the IDS? If so, which methods would you suggest?

Comments

Five commenters supported the continued advancement of delivery by electronic means. The following suggestions were made:

- Hard copies should also be available upon request, even to those who have consented to receive or access documents through electronic means.

- This permitted means of delivery should be extended to the posting of the documents on the company's website provided that the documents are also available on SEDAR, and provided that the shareholders obtaining delivery in this manner have specifically agreed to accept delivery in such form.

- National Policy 11-201 *Delivery of Documents by Electronic Means* ("NP 11-201") should be drafted broadly enough to permit new delivery means as they evolve.

Two commenters expressed a belief that a good portion of the financial statements and reports mailed to shareholders go directly to the waste basket. One of these commenters also suggested that issuers should only be required to mail each year to each registered and beneficial shareholder a communication, together with a stamped and addressed return envelope, by which the shareholder can request to be sent the relevant disclosure materials.

Another commenter, with respect to delivery mechanisms, strongly supported all efforts to add flexibility and to allow procedures to adapt to new technologies provided they do not compromise investor protection.

Response

NI 51-102 requires issuers other than investment funds to file quarterly financial statements and MD&A rather than QIFs. Similarly, proposed NI 81-106 will require investment funds to file interim financial statements and a Management Report on Fund Performance. These documents only have to be delivered if securityholders request them. The CD Rules require all issuers to file an AIF but do not require delivery to securityholders. Electronic delivery of CD documents is permitted under NP 11-201, subject to certain conditions.

Question

15. The CSA propose to require that interim financial statements filed as part of an issuer's continuous disclosure record have been reviewed by the issuer's audit committee and approved by the issuer's board of directors or equivalent. The CSA are also considering requiring that interim financial statements have been

> reviewed by an auditor, as required in the United States. Would such a requirement be appropriate? If not, why not?

Comments

Three commenters supported the proposed requirements for audit committee review and board director approval of interim financial statements prior to the release of any interim financial information. The following reasons were given:

- This will ensure that timely attention is given to the accounting and disclosure issues related to high profile events and transactions and reduce the need for significant "fourth quarter" adjustments arising from the annual audit.
- The competitiveness of Canadian capital markets is enhanced by raising Canadian CD standards to U.S. levels.

Three commenters expressed concern over the requirement that financial statements be both reviewed by the audit committee or equivalent and approved by the board of directors. Factors considered were the added cost of requiring board approval, the difficulties associated with scheduling another meeting, the significant risk that companies would be unable to meet the proposed abbreviated reporting deadlines, the fact that unaudited (reviewed) statements are permitted with a prospectus, and the appearance of duplication of effort. Two of these commenters recommended limiting the requirement to a requirement for either audit committee or board review and approval. One commenter said that the 45 day period to provide interim financial statements may be too short, especially if an auditor is to be involved and must provide a comment letter.

Five commenters opposed mandatory auditor review of interims. All of these cited the cost involved and two argued that auditor involvement should be left to the discretion of the board. One commenter was particularly concerned about the additional cost burden for smaller companies. Another commenter stated that unaudited statements are permitted with a prospectus and that the standards for IDS should be no higher.

Four commenters supported mandatory auditor review of interims. These commenters noted that the capital markets have demonstrated a significant sensitivity to interim reporting, that auditor involvement in interims would help the issuer anticipate year-end accounting and reporting problems and avoid unnecessary adjustments in subsequent reporting periods, and that the competitiveness of Canadian capital markets is enhanced by raising the Canadian CD standards to U.S. levels.

However, although they supported the auditor review requirement, two of these commenters expressed concern that retail investors do not understand that a review provides a significantly lower level of assurance than an audit, and suggested the following:

- The QIF should contain a disclaimer advising that a review is not an audit.

- The CSA should adopt the practice used with prospectuses, where a comfort letter is filed with regulators and the review engagement report is not publicly reported or filed.

Response
The CD Rules now require that an issuer's board of directors approve its interim financial statements, though approval may be delegated to the audit committee. The CD Rules also require that an issuer disclose if its auditor has not reviewed its interim financial statements. Where applicable, the Audit Committee Rule now requires audit committee review of interim financial statements.

1. Certification

Question
16. Would the proposed certification requirements materially affect the extent to which signatories participate in the preparation of IDS continuous disclosure documents? Are there practical impediments to the certification of such documents?

Comments
One commenter stated that the proposed certification requirement would have a positive impact on the disclosure process.

One commenter did not believe that the proposed certification requirements would materially affect the extent to which signatories participate in the preparation of CD documents. In particular, this commenter thought that smaller issuers would gladly accept the requirements to provide enhanced disclosure and to certify the disclosure if, as a result, such issuers were able to participate in IDS.

One commenter strongly opposed the introduction of a certification requirement, since it raises the possibility of liability for secondary market disclosure, without any consideration being given to when such liability should actually be incurred, by whom, to whom, in what amount, and the defences which would be available. Six commenters questioned how the certification requirements would interact with the civil remedies proposal. One of these commenters said that the certificate requirement creates an undue burden on officers and directors to perform sufficient due diligence within the proposed shortened time frame. One commenter questioned whether the certification of each SIF was necessary, while commenting that certification of the QIF and the AIF would likely enhance the accuracy and quality of disclosure. Two others suggested deferring any requirement for certification until the civil remedies proposal was finalized. One commenter said that, assuming the requirements for audit committee review and board of director approval of interim financial statements are adopted, that a certified statement by a senior officer of the company stating that this review and approval have been done would be sufficient "certification."

<u>Response</u>

Although the CD Rules do not impose any certification requirement, MI 52-109, where applicable, does. It requires the chief executive officer or person who performs similar functions (the "CEO") and the chief financial officer or person who performs similar functions (the "CFO") of all issuers to certify the issuer's annual and interim filings, subject to certain exemptions.

<u>Question</u>

17. Is the "full, true and plain disclosure of all material facts" standard of disclosure attainable on a timely basis in connection with IDS continuous disclosure filings? If not, why not? What alternative disclosure standard would be appropriate given the objectives of the integrated disclosure system? Would an alternative misrepresentation standard be more appropriate for some continuous disclosure documents (i.e. "The foregoing does not make a statement that, in a material respect and in the light of the circumstances is misleading or untrue and does not omit a fact that is required to be stated or that is necessary to make the foregoing not misleading")?

<u>Comments</u>

Five commenters had difficulty seeing under IDS how the sum of the various documents placed on the public record would at all times measure up to a "full, true and plain" disclosure standard. The following points were raised:

- CD filings under the existing short form prospectus system already fall short of this standard (due to intense time pressures and lack of rigorous CD requirements).

- Imposing a "full, true and plain" disclosure standard on all CD filings would place a significant burden on the existing reporting processes of companies.

- This standard is particularly onerous for ongoing CD, particularly in relation to SIFs and probably not practically possible. If imposed, issuers will likely be spending a disproportionate amount of time preparing and verifying documents without a commensurate regulatory purpose being served.

- In the past, the CSA have indicated that they are considering imposing civil liability in connection with an issuer's CD. In conjunction with the proposed AIF, QIF and SIF requirements under the IDS, one must consider the likelihood of honest oversights or delays in the recognition and reporting of significant developments. In this context, it is questionable whether "full, true and plain disclosure of all material facts" is a realistic standard.

- This standard of disclosure is too onerous for SIFs unless the certification is limited to the SIF itself. It is not realistic to force issuers to consider whether a "full, true and plain" disclosure standard is met on a day-to-day basis. The alternative "no misrepresentation" standard would be more appropriate for the filing and certification of all interim documents such as an SIF.

Eight commenters suggested that since neither the SIF nor the QIF will by its nature contain prospectus level disclosure, a "full, true and plain" certification requirement would not be appropriate for these forms. Two of these commenters stated that the proposed alternative "no misrepresentation" standard would be appropriate for both SIFs and QIFs, while four of these commenters suggested variations to the "no misrepresentation" certificate, as follows:

- One commenter proposed that, although a "no misrepresentation" certificate would be appropriate for a QIF, since the SIF is required to be filed at times when an issuer may not have full information, the certification standard for SIFs should be lower. The commenter suggested that SIFs be certified as follows: "The Issuer believes the information in this form to be accurate and has no reason to believe that there are material facts relating to this information which have been omitted."

- One commenter suggested using the following form of certificate for QIFs: "The contents of this QIF have been reviewed by the Company's audit committee and have been approved for release by the Company's board of directors."

- One commenter suggested that the proposed "no misrepresentation" standard be prefaced by the following phrase: "To the best of our knowledge and belief."

- One commenter indicated that the proposed "no misrepresentation" standard should be extended solely to misrepresentations of material facts and applied only in the context of the issuer's CD base. This commenter proposed the following alternative "no misrepresentation" standard to address their concerns: "The foregoing when read with the issuer's CD base does not make an untrue statement of a material fact relating to securities of the issuer and does not omit a material fact that is required to be stated or that is necessary to make a statement not misleading in a material respect and at the time and in the light of the circumstances in which it is made."

One commenter stated that the misrepresentation standard would be appropriate for documents such as SIFs.

One commenter stated that when a prospectus offering is conducted, the certificate page required in connection with the prospectus will require the issuer to verify the previously disclosed information to prospectus standards and will ensure that the standards of disclosure as compared to the current regime are not impaired.

One commenter stated that the requirement for each annual and quarterly disclosure filed to meet prospectus standards of completeness, accuracy, quality and regulatory scrutiny may simply add cost and inefficiency to the system.

Response

The CD Rules do not impose a "full, true and plain disclosure of all material facts" standard for CD documents, for many of the reasons given by the commenters. However,

a short form prospectus, when combined with CD documents incorporated by reference must give "full, true and plain disclosure of all material facts". Most of the comments received relate specifically to QIFs and SIFs. Neither the CD Rules nor Proposed NI 44-101 require QIFs or SIFs. Please see our responses to questions 9 and 11 above

Where applicable, MI 52-109 now requires the CEOs and CFOs of all issuers to certify that the issuer's annual or interim filing, as applicable, does not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of circumstances under which it was made, with respect to the period covered by the annual or interim filing, subject to certain exemptions. Where applicable, MI 52-109 also requires the CEOs and CFOs of all issuers to certify that, based on their knowledge, the annual or interim financial statements, as applicable, together with the other financial information included in the annual or interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the annual or interim filings, subject to certain exemptions.

2. Involvement of Advisors in Continuous Disclosure

Question

18. Is it realistic to expect that advisors will become more involved in continuous disclosure in order to address increased time pressure at the time of an IDS prospectus? Alternatively, will the expedited offering process result in a deterioration of the due diligence conducted by advisors in respect of information incorporated by reference in a prospectus? If so, how would this affect the ability of underwriters to certify the prospectus?

Comments

Four commenters suggested it would be unreasonable to expect that advisors will become significantly involved in CD to avoid having a deterioration in due diligence as a consequence of the expedited offering process under IDS. Two commenters cited a perceived deterioration of due diligence under the POP system to support their contention, while the other two commenters suggested that introducing civil liability for CD would be needed to increase advisor involvement in these filings.

One commenter said that it is unclear whether the IDS contemplates that securities might be offered without the involvement of an underwriter or other intermediary. This commenter said that this would almost certainly have a negative impact on the quality of offering documents in that it might eliminate two levels of due diligence – that performed by an underwriter or agent and that performed by the underwriter's legal counsel.

One commenter suggested that the CSA identify those practices which would constitute competent due diligence to assist underwriters in carrying out due diligence and managing the task effectively under the expedited IDS offering timetable. The commenter referred to the list of specified procedures included by the SEC in the "aircraft carrier" proposal, as follows:

- review of the [registration statement] and reasonable inquiry into any fact or circumstance that would cause a reasonable person to question the contents;
- discussion with management (including, at a minimum the chief financial and accounting officers) and receipt of certification as to compliance from those officers;
- receipt of a "comfort letter";
- receipt of a favourable opinion from issuer's counsel;
- receipt of a favourable opinion from underwriters' counsel; and
- employment of and consultation with an appropriately experienced and informed research analyst.

This commenter also proposed that underwriters should not be held to the standard of "full, true and plain" disclosure of all material facts as is the case for senior officers and directors of the issuer, but instead proposed the following alternate certification: "[T]o the best of the underwriter's knowledge, the underwriter is unaware of any misstatement of a material fact relating to the securities offered hereby in the prospectus or disclosure documents incorporated by reference."

One commenter said that the enhanced disclosure standard will likely require greater involvement of professional advisers than is currently the case, but that this may only be an added cost and inefficiency to the system.

Another commenter disagreed that an "aircraft carrier" style list of due diligence procedures should be produced by the CSA, stating that this is an area in which it makes more sense to let the industry deal with the practicalities of due diligence rather than try to deal with this through regulation. The commenter believed that, what was then proposed Regulation FD in the United States, simply states what is the current law in Ontario in the case of intentional disclosures and what is the current practice in the case of non-intentional disclosures.

Response

The CD Rules, MI 52-109 where applicable, and MI 52-110 where applicable, together with proposals to introduce secondary market civil liability, represent a fundamental shift in regulatory focus from primary to secondary market disclosure. The CSA believe that their combined effect will encourage issuers to seek the counsel of their advisors when preparing their CD. We also believe that by expanding the expedited offering procedures under Proposed NI 44-101 to more issuers, more issuers will seek increased involvement by underwriters, as well as other advisors, in their CD to ensure that they will be able to access the market as quickly as possible.

The CSA believe that we should not prescribe due diligence practices. What constitutes appropriate due diligence in any particular case will depend on the specific

circumstances at the time and with respect to the individual issuer. The professionals involved in the conduct of due diligence are best able to make such decisions.

C. IDS Prospectuses

1. Delivery of the Preliminary IDS Prospectus

Question

19. Do preliminary and final prospectuses assist investors in making their investment decisions and is it relied upon for this purpose today? If not, on what basis are investors in the primary market currently making their investment decisions?

Comments

Four commenters suggested that most recipients of these documents at best give them a cursory reading, and that investment professionals, including financial analysts and brokers, are the prime users.

Four commenters stated that retail investors typically rely on their brokers in making investment decisions, rather than on the prospectus. Another commenter asserted that, although the preliminary prospectus continues to serve an important function in investors' decision-making process, the final prospectus adds little additional value for primary market investors as it is delivered after the investment decision has been made.

Response

The CSA note the commenters' views that the preliminary and final prospectuses may only be given a cursory reading by some investors. Nevertheless, our securities legislation continues to require preliminary and final prospectuses. We believe that, in a non-exempt offering, a final prospectus with full, true and plain disclosure of all material facts relating to, and, in Québec, not making any misrepresentation likely to affect the value or market price of, the securities to be distributed, and from which purchasers' rights of withdrawal, rescission and damages flow, is an appropriate regulatory requirement.

In the Notice, we have asked your views on whether we should seek legislative change in order to eliminate the preliminary prospectus, prospectus receipts and prospectus review.

Question

20. As discussed in Part III.D.4(a) of the Concept Proposal, the CSA considered specifying the timing of delivery of the preliminary IDS prospectus to ensure that a prescribed minimum period of time would be available to an investor before an investment decision becomes binding. Would a prescribed minimum preliminary IDS prospectus delivery period (for example, a specified number of days before pricing or the signing of a subscription agreement) be suitable for all investors and all situations? If so, what would be an appropriate period of time? If not, why not?

<u>Comments</u>
Several commenters did not believe that a prescribed minimum preliminary prospectus delivery period would be suitable for all investors and all situations. Comments were as follows:

- Investors are not concerned about lack of time to review a prospectus: The timing should be geared to the needs of the investment community.

- The prescribed waiting period triggered off the delivery of the preliminary prospectus would be administratively difficult to manage and would not provide additional investor protection provided the rights of rescission and withdrawal are retained upon delivery of the final prospectus.

- The time required to evaluate the purchase of a security depends largely on the nature of the offering. The commenter was of the view that the prospectus delivery period will be driven largely by marketing considerations and that market forces, together with the statutory rescission period, offer investors sufficient protection.

- A prescribed minimum preliminary IDS prospectus delivery period would unduly interfere with the distribution process. In particular, it would be impractical to either exclude investors identified as "late" in the distribution process or, alternatively, stop the process to allow newly identified investors to "catch up." Further, the availability of the preliminary prospectus on SEDAR would provide investors with ready access to this document.

<u>Response</u>
The CSA do not believe a minimum delivery period for a preliminary short form prospectus is necessary. Under Proposed NI 44-101, as with Current NI 44-101, the implementing law of applicable jurisdictions removes the statutory minimum period of time between the issuance of a receipt for a preliminary short form prospectus and the issuance of a receipt for a short form prospectus as it would otherwise apply to a distribution.

<u>Question</u>
21. Should the IDS require filing and delivery of the preliminary IDS prospectus? Should alternative methods of delivering the preliminary IDS prospectus be permitted? If so, how?

<u>Comments</u>
One commenter said that, if a prospective investor can easily obtain a copy of the prospectus, this should be sufficient.

Another commenter suggested that the preliminary prospectus should be available to investors electronically (not in hard copy unless requested) and should also be included in any marketing communications. The final prospectus should be required to be delivered

to investors no later than the delivery of the confirmation of purchase to ensure investors are provided with statutory withdrawal rights.

Three commenters stated that an IDS preliminary prospectus should be delivered to investors. One of these commenters said that this would give investors the opportunity to review the information and advise them as to where the disclosure incorporated by reference in the prospectus may be obtained and reviewed. Two commenters also recommended that delivery by electronic means be permitted. One commenter added that if alternative prospectus delivery methods are introduced, they should be available to all offerings and not just IDS offerings.

One commenter recommended that the delivery requirement be eliminated because the issuer's preliminary prospectus is readily available on SEDAR and marketing communications must include a statement regarding how a potential investor may obtain the preliminary IDS prospectus.

Response
Proposed NI 44-101 does not change the statutory requirements to deliver a preliminary prospectus to potential investors. Electronic delivery of prospectuses is permitted under NP 11-201, subject to certain conditions.

In the Notice, we have asked your views on whether we should seek legislative change in order to eliminate the preliminary prospectus, prospectus receipts and prospectus review.

2. Content of IDS Prospectuses

Question
22. Are the preliminary IDS prospectus disclosure items outlined in Part III.D.2(a) of the Concept Proposal appropriate to ensure that an investor can make an informed investment decision? Please explain.

Comments
Two commenters suggested the addition of a "Current Developments" or "Recent Developments" category, which would require the issuer to provide any information necessary to update documents incorporated by reference to reflect more recent developments. One of these commenters suggested that the new requirement extend to capture recent developments that may not otherwise be required to be disclosed in an SIF.

One commenter voiced the need for a mechanism whereby a proposed acquisition cannot take place until an exchange has accepted the transaction, conditional only on the completion of the financing; otherwise there is a risk that a prospectus will be receipted for an offering where the proceeds are not allocated to what is disclosed and the issuer is raising money for a non-existent project.

Two commenters stated that the proposed IDS prospectus disclosure items are generally appropriate. One of these commenters stated that there should be certain exceptions to those documents which are incorporated by reference in the prospectus.

Another commenter strongly supported allowing issuers to incorporate by reference all of its IDS disclosure base filings, including marketing communications, in the prospectus. This would result in more readable marketing document formats and increased reliability of information, since incorporated documents must be certified. The same commenter also recommended that issuers be required to provide investors with any information that is incorporated by reference on request and in a timely manner. This would involve attaching incorporated information as an electronic file to the AIF. As well, this commenter recommended that when incorporating by reference, issuers should be required to: (1) provide specific information on how to access the referenced information; and (2) provide a hyperlink from the issuer's Web site to these reports.

Response

Proposed Form 1 generally requires a short form prospectus contain full, true and plain disclosure of all material facts relating to, and in Quebec not to make any misrepresentation likely to affect the value or market price of, the securities to be distributed. While we have not specifically required a "Recent Developments" section, we expect that issuers will include previously undisclosed material facts in such a section.

The disclosure items outlined in Proposed Form 1 are consistent with the disclosure items set out in Part III.D.2(a) of the 2000 Concept Proposal. Under Proposed Form 1, any information required in a short form prospectus may generally be incorporated by reference in the short form prospectus.

Question

23. What are the advantages and disadvantages of a streamlined form of final IDS prospectus? Which form of final IDS prospectus would issuers and investors prefer? Should the traditional form of final IDS prospectus be mandatory? If so, why?

Comments

Three commenters supported the streamlined form of final prospectus, stating that it would be of much greater utility to investors since it would highlight new information from the date of the preliminary prospectus. One of these commenters stated that the streamlined form would also be welcomed by issuers, who would benefit from reduced printing and distribution costs. Both the streamlined and the traditional alternatives should not be available to issuers; there should be only one permitted form of final prospectus. Two commenters expressed concern over the streamlined approach and made the following points:

- It may be cumbersome to clearly distinguish what portions of the preliminary prospectus have been carried forward and what portions have been deleted or

superseded. As well, the final document may be construed as a formal notice of the deficiencies in the preliminary disclosures, since it highlights necessary updates.

- The streamlined final prospectus only works if the preliminary prospectus must be delivered to potential investors, and would not necessarily reduce costs or preparation time for the issuers, since it requires the preparation of two different documents rather than simply updating the preliminary. This commenter recommended that investors be provided with the final prospectus and be advised of the existence, location and availability of a blacklined version of the final prospectus which shows all changes from the preliminary prospectus.

Response
Though some commenters support this proposal, the CSA has decided not to adopt a streamlined form of final short form prospectus which would incorporate a preliminary prospectus. We recognize the concerns raised by the commenters. Given that investors' prospectus rights flow from the final prospectus, we believe it should, through incorporation by reference of CD, be a comprehensive disclosure document.

D. IDS Marketing Regime

Question
24. Is the proposed definition of "marketing communication" in the IDS appropriate? What types of communications should be excluded from the definition, and why?

Comments
One commenter was of the view that "green sheets" should not be included in the category of marketing documents, since "green sheets" typically contain financial information of other companies in the issuer's industry, along with numerous financial ratios and calculations.

Another commenter suggested that the IDS instrument clarify that the issuer is not responsible for documents prepared by underwriters and that these documents are not considered to be incorporated by reference.

Two commenters emphasized that the broad definition of "marketing communications" requires more exceptions, and recommended that the CSA consider a definition which specifically excludes communications which indicate that they are internal or confidential.

One commenter generally supported the proposed removal of existing pre-marketing restrictions, but suggested that the proposed definition of "marketing communication" coupled with the requirement that an IDS prospectus incorporate by reference all written marketing communications disseminated by or on behalf of the issuer during the course of distribution of securities may have an unintended "chilling" effect, e.g., underwriters conducting road shows without written materials to avoid the filing and certification requirements. The CSA should not confuse the responsibility of the issuer to provide equal access to all disclosed material information with: (i) a responsibility of the issuer to

provide equal access to all information; or (ii) a responsibility of the underwriter to provide equal access to its proprietary materials.

The same commenter stated that research reports and other written commentary on the issuer, published in the ordinary course, should be excluded from the definition of marketing communications and the certification requirement, unless the issuer or the issuer's agent makes specific reference to, or widely disseminates, such materials during the distribution period. Subjecting research reports and commentary to the due diligence process and "full, true and plain" disclosure standard would be a costly, time-consuming and possibly problematic exercise. This commenter also suggested that guidance should be given to assist interpretation in the context of electronic media – for example, the criteria that would be examined in determining whether a hyperlink or other reference to third party materials on the issuer's website would constitute "dissemination" of such materials by the issuer.

Response
The CSA recognize the concerns relating to incorporating certain marketing materials into a prospectus. This question is not relevant at this time given the CSA's decision not to presently adopt the marketing restrictions set out in the 2000 Concept Proposal. See the response to item 25 below.

Question
25. What are your views concerning the proposed IDS marketing restrictions? Are others necessary for investor protection purposes? Would the proposed IDS marketing restrictions restrict valid corporate communications?

Comments
One commenter stated that the IDS marketing restrictions appear to provide issuers with more flexibility in their investor communications; the restrictions appear to strike a reasonable balance between investor protection and business expediency.

One commenter supported the elimination of the pre-marketing restrictions in the context of the proposed IDS regime based on the view that it provides greater flexibility in the capital raising process and acknowledges the diminished role of the prospectus and the increased emphasis on CD. This commenter went on to highlight two further issues:

- There is potential for abuse and pre-marketing should be closely monitored, particularly with regard to the elimination of the existing pre-marketing rules in the absence of the formulation, adoption and enforcement of a new framework to address pre-marketing issues and potential abuses under the IDS regime. Regulators should remind IDS issuers that they have an obligation to make timely disclosure of material information (by the SIF), once issuers have formed a reasonable expectation of proceeding with the offering. Regulators should also ensure enforcement of these obligations.

- Market distortion resulting from the misuse of information concerning the existence of a proposed offering is possible – for example, an institutional investor learning of a

> proposed equity offering may anticipate ensuing weakness in the market price of the security and sell the security placing downward pressure on its market price. Alternatively, institutional investors may not sell after learning of a proposed equity offering but may not buy either if it anticipates a pricing fallout or announcement.

One commenter emphasized the view that existing pre-marketing rules are confusing, anomalous (given that private placements for public companies can now be pre-marketed), and favour the large, well-capitalized dealers over the smaller dealers who specialize in financing smaller issuers. It is far better, said this commenter, to rely on available enforcement remedies rather than to continue to anticipate the worst and thereby limit options.

One commenter stated that marketing materials should not be incorporated by reference in an IDS prospectus. According to the commenter, the inappropriate use of marketing material should be policed separately by the securities regulatory authorities. A requirement to incorporate marketing materials by reference could cause issuers to inadvertently make misrepresentations. Many marketing communications, because of their necessary brevity, do not contain full, true and plain disclosure. It is also becoming increasingly difficult for issuers to monitor the dissemination of marketing information that occurs through media such as bulletin boards and chat rooms. An alternative would be to require that materials produced by the issuer contain a disclaimer that the information is not complete, with a cross-reference to the prospectus and its location on SEDAR or the issuer's website.

<u>Response</u>
With the implementation of the CD Rules and other CSA CD initiatives, we continue to believe that the current pre-marketing restrictions could be revisited in order to allow more flexible capital-raising by issuers with less focus placed on the preliminary prospectus. However, the CSA is not currently prepared to propose any change to the prospectus regime that would permit marketing of a prospectus offering prior to public disclosure that the offering is pending. Without the prior public disclosure about a pending offering, we are concerned about the potential improper use of undisclosed information about an offering, including insider trading and tipping.

The CSA recognizes the tension, as reflected in the comments on this question as well as to question 11 above (where significant concerns were raised with the "reasonable expectation" test for disclosure of a potential offering) between an issuer's obligations to provide timely disclosure of pending offerings and concern about premature disclosure of pending offerings. Generally, issuers do not disclose a proposed prospectus offering until a bought deal is agreed upon, or, for a marketed offering, at or about the time a preliminary prospectus is filed. Recent discussions with our advisory committees suggest that the current marketing regime, particularly for bought deals, is generally sufficient. Consequently, given the current regulatory framework, it is not apparent that issuers would publicly disclose a pending prospectus offering any earlier than they are currently disclosing such offerings in order to initiate legal marketing of the offering.

Accordingly, Proposed NI 44-101 does not include any of the proposed changes to the pre-marketing regime set out in the 2000 Concept Proposal. However, as discussed in the Notice, the Proposed Rule does include a minor amendment which allows issuers and underwriters to agree to file a preliminary prospectus up to four business days after entering into a bought deal agreement. As also discussed in the Notice, to the extent that the CSA moves forward in the future with the prospectus offering regime that does not require preliminary prospectuses, a new prospectus marketing regime will be considered. See question 7 under the heading "Marketing Restrictions" in the Notice.

Question

26. How should "distribution period" be defined for purposes of determining which written marketing materials must be incorporated by reference in an IDS prospectus? Should it be defined as commencing a specified number of days (e.g. 15 days) before the first offer of the securities, upon the filing of the preliminary IDS prospectus or some other event? When should the distribution period be considered terminated for this purpose?

Comments

One commenter welcomed efforts to more clearly define this period, but deferred to the underwriting community as to what limits should be imposed.

One commenter stated that the distribution period should be commenced from the receipt of the prospectus to such time as the offering has been sold and the contractual rights of rescission and withdrawal have expired.

One commenter supported a bright line test commencing at the time the issuer determines to effect an offering and terminating upon the cessation of offers and sales under the final IDS prospectus. An issuer should not be required to incorporate by reference, and assume liability for, any document prepared prior to its determination to effect an offering and without its prior review and approval.

Another commenter proposed that the distribution period extend from the earlier of the filing of the SIF (disclosing the proposed offering of securities) and the filing of the preliminary IDS prospectus to the filing of the final IDS prospectus. This definition would have the advantage of providing certainty to market participants.

Response

Since we are no longer considering requiring marketing communications to be incorporated into a prospectus, this question is no longer relevant. See the responses to items 24 and 25 above.

E. Proposals for Changes Outsides the IDS

Question

27. Should the IDS continuous disclosure enhancements be broadly applied to all issuers?

<u>Comments</u>
Four commenters were opposed to broadly applying IDS enhancements to all issuers. Four commenters cited considerable additional burdens and increased expenses, particularly for smaller issuers. One of these commenters suggested that transitional provisions are required to allow time for such smaller companies to meet any new reporting requirements. One of the commenters stated that those issuers who do not benefit from the system should not have to pay the price inherent in complying with the higher standards of disclosure. This commenter argued the following concessions for smaller issuers: more time to prepare and file the required disclosures; exemption from audit committee requirements; exemption from auditor review of interim financial statements; and exemption from interim MD&A requirements. One commenter felt that the changes proposed would impose considerable burdens on issuers and increased expense. In the event that any of the CSA participants determine to adopt any of the IDS initiatives as mandatory requirements prior to completion of the pilot project, the commenter strongly recommended that an intensive educational and feedback process be conducted prior to implementation.

One commenter observed that companies considered small by U.S. standards are much larger than their Canadian counterparts. Additional latitude needs to be provided for Canadian juniors.

One commenter strongly supported the extension of certain IDS disclosure enhancements to all issuers, particularly the proposed upgraded content of annual and interim reports and accelerated filing periods for annual and interim reports.

One commenter stated that the requirement for a review engagement report in regard to interim financial statements should not be extended to non-IDS participants. This commenter encouraged the introduction of the requirement of MD&A in regard to the interim financial statements in regard to all issuers.

<u>Response</u>
The CSA acknowledge the comments of those who argued that IDS enhancements should not apply to all issuers. The CD Rules, MI 52-109 where applicable, and the Audit Committee Rule where applicable, now apply to all issuers, subject to certain exemptions. However, the CSA has recognized that smaller issuers may be disproportionately burdened by these enhanced requirements and has provided for somewhat less onerous requirements for venture issuers.

<u>Question</u>
28. The CSA propose to extend to non-IDS issuers the IDS certification requirements discussed in Part III.B.1 of this Notice and Part III.C.2.(c) of the Concept Proposal. Does this raise concerns unique to non-IDS issuers? If so, what are they?

Comments
One commenter saw no reason to exempt non-IDS issuers from this requirement if the certification requirements are adopted. Smaller issuers should make the same assertions as IDS issuers if allowed more time for filing and preparation.

One commenter concluded that certification by senior management and the directors will have a positive impact on the disclosure process and therefore the commenter supported the proposed extension to non-IDS issuers.

Another commenter stated that, given the predominance of secondary market trading over primary market, the main purpose of IDS should be to provide the marketplace in general with enhanced and expanded disclosure. Accordingly, IDS disclosure should logically apply to all reporting issuers. As well, broad-based IDS disclosure standards might also permit the elimination or substantial reduction of much of the complexity of current securities regulation.

Response
Where applicable, MI 52-109 now requires the CEOs and CFOs of all issuers to certify the issuer's annual and interim filings, subject to certain exemptions.

Question
29. Should the IDS marketing restrictions discussed in Part IV.B be broadly applied to non-IDS offerings?

Comments
One commenter stated that, as it believes that the creation of an enhanced disclosure base in respect of an IDS issuer is essential to the functioning of the proposed regime, it does not support the removal of pre-marketing restrictions in respect of non-IDS issuers.

One commenter supported a broad application of the prohibition on misrepresentation in marketing materials, stating that this would assist in regulating communications which potentially mislead the investing public.

Response
Please see the response to item 25 above.

Question
30. Are there any other elements of the IDS that should be broadly applied to all issuers?

Comments
One commenter recommended that more frequent and extensive regulatory review of CD materials be applied to all issuers.

Response
The CSA agree with the commenter's recommendation. The CDR Program is intended to complement the CD Rules by enhancing consistency in the scope and level of reviews

carried out by CSA staff. We believe that greater consistency in the treatment of issuers will improve the overall quality and timeliness of CD.

F. Pilot Introduction of the IDS

Question

31. Would issuers be interested in participating in the pilot introduction of the IDS? If not, why not?

Comments

One commenter stated that it is not certain that issuers will be willing to participate in a pilot introduction of the IDS because of the cost of complying with the IDS and the increased exposure as a result of the certification requirements contained in the IDS.

One commenter did not think that issuer interest would be very strong, based on MRRS pilot test experience. The non-POP issuers with the imminent need to raise capital, stated this commenter, will have the most to gain by opting into the IDS pilot program.

Another commenter believed that many junior issuers would be interested in participating, provided that the costs are not prohibitive. According to the commenter, the primary deterrent to participating in IDS is the requirement to become a reporting issuer in all jurisdictions. If this provision was removed, junior issuer participation would likely be significant. This commenter's experience with issuers utilizing the SHAIF system and the short form prospectus distributions system would appear to indicate that a system emphasizing CD and an ability to access the market quickly will be widely utilized by issuers.

Another commenter stated that exchange-listed non-POP system issuers may be particularly interested in improving their speed of access to the markets. Possible deterrents could be the additional costs of preparing the enhanced disclosure and reporting on a national basis, the reduced period in which to file annual and interim financials and the regulatory uncertainty surrounding a new system.

Response

A pilot period is not necessary with respect to Proposed NI 44-101. The CD Rules will have been in effect for a period of time prior to the implementation of Proposed NI 44-101, and Proposed NI 44-101 is a revision to rules that have been in place since 2000.

Question

32. Would issuers who are currently eligible to use the prompt offering qualification system be interested in participating in the pilot introduction of the IDS? If not, why not?

Comments

One commenter speculated that if the benefits currently enjoyed by Canadian SEC registrants under the MJDS are removed, there would be little or no benefit to the IDS prospectus system, let alone the short form prospectus distributions system, because the

more rigorous U.S. form requirements will prevail. The CD enhancements, however, will put both IDS and short form prospectus issuers in a better position to make U.S. filings.

One commenter indicated that IDS is primarily attractive to issuers that do not qualify for the short form prospectus distributions system. This commenter said that IDS introduces additional disclosure requirements that do not exist in the short form prospectus distributions system without providing any benefits for issuers eligible under that system.

Another commenter stated that there may be less incentive for POP system issuers to migrate to the new system as timing advantages would not be significant. Under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms*, regulators will use their best efforts to review and provide comments on short form prospectuses within three and a half days.

One commenter believed that relatively few issuers will perceive the IDS to offer significant advantages over the existing short form prospectus and shelf distribution procedures when compared with a significant increase in reporting issuers' compliance burden. Accordingly, there will be little incentive for issuers to participate in the pilot introduction of the IDS unless and until the CD requirements in the proposal are extended to non-IDS offerings. This commenter emphasized that investors should be entitled to receive the same quality of disclosure, regardless of whether the issuer is an IDS participant. In the event that the CD enhancements set forth in the 2000 Concept Proposal are applied universally and take effect simultaneously, the IDS will offer several compelling advantages. Issuers who are not eligible to use the short form prospectus or shelf distribution procedures will be eligible to use streamlined procedures under the IDS. Issuers who are eligible to use short form prospectus or shelf distribution procedures would benefit from faster and more predictable timing when qualifying a prospectus distribution.

Response
The CSA thank the commenters for their comments. As noted above, however, given the CSA's decision to proceed with the liberalization of existing rules rather than the development of a separate IDS, no pilot period is required.

Question
33. What do you perceive as the main benefits of the IDS, as compared with the existing distribution procedures?

Comments
Four commenters listed the following benefits:

- The main benefits of the IDS would be the speed at which the capital markets could be accessed by the issuers.

- A National Instrument will most likely be adopted as a rule in all Canadian jurisdictions, which will be a major step towards creating a virtual national securities

commission and which will narrow the gap between information on the public record at any point in time and the "full, true and plain" prospectus disclosure.

- The extent of disclosure in the prospectus document, short form included, will be significantly reduced, and mid-sized issuers will be able to obtain benefits similar to those presently enjoyed by POP issuers.

- IDS will allow all investors, not just those participating in primary offerings, to make informed investment decisions. This commenter also listed as a benefit the ability of issuers to access the market in a timely manner, which is particularly important in the current market environment.

- IDS will allow faster and more predictable access to the capital markets as an IDS prospectus would be subject to only limited review by regulators. The IDS has the potential to provide issuers with greater flexibility to go to the market more often, in lesser amounts, and at lower transaction costs. The main benefit for investors under the IDS is the potential for more complete and timely disclosure information.

Response

The CSA believe that these comments apply equally to Proposed NI 44-101. The CD Rules have enhanced CD requirements, accomplishing a significant component of IDS, and Proposed NI 44-101 generally permits more issuers to access the short form prospectus system than Current NI 44-101 does. Even more issuers will be able to access the short form prospectus system if the seasoning and quantitative size qualification criteria are eliminated as proposed under Alternative B of Proposed NI 44-101.

Question

34. If the IDS proves to be a successful alternative to the short form prospectus and shelf distribution systems, the CSA will consider eliminating the short form and shelf distribution procedures for IDS-eligible issuers. Is this appropriate? If not, why not?

Comments

One commenter suggested waiting until the results of the pilot test are known.

Another commenter wished to clarify with the CSA that the MTN program (as defined in National Instrument 44-102 *Shelf Distributions*) shelf procedures, or analogous procedures permitting the use of one-page pricing supplements, would be continued under the IDS.

Another commenter opposed elimination of short form and shelf because of the recognized efficiency of these systems. This commenter believes the better approach would be to allow IDS as an alternative offering regime.

Another commenter believed that if the IDS proves to be a successful alternative to the short form prospectus and shelf distribution systems (and following an appropriate

industry consultation), the CSA should consider eliminating the short form and shelf distribution procedures for IDS-eligible issuers.

Response
The CSA are not considering eliminating the short form and shelf distribution procedures. IDS, as described in the 2000 Concept Proposal, and Proposed NI 44-101 are quite similar to one another, with the exception of the marketing restriction proposals.

G. Other Comments

(a) Reduced filing periods for financial statements

Comments
Two commenters stated that the change requiring the filing of annual and interim financial statements to within 90 days of year end and 45 days of quarter end, respectively, is a positive change.

One commenter generally opposed the reduced filing periods because they would take away the buffer that companies have to cope with emergencies, day-to-day business and the ever-increasing regulatory burden. Another commenter opposed the requirement other than in the context of a voluntary system, but suggested that, if the requirement were adopted, consideration should be given to providing additional time for the delivery of materials to shareholders.

Two commenters, although not opposed to the requirement, recommended providing a transition period. One of these commenters suggested that current filing deadlines be maintained for two years to conform with the pilot introduction for IDS until issuers become familiar with the increased content requirements.

Four commenters believed that junior issuers would experience difficulties in meeting the new deadlines and proposed that some form of relief be provided.

One of these commenters raised the following specific concerns:

- Smaller companies are already poorly served by their auditors and rarely get their financials more than a day before the print deadline. A reduction for the annuals to 90 days would greatly increase the difficulty and costs.

- 60 days for quarterlies is generally easy to keep track of, being roughly 2 months from the quarter end, whereas the odd 45 day requirement will lead to a lot of wasted time and administrative difficulties.

- Current management time is already at a premium.

- Even if the new time frames are tied only to the IDS there is a strong incentive to apply them to all filers eventually, and the commenter was against this.

- Junior companies in Canada (unlike their U.S. counterparts) do not have the resources that would enable them to meet the new time constraints.

Suggested forms of relief that could be granted to junior issuers include:

- setting the annual filing deadline to 120 days after year end, rather than 90 days, in view of the complexities of completing a year end audit; and

- providing an exemption.

One commenter requested that the CSA clarify that the deadline for submission of the MD&A which discusses the fourth quarter financial results is 90 days after the issuer's year end. Quarterly submissions are due within 45 days after the relevant interim period, however the fourth quarter MD&A is to be included in the AIF which is due 90 days after the issuer's year end.

Response

The CD Rules have reduced the filing period for various CD documents. This was subject to extensive comment when the CD Rules were published for comment. The financial statement filing periods in NI 51-102 for annual financial statements is 120 days after year-end for venture issuers, and 90 days for non-venture issuers. The deadline for filing interim financial statements remains at 60 days for venture issuers and is reduced to 45 days after period end for non-venture issuers. The new filing deadlines apply to financial years starting on or after January 1, 2004.

(b) Eligibility criteria

Comments

One commenter said that the listing requirement needs to be clarified in order to confirm whether "recognized market" includes the junior tier of the Canadian Venture Exchange.

Response

Under the basic qualification criteria of Alternative B of Proposed NI 44-101, the issuer's securities must be listed or posted for trading on a short form eligible exchange. Alternative B of Proposed NI 44-101 defines a short form eligible exchange to be the TSX, Tier 1 and Tier 2 of the TSX Venture Exchange, and their respective successors

(c) Measures to ensure quality of disclosure

Comments

Two commenters emphasized the importance of strong regulatory review, subsequent audit and enforcement where necessary, in ensuring the quality of disclosure under IDS.

Response

The CSA agree with these comments and has implemented the CDR Program. Please see the response to item 30 above.

(d) Use of plain language

Comments

Another commenter noted that, because of the growth in the retail investor market, Canadian regulators should encourage "plain language" disclosure as in the United States.

Response

The CSA encourage the use of plain language in disclosure documents.

(e) Support for Concept Proposal

Comments

Six commenters generally supported the 2000 Concept Proposal, subject to individual concerns.

Response

The CSA note the comments. We believe that many of the benefits of the IDS as set out in the 2000 Concept Proposal are now in place under the CD Rules, MI 52-109 where applicable, and MI 52-110 where applicable, and with the implementation of other CSA initiatives. Proposed NI 44-101 harmonizes Current NI 44-101 with these new requirements.

(f) Other market developments

Comments

One commenter observed that IDS should take into account other developments in North American securities markets, such as the proposed association of stock exchanges.

Response

The CSA will continue to consider the impact of any other developments in North American securities markets.

SCHEDULE 1

LIST OF COMMENTERS
(listed according to the comment letter date)

Jonathan McCullough
McCullouch O'Connor Irwin
April 17, 2000

Andrew D. Grasby, Co-Chair and Philippa P.B. Hughes, Associate, Advocacy
Canadian Advocacy Council
Association for Investment Management and Research (AIMR)
May 19, 2000

Maria Casano, Partner
BDO Dunwoody LLP
May 26, 2000

Mark Fields
Vice President and Director
Copper Ridge Exploration Inc.
May 26, 2000

Kenneth G. Hanna
May 28, 2000

John H. Deacon
Vice President, General Counsel and Corporate Secretary
NAV Canada
May 29, 2000

Maria V. Casano, Member
Task Force of the Accounting and Assurance Standards Boards
Canadian Institute of Chartered Accountants
June 1, 2000

Lezlie Oler
Executive Director
Canadian Society of Corporate Secretaries
June 1, 2000

Stewart Lockwood
slockwood@canarc.net
June 2, 2000

Michelle Caturay
Canadian Imperial Bank of Commerce
June 5, 2000

Richard A. Lococo
Securities Subcommittee
CBAO Business Law Section
June 5, 2000

Gordon C. Fowler, Partner, and Alan G. Van Weelden, Senior Principal
KPMG LLP
June 5, 2000

Lawson Lundell Lawson & McIntosh
June 6, 2000

Christopher Begy
Bank of Montreal
June 7, 2000

Gerald A. Romanzin
Executive Vice President
Canadian Venture Exchange
June 7, 2000

Ron Blunn, Chair, and David Mills, Past Chair
CIRI Issues Committee
Canadian Investor Relations Institute
June 9, 2000

Osler Hoskin & Harcourt
June 13, 2000

Peter McCarter
Aur Resources Inc.
June 17, 2000

Nelson Smith
Head of Investment Banking
Yorkton Securities Inc.
June 19, 2000

Joseph J. Oliver
President and Chief Executive Officer
Investment Dealers Association of Canada
June 22, 2000

Duane Poliquin
President
Almaden Resources and Fairfield Minerals
June 23, 2000

John Kruzick
President
DRC Resources
June 23, 2000

Brooke Campbell
Manager Corporate Finance and Director
Odlum Brown Limited
September 20, 2000

LIST OF COMMENTERS

Proposed Replacement of National Instrument 44-101
Short Form Prospectus
Request for Comment January 7, 2005

	COMMENTER	NAME	DATE
1.		Shawn Allen	January 31, 2005
2.	Aur Resources Inc.	Peter McCarter	March 8, 2005
3.	Canadian Trading and Quotation System Inc.	Timothy S. Baikie	March 29, 2005
4.	Macleod Dixon	Scott Negraiff	April 7, 2005
5.	Canaccord Capital Corporation	Michael G. Greenwood	April 8, 2005
6.	Investment Dealers Association of Canada	Joseph J. Oliver	April 8, 2005
7.	Securities Law Subcommittee Business Law Section Ontario Bar Association	Susan McCallum Timothy S. Baikie	April 8, 2005
8.	Torys LLP	Robert H. Karp Jennifer L. Friesen	April 8, 2005
9.	TSX Group	Rik Parkhill Linda Hohol	April 8, 2005
10.	Ernst & Young	Gord Briggs Charlmane Wong	April 11, 2005
11.	Osler, Hoskin & Harcourt LLP		April 11, 2005
12	Stikeman Elliott LLP	Simon Romano	April 11, 2005
13.	KPMG LLP (Short Form Prospectus)	Gordon C. Fowler Alan G. Van Weelden	April 12, 2005
14.	KPMG LLP (Shelf Distribution)	Gordon C. Fowler Alan G. Van Weelden	April 12, 2005
15.	Securities and Capital Markets Group Borden Ladner Gervais LLP	Paul A.D. Mingay Michael C. DeCosimo	April 13, 2005

COMMENT ON DRAFT NATIONAL INSTRUMENT 44-101 FORM 44-101F1 SHORT FORM PROSPECTUS

My comment on the draft is restricted to one recommendation - to exempt issuers from the requirement to file a prospectus, for secondary share offerings, in certain limited circumstances.

I applaud the great strides that Canadian securities regulators have taken in developing a transparent system of continuous disclosure in Canada. In fact, I believe that the continuous disclosure system has now developed to the point where, in the case of secondary offerings, the requirement for issuers to produce and file a prospectus is arguably redundant. In a world of continuous disclosure there must, by definition, be cases in which there is essentially nothing new left to disclose in a prospectus.

Given the existing continuous disclosure requirements, I recommend that Canadian regulators exempt secondary offerings, limited to a certain percentage of the existing outstanding shares, from the need to file any prospectus. This should be replaced by a requirement to file for permission to sell a limited number of shares to the public, through the stock exchange(s). This requirement would be a mirror image of the current requirement to file for permission before an issuer may buy back shares through the stock exchange(s).

That is, I propose that companies that already have shares trading on an exchange simply be allowed to directly sell, a limited amount of, additional shares to the public on a continuous basis without the need for a prospectus (with certain exceptions and with advance approval required).

The reasons that a prospectus should not be required for many secondary issues are the following:

1. The current continuous disclosure requirements obviate the need for additional information.

2. Investors who currently buy shares in the secondary market, without the benefit of a recent prospectus, are not second-class investors. The current requirement for a prospectus for **all** secondary share issues pre-supposes that an investor buying shares directly from an issuer needs and deserves more information than an investor buying shares from another investor. In my opinion, this is not true and if it is true it implies that investors who buy from other investors rather than directly from an issuer through a prospectus are second-class investors.

   When I buy shares in the stock market I believe that I deserve full and continuous disclosure. And in fact Securities Laws now bring me that. Why then would I suddenly expect the company to have more information available when it wants to sell shares directly to the public? To the extent that the issuer has any material information to disclose in a prospectus, associated with a secondary issue, I

believe that the continuous disclosure rules already do (or should and could) require the information to be disclosed, even in the absence of a prospectus.

3. Issuers are currently allowed to enter into share buy backs, through the stock exchange, after obtaining the permission of regulators. Arguments of symmetry would then suggest that issuers should be able to sell shares directly to the public, through the stock exchange, in a similar manner. In fact it almost seems blatantly discriminatory that anyone can sell shares in an issuer without a prospectus, but the issuer itself cannot sell even one share directly to the public through the stock exchange! (Although it can grant shares to insiders and grant stock options and it can enter into private placements).

4. Given the status-quo, issuers sometimes see their shares rising to great heights in the market and yet this is of no immediate direct benefit to the issuer company unless it undertakes the somewhat arduous and expensive route of issuing shares through a prospectus or private placement. Private placements often require a large discount to the market price which often undermines the market price and which is clearly disadvantageous to public investors who cannot participate in private placements.

5. The ability to sell shares into the stock market would be an incredible boon to many smaller issuers. Companies could raise capital slowly and incrementally, without incurring large transaction fees and in a manner that is fair to all investors. Issuers would be able to directly benefit from a rise in their share prices, on a continuous basis.

6. This proposal would make Canada a more competitive economy as the process of raising capital for existing listed issuers would be rendered lower cost, faster and easier. This might provide an exceptional investment boon to Canada.

7. Such a process would be a mechanism for companies to easily signal (by selling shares) that it believes its stock price in the market is becoming too high. This could help to stabilize stock prices in some cases. Currently issuers can signal that their shares are attractively priced by buying back shares. The opportunity to sell shares easily through the stock market would provide an added ability to signal that is currently missing or more difficult to use.

Although my suggestion seems to be a natural extension of the work that regulators have done to provide continuous disclosure, some may view the suggestion as novel or radical.

Therefore I will address the predictable objections:

1. Canada should not allow this because other countries do not.

I am not aware if any other jurisdiction allows issuers to continuously sell, at least a limited amount of, shares through the stock market. But that is irrelevant, Canada should be prepared to be a leader.

2. Issuers have access to inside information and will take advantage of investors.

If that is true, it applies equally to stock buy backs. Restrictions could easily be placed on the process to insure that issuers do not sell shares when they are possession of material non-disclosed inside information. More importantly this objection applies to insiders who exercise options and then sell stock to the public. If an insider is allowed to sell shares to the public without a prospectus then why isn't the issuer? They both have access to the same information.

3. Such a system would depress stock prices due to potential share issues at any time.

I don't believe that this is a valid objection, since the issuer would still be required to announce share issues and file for permission, just as is the case for share buy-backs. To the extent it depressed stock prices, in certain cases, it would likely be moving stock prices toward a rational level.

4. Investment bankers perform a vital service of distribution and this system would be undermined if issuers had low-cost direct access to the stock market to sell shares.

Naturally, I would expect loud protests from investments bankers that might lose fees under this proposal. However, the investments bankers would still be needed for larger issuers and for IPOs. Issuers would be free to undertake any secondary issue through investments banks if they chose to. These institutions would survive and adapt to the competitive challenge.

5. This exemption is not needed since issuers can simply use private placements

I believe that a direct share issue to the public, through the stock exchange, is preferable because private issues usually require an expensive discount to the market trading price and are, by definition, available to only certain investors and not to all investors.

6. There may not be a mechanism for issuers to access the stock exchange

I believe that the same mechanism by which companies currently buy back their own shares on the stock exchange could be used. If not, an appropriate mechanism can be put in place.

In conclusion, given the exiting improved continuous disclosure system fostered by regulators, I recommend that NI 44-101 be amended to allow existing issuers, with equity shares trading on a stock exchange, to directly sell additional shares to the public through

the stock exchange, without a prospectus, with appropriate limitations placed on the percentage by which the outstanding number of shares is increased, and with appropriate advance permission from regulators.

Respectfully Submitted,

Shawn Allen, P.Eng, MBA, CMA, CFA

Signed "Shawn Allen"

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March 8, 2005

BY E-MAIL

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Attention: Mr. Charlie MacCready
Co-Chair of the CSA's Prospectus Systems Committee

Dear Mr. MacCready:

Re: Proposed Replacement of National Instrument 44-101 - *Short Form Prospectus Distributions*

The following comments principally address the merits of Alternatives A and B in respect of the proposed qualification criteria for access to the short form prospectus distribution ("SFP") system as set out in Proposed NI 44-101 published for comment in the January 7, 2005 OSC Bulletin. Comments are also made on the usefulness of the filing and delivery of preliminary prospectuses.

The key difference between Alternative A and Alternative B is that Alternative A incorporates a "seasoning" requirement as well as a "quantitative (size)" requirement. In my view, neither such requirement is necessary and, hence, Alternative B is the superior alternative for the following reasons:

It is noted under the "Alternative B - Seasoning" Requirement" sub-heading in the Request for Comments that the CSA view is that the CD Rules, etc. are sufficiently rigorous that a seasoning requirement is not essential and that the CSA hasn't changed such view since the 2000 Concept Proposal (the "Proposal"). Further, as is noted in the Summary of Comments Received on the Concept Proposal (the "Comments"), none of the commenters supported the inclusion of seasoning as a condition of IDS eligibility, and eight commenters specifically agreed that seasoning should not be imposed as a condition. Accordingly, there seems general accord amongst the regulators and the representatives of the users of the SFP system that seasoning shouldn't be an eligibility requirement.

Presumably, the principal rationale for a seasoning requirement is that such creates a track record of disclosure and allows sufficient time for information about the issuer to be disseminated to and absorbed by the marketplace. Given the implementation of the CD Rules as well as SEDAR and general technological advances vis a vis the dissemination of information, the foregoing rationale is difficult to support.

In respect of the quantitative requirement, it is noted in the Request for Comments under the "<u>Alternative B - Quantitative (Size) Requirement</u>" sub-heading that the CSA view is that the CD Rules, etc. are sufficiently rigorous so that a quantitative requirement is not essential and that the CSA hasn't changed such view since the Proposal. Further, as is noted in the Comments, none of the commenters supported the inclusion of a quantitative requirement as a condition of IDS eligibility and 10 commenters specifically agreed that a size requirement should not be imposed as a condition. Accordingly, there seems general accord amongst the regulators and the representatives of the users of the SFP system that a size requirement shouldn't be an eligibility requirement.

It would appear that the principal rationale for a quantitative requirement is the belief that larger issuers generally provide a higher quality of disclosure than smaller issuers. A fairer statement might be that there are a higher proportion of smaller issuers whose disclosure is so deficient that a refiling of their continuous disclosure documents is required – see OSC Staff Notice 51-715 – Corporate Finance Review Program Report – October, 2004. (As an aside, the existence of the foregoing review program will also encourage issuers to improve their disclosure.) However, even making the assumption that larger issuers do have higher quality disclosure, it seems somewhat inappropriate to penalize all smaller issuers because some arguably have lesser quality disclosure. For that matter, there are larger issuers with lesser quality disclosure as well. More importantly, however, there are certain key policy considerations that support enabling smaller issuers to participate in the SFP system. First, such participation may well have the effect of generally improving the overall quality of their disclosure. These smaller issuers will now have a substantial incentive to maintain high quality disclosure as access to the SFP system enables them to raise funds publicly based on their disclosure documents. To the extent that smaller issuers will now be able to more easily public finance, there will be more underwriter or other intermediary involvement in their financings and this "gate-keeper" role, and the knowledge of issuers that such will occur, will also serve to improve disclosure and hopefully lessen the frequency of address the issue of "deficient" disclosure as noted above. Second, capital markets policies should, all other things being equal, be designed to offer the most cost-effective and efficient way for issuers to raise funds. Participation of smaller issuers in the SFP system allows them to raise capital on a much more cost-effective and timely basis.

I would also reiterate the comment made in the Comments that disclosure for certain smaller issuers might in fact be superior to that of larger issuers, simply because of all relevant details of the smaller issuer are much easier to provide than for a larger issuer. For example, in the natural resources sector, an issuer's asset base might well consist of a single, or relatively few, mines, projects or properties. Hence, in terms of investors having available information to make investment decisions, a smaller issuer is in all likelihood more transparent and easy to assess. Note that, although smaller issuers are likely riskier, the issue of risk is distinct from that of adequate disclosure – it is adequate disclosure that enables investors to most efficiently assess entity risk.

I would further refer you to Sections 7.21 and 7.24 in the Allan Committee's Interim Report which supports all issuers being entitled to participate in the SFP system, which Sections are reproduced below;

7.21 *If statutory civil liability attaches to the cornerstone AIF and supplemental disclosure documents, one must presume that a greater degree of care will be taken by issuers and that the need for external participation in a prospectus will be reduced. Also, and perhaps more importantly, if all issuers were allowed (through, in effect, an expanded POP system) to incorporate their AIF, material change reports, etc. into a short form prospectus, one would expect that a greater degree of care will be taken in their preparation due to the possibility that such documents will be reviewed by underwriters and regulators in the context of a public offering, which is currently not the case.* ***We recommend that the SRAs consider expanding the POP system to allow its use by all reporting issuers.*** *We believe that the carrot is a better motivator than the stick.*

7.24 *We believe our recommendations lead to a system under which there is little, if any, new content in a prospectus. We believe that under the system we are recommending, under which continuous disclosure is to meet prospectus standards and under which civil liability to injured investors is established, the distinction between "POP" and "non-POP" issuers would be irrelevant. We believe that the eligibility tests would be unnecessary. This streamlining of the process would, in one sense, be purchased:*

- *by issuers accepting liability for their continuous disclosure documents; and*
- *by regulators engaging in a periodic review of disclosure whether or not an issuer filed a prospectus.*

The foregoing recommendations were also repeated in the Allan Committee's Final Report – see Section 7.8.

As to the questions regarding the usefulness of the filing and delivery requirements related to preliminary prospectuses, at the very least, the delivery requirement for preliminary prospectuses should be eliminated. First, a short form prospectus typically provides little more useful information in most cases than does the initial press release announcing such offering. Second, it is not so much that a preliminary prospectus (or final prospectus for that matter) assists individual investors in making their investment visions but rather that such provides useful information generally in the marketplace to analysts and others both before and, perhaps, more importantly, after the offering. In any event, a preliminary prospectus adds no significant information to the market place that isn't in the final prospectus. Third, if an investor wants a copy of the preliminary prospectus, such can either be obtained electronically on SEDAR or, alternatively, from the issuer or the underwriter. That a prospective investor can easily obtain a copy of the preliminary prospectus should the investor wish to do so should be sufficient. (The same rationale also applies to the delivery requirement for the final prospectus; however, I suspect that the regulators will be unwilling to go so far as to the eliminate that requirement.)

As to the requirement of actually filing a preliminary prospectus, such is not a particularly onerous undertaking. In any event, such is far preferable than the imposing of more onerous restrictions on accessing the SFP system because of the elimination of such requirement. Also, rather than requiring a receipt to be issued, such should perhaps be handled in a manner similar to that for rights offerings, in other words, staff would have the right to object to any offering within a specified limited time period after the filing of a preliminary prospectus, absent which objection the issuer would thereafter simply file a final prospectus without review. Such a mechanism would enable routine issues to proceed without formal regulatory staff review while providing a gatekeeper type function for unusual or atypical offerings or offerings with which the regulator has identified significant unresolved issues. I would also note that the issuance of a preliminary receipt is usually a somewhat of a meaningless exercise as such is typically simply the receipt of fees and checking off the items listed on the applicable checklist.

I would be happy to discuss or clarify the above comments with you should you wish such to be done.

Yours very truly,

Peter McCarter
Executive Vice-President,
Corporate Affairs

PMC/sf

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March 29, 2005

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- and -

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- and -

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Dear Sirs and Mesdames:

RE: REQUEST FOR COMMENTS — SHORT FORM PROSPECTUS DISTRIBUTIONS

Canadian Trading and Quotation System Inc. ("CNQ") appreciates this opportunity to comment on the proposed amendments to National Instrument 44-101 Short Form Prospectus Distributions and companion policy published for comment on January 7, 2005.

CNQ strongly supports initiatives to facilitate capital raising by issuers, particularly junior issuers. However, the proposed Alternative B, which would allow only Toronto Stock Exchange ("TSX") and certain TSX Venture Exchange ("TSX VE") (collectively, "TSX Group exchanges") listed issuers to be eligible to use short-form prospectuses, contains a fundamental omission and will be a barrier to competition. It should be amended to include CNQ-listed issuers that have an active business and principal assets other than cash or its exchange listing. If Alternative B is adopted as proposed, it will create a huge impediment to CNQ's ability to attract issuers to its market. Listing decisions could be determined by the ability to use a short-form prospectus rather than by the competitive attributes, liquidity and cost of a particular market. It would even deny eligibility to CNQ-listed issuers that met the "large issuer" thresholds in proposed Alternative A.

The proposal provides no analysis why the CSA has excluded CNQ issuers from eligibility. Including CNQ-listed issuers is consistent with the approach of reinforcing compliance with continuous disclosure rules and is also consistent with fostering fair competition among marketplaces, which is the underpinning of National Instrument 21-101.

Although CNQ was established to primarily be a market for micro- and small-cap issuers, it is not a market solely for companies that do not meet TSX VE requirements. Rather, it offers an alternative regulatory model and market structure, as well as competitive fees, that we believe will be attractive to issuers of all sizes. We have at least one issuer today that would appear to meet the TSX minimum listing standards and which issued a press release last April stating that its management believed the company's best interests would be served by remaining on CNQ rather than by moving to another marketplace. Several of our issuers were active companies listed on Tier 1 and 2 of the TSX VE that voluntarily moved to CNQ because of its regulatory model and lower costs. To date there is no evidence that companies want to "graduate" to the TSX VE if they meet its listing standards, but they may be forced to if Alternative B is adopted as proposed.

We submit that there is no policy reason to differentiate between issuers listed on CNQ and on the TSX Group exchanges with respect to eligibility to use short-form prospectuses. CNQ is a marketplace for small-capitalization issuers, but is not an over-the-counter ("OTC") market such as the Canadian Dealing Network ("CDN") was. CNQ has the same regulatory framework as the TSX Group

exchanges and is subject to comparable oversight by the OSC to ensure it operates in the public interest.

Background

CNQ was recognized as a quotation and trade reporting system by the Ontario Securities Commission ("OSC") on February 28, 2003 and as a stock exchange by the OSC on May 7, 2004. It is the first new marketplace to be recognized since the implementation of National Instrument 21-101 — Marketplace Operation.

The CNQ Market Structure

Like the TSX Group exchanges, CNQ operates an electronic, automated marketplace for participating investment dealers to trade securities. Investment dealers ("CNQ Dealers"), who must be members in good standing of the Investment Dealers Association of Canada, agree with CNQ to be bound by CNQ's rules (including the Universal Market Integrity Rules and CNQ-specific trading and sales practice rules) and be subject to CNQ's enforcement and discipline jurisdiction. CNQ has contracted with Market Regulation Services Inc. ("RS") to provide market regulation services to CNQ's marketplace, including market surveillance, timely disclosure policy administration, trade desk compliance and investigations and enforcement. Issuers ("CNQ Issuers") that are Canadian reporting issuers and that meet CNQ's minimum standards can apply to CNQ to list their securities. As described below, CNQ Issuers prepare and post an enhanced disclosure record on CNQ's website www.cnq.ca (the "Website") and agree to follow CNQ's policies and submit to CNQ's jurisdiction to suspend or delist their securities.

Issuer Regulation

CNQ has entry-level listing standards (minimum working capital, active business, minimum public distribution and integrity of principals) that allow the refusal of companies whose financial condition, capital structure or insiders give rise to market integrity concerns. CNQ issuers are also subject to ongoing enhanced disclosure requirements detailed below.

Enhanced Disclosure Model of Regulation

CNQ's regulatory model is different, but we submit no less effective, than the TSX Group exchanges. The enhanced disclosure requirements minimize the

abuses that have been seen with small-cap companies in the past. CNQ Issuers are required to disclose material information over and above that mandated by Ontario securities law, and must post and update that information on the Website, which is a central repository of issuer and trading information for investors. These disclosure obligations are comparable to (and, in many instances, higher than) those for issuers on the TSX Group exchanges, and complement CSA initiatives to bolster continuous disclosure by reporting issuers.

In order to qualify for listing, CNQ Issuers must prepare and post a prospectus-like base disclosure document ("the Listing Statement"), and provide monthly progress reports and quarterly updates. The Listing Statement itself must be refiled annually, just like an Annual Information Form. Press releases must be posted, along with notices of corporate transactions (similar to the documentation provided to the exchanges for listed issuers which is considered public but which is not easily available for viewing).

Once listed, the issuer is subject to the same timely disclosure requirements as the TSX Group exchanges. Monitoring compliance with the timely disclosure rules and overall market integrity is done by RS. RS also investigates potential instances of insider trading and market manipulation and forward the results to CNQ and the relevant securities commission(s) for follow-up action.

In addition to disclosure requirements, management of CNQ Issuers is required to post monthly a certificate that the issuer is in compliance with all applicable securities law and CNQ requirements. This requirement forces management to turn their minds to compliance with applicable rules, and should help foster a compliance culture.

CNQ undertakes periodic compliance reviews to determine issuers' compliance with applicable CNQ rules. These are on an ad-hoc basis (triggered by such things as a late filing or a complaint from an investor or RS) and a systematic basis (reviewing an issuer's entire disclosure record). Initially, we intend to do a complete review of each issuer at least annually. As more issuers are listed, we will use a risk analysis to prioritize reviews, similar to that used by the commissions in their continuous disclosure review programmes.

CNQ's sanctions for issuer non-compliance include suspension and delisting.

Conclusion

For the foregoing reasons, CNQ requests that if Alternative B is adopted it be amended to allow CNQ-listed issuers to be eligible to use short-form prospectuses if they have current annual financial statements and a current AIF filed and if they are not issuers whose operations have ceased or whose principal assets are cash, cash equivalents or their exchange listing. To do otherwise will deal a severe and unwarranted blow to CNQ's ability to attract issuers that also qualify for the other exchanges as a listing decision will likely be motivated by the ability to raise funds through a short-form prospectus rather than by the competitive features of a particular market.

Because including CNQ-listed issuers is consistent with the underlying policy rationale for the proposed amendments and is consistent with National Instrument 21-101, we do not believe that it would require further publication and comment.

In addition, the National Instrument should provide that other marketplaces may be included on application. Otherwise, new marketplaces could only be accommodated in some jurisdictions through a rule change, which will be a significant barrier to entry.

Thank you for considering our submission.

Please direct any questions to myself at 416.572.2000 x2282 (e-mail: Timothy.Baikie@cnq.ca) or Mark Faulkner, Director, Listings and Regulation at 416.572.2000 x2305 (e-mail: Mark.Faulkner@cnq.ca).

Yours truly,
CANADIAN TRADING AND QUOTATION SYSTEM INC.

Timothy Baikie
General Counsel & Corporate Secretary

Macleod Dixon LLP
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April 7, 2005

BY ELECTRONIC MAIL

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Dear Sirs/Mesdames:

Re: Proposed Repeal and Replacement of National Instrument 44-101, Form 44-101F3 and Companion Policy 44-101CP

We have reviewed the proposed amended and restated National Instrument 44-101 *Short Form Prospectus Distributions* (the "Proposed NI 44-101"), the proposed amended and restated Form 44-101F1 *Short Form Prospectus* (the "Proposed Form 1") and the proposed amended and restated Companion Policy 44-101CP *Short Form Prospectus Distributions* and have the following comments.

Financial Statements - Significant Acquisitions

Section 4.3 of the current NI 44-101 requires the inclusion of interim financial statements in respect of significant acquisitions completed during the current financial year for the most recently completed interim period of the acquired business that ended before the date of the acquisition and more than 60 days before the date of the prospectus. As a result, if a significant acquisition of a business with a calendar year end is completed on April 30 and a prospectus filed on May 1, the interim financial statements of the business for the first quarter interim period ended March 31 would not be required, since less than 60 days had elapsed between the end of the most recently completed interim period (March 31) and the date of the prospectus (May 1).

Section 10.1(3) of the Proposed Form 1 will require the inclusion in a prospectus of the financial statements that would be required by Part 8 of NI 51-102 in respect of a significant acquisition for which no business acquisition report has yet been filed, if the inclusion of such financial statements is necessary in order for the prospectus to contain full, true and plain disclosure of all material facts. Section 8.4(2) of NI 51-102

requires that interim financial statements be included for the most recently completed interim period of the business that started after the year end and *ended before the date of the acquisition*.

Using the example described above, in respect of an acquisition completed on April 30, the Proposed Form 1 would appear to require the inclusion in a prospectus filed on May 1, of the financial statements for the first quarter interim period ended March 31, since the most recently completed interim period of the business that ended before the date of the acquisition would be the three month interim period ended March 31. As a result, the acquired business would be required to accelerate the preparation of its quarterly financial statements, which would otherwise be required to be filed on May 15, for purposes of the prospectus.

The Proposed Form 1 should only require the inclusion of interim financial statements of the business for the most recently completed interim period for which interim financial statements have been filed. The current NI 44-101 addresses this by including the 60 day period between the date of the prospectus and the end of the most recently completed interim period.

In addition, section 8.5 of NI 51-102 requires the inclusion of annual financial statements for the business for the most recently completed financial year of the business that ended more than 45 days before the date of the acquisition. If a significant acquisition is completed between 46 days and 90 days after the year end of the business and a prospectus filed during that period, section 10.1 of the Proposed Form 1 would appear to require the prospectus of the issuer to include annual financial statements of the business for the most recently completed financial year of the business, thereby accelerating the preparation and filing of such annual financial statements, which would otherwise be required to be filed within 90 days of year end.

Mandatory Incorporation by Reference

Section 11.1 of Proposed Form 1 requires the incorporation by reference of "any other disclosure document which the issuer has filed, or has undertaken to file pursuant to an undertaking to a provincial or territorial securities regulatory authority". The term "disclosure document" has not been defined. Would this addition to Proposed Form 1 require the incorporation by reference of those documents affecting the rights of security holders and material contracts filed under Part 12 of NI 51-102, or the notice of change in corporate structure required by section 4.9 of NI 51-102, for example? Any additional documents required to be incorporated by reference will also require translation into French for those issuers who are distributing securities in Québec as part of a short form offering. This will increase the time and expense involved in the offering.

Resource Property

Section 9.1 of the Proposed Form 1 requires the issuer to disclose the information required under section 5.5 of Form 51-102F2 if a material part of the proceeds of the distribution are to be expended on a particular resource property. Section 5.5 of Form 51-102F2 also requires the report on Form 51-101F2 *Report on Reserves Data by Independent Qualified Reserves Evaluator or Auditor* and the report on Form 51-101F3 *Report of Management and Directors on Oil and Gas Disclosure* in sections 5.5(2) and (3), respectively. Under the Proposed Form 1, will the issuer also be required to include the reports on Forms 51-101F2 and F3 in its prospectus?

In addition, some of the information required by Form 51-101F1, for example, Item 4.1 *Reserves Reconciliation*, which requires disclosure of changes in reserve estimates between the effective date and the previous year end, would arguably be irrelevant in the context of prospectus disclosure concerning an acquisition of resource property by an issuer.

Language of Documents

Section 4.5(3) of the Proposed NI 44-101 includes a requirement that, in Québec, any document incorporated by reference must be in the French language or in the French language and the English language. Under current practice, in the event the issuer is not able to complete the translation of all documents incorporated by reference prior to the time of filing the preliminary prospectus, the issuer was usually able to obtain exemptive relief directly from the Autorité des marchés financiers allowing the French translated documents incorporated by reference to be filed at the time of filing the final prospectus. Will the addition of section 4.5(3) now require an issuer to make application to the principal regulator for exemptive relief, either through the MRRS system or in the preliminary prospectus cover letter, rather than directly through the Autorité des marchés financiers?

Please contact me if you have any questions or require clarification on any of the foregoing comments.

Yours truly,

MACLEOD DIXON LLP

(Signed) Scott Negraiff

INDEPENDENT THINKING

April 8, 2005

Jo-Anne Bund
Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
By email to joanne.bund@seccom.ab.ca

Charlie MacCready
Co-Chair of the CSA's Prospectus Systems Committee
Ontario Securities Commission
By email to cmaccready@osc.gov.on.ca

Anne-Marie Beaudoin
Directrice du secretariat
Autorité des marchés financiers
By email to consultation-en-cours@autorite.qc.ca

Dear Sirs/Mesdames:

Re: Proposed Repeal and Replacement of National Instrument 44-101 Short Form Prospectus Distributions

Canaccord Capital Corporation has reviewed the CSA's Notice and Request for Comment on the proposed repeal and replacement of National Instrument 44-101. Generally, we are of the view that the efficiencies introduced to the capital markets through the continuous disclosure requirements should be capitalized on. We are in support of any initiative that relies on the continuous disclosure obligations of reporting issuers. We are also in support of any initiative that removes the requirement for reporting issuers to obtain, in one form or another, "acceptance" by the regulatory authorities of financings.

We have the following comments on certain of your specific questions. We have used the question numbering system contained in the Notice and Request for Comments.

1. Regarding qualification to file a Short Form Prospectus, we are in support of Alternative B. We do not believe there should be a seasoning requirement or a market capitalization requirement for issuers with operating businesses and satisfactory disclosure records and who have filed a comprehensive and sophisticated disclosure document in order to become a reporting issuer.

5. Regarding the elimination of preliminary prospectuses and prospectus review, we believe that the effect would be positive for the capital markets and all its participants. For reporting issuers with satisfactory disclosure practices, the requirement to file a preliminary prospectus and to wait for review by regulatory

authorities is burdensome and unnecessary. Market windows are often lost. We note that for many TSX-V listed issuers, financings are generally conducted by way of private placement and available only to larger investors. In addition, the TSX-V's financing instrument – the Short Form Offering – is limited to $2,000,000 in any fiscal year and thus is not available when larger amounts are needed.

6. Regarding qualification criteria for the final prospectus only system, we fail to see the advantage of a seasoning period of any length. We note that recently admitted reporting issuers are likely to have adequate initial disclosure records with a final prospectus being the anchor. However, we do agree with restrictions 2 and 3.

7. Your question 7 suggests a marketing regime which is triggered by the issuance of a press release and required upon "the issuer forming a reasonable expectation that an offering will proceed". For some time, we have been interested in the CSA developing a realistic approach to "pre-marketing", but we do not think that the proposal goes far enough or deals with a fundamental issue in the Canadian capital markets.

   As small reporting issuers are critical to the Canadian capital markets, the current restrictions on solicitation of expressions of interest are not a workable balance of an issuer's desire to manage its risk by completing a bought deal before any public announcement is made and an underwriter's desire to manage its risk by knowing before it has committed to purchasing the securities offered (that is, before the underwriter has entered into an enforceable agreement to purchase the securities) that there is sufficient market interest. Although Part 7 of the proposed National Instrument extends the pre-filing period to four business days, it also confirms the *status quo* in permitting pre-marketing only in the circumstances of a bought deal where the underwriter has already committed to purchasing the offering. Such a system is most likely workable in a market where there is a good price discovery mechanism and depth of market for all issuers, but that is not the case for the majority of issuers in Canada. Without an opportunity to explore market interest and discover the appropriate price, underwriters will often not be prepared to make an underwriting commitment.

   From a practical point of view, even the approach suggested by question 7 does not go far enough. Issuers will be reluctant to issue the type of press release you suggest and if the offering does not proceed, there will be market consequences and perhaps some embarrassment incurred by the issuer.

Finally, we have a comment on one other matter. Although the proposed NI may not be the BEST place to deal with the clarification of the issue, it would be an APPROPRIATE place to deal with it. At present, it is unclear when an underwriter is "out of distribution" (that is, when a distribution ends). This issue has a significant impact on the hour-by-hour calculation of the capital of investment dealers and their underwriting capacity, and thus it would be very useful to

CANACCORD
CAPITAL

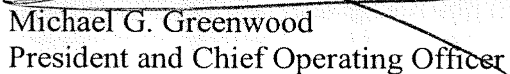
obtain some guidance on regulatory policy. From our point of view, we should be considered "out of distribution" when we have received confirmation of an order from our client.

We would be pleased to discuss in further detail our thoughts on "pre-marketing" and guidance pertaining to "out of distribution" in order to provide the right regulatory balance for the benefit of the public markets.

Thank you for the opportunity to comment and we applaud the CSA's initiative on these proposals.

Yours truly,

CANACCORD CAPITAL CORPORATION



Michael G. Greenwood
President and Chief Operating Officer

JOSEPH J. OLIVER
PRESIDENT AND CHIEF EXECUTIVE OFFICER

April 8, 2005

Alberta Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Saskatchewan Financial Services Commission
British Columbia Securities Commission
Nova Scotia Securities Commission
Autorité des marchés financiers

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Dear Mesdames/Sirs:

RE: Request for Comment on the proposed repeal and replacement of National Instrument 44-101 *Short Form Prospectus Distributions,* Form 44-101F1 *Short Form Prospectus* and Companion Policy 44-101CP *Short Form Prospectus Distributions*

A. Introduction

The Corporate Finance Committee ("we" or the "Committee") of the Investment Dealers Association of Canada (the "IDA") is pleased to respond to the Canadian Securities Administrators (the "CSA") notice and request for comment (the "Request") dated January 7, 2005 relating to the proposed amended and restated National Instrument 44-101, *Short Form Prospectus Distributions* ("Proposed NI 44-101"), amended and restated Form 44-101F1 *Short*

Form Prospectus ("Proposed Form 1") and amended and restated Companion Policy 44-101CP *Short Form Prospectus Distributions* (collectively, the "Proposed Rule").

We commend the CSA and its staff for their efforts and strongly endorse the thrust of the proposed amendments reflected in the Proposed Rule to streamline the short form prospectus system, eliminate duplication and inconsistencies between the short form prospectus disclosure requirements and current continuous disclosure rules and expand issuer eligibility and access to the short form prospectus system. In our view, these developments would contribute to more efficient Canadian capital markets and thereby benefit Canadian investors and issuers.

B. Overview

Part I: Request for Comment on Proposed Qualification Criteria for Part 2 of Proposed NI 44-101

As discussed below, we support the proposed qualification criteria set out in Alternative B for Part 2 of Proposed NI 44-101 principally because it would afford broader access to the short form offering system in Canada than Alternative A without compromising investor protection. Since the last package of changes to the short form offering regime in 2000, there have been a number of significant regulatory and technical developments affecting the disclosure and quality of information available to the investing public, including the CSA's efforts to harmonize continuous disclosure requirements and to increase its focus and allocation of resources on continuous disclosure reviews and remedial disclosure. Accordingly, we recommend that the CSA adopt Alternative B for Proposed NI 44-101 and eliminate any seasoning requirement and quantitative (size) requirement from the issuer qualification criteria for the short form prospectus system. In the current Canadian regulatory and market environment, we do not believe that the absence of these two issuer eligibility criteria would diminish investor protection.

Part II: Request for Comment on Possible Further Changes in Prospectus Regulation

In broad terms, certain aspects of the concepts (the "Concepts") outlined in the latter portion of the Release appear to be potentially beneficial for the Canadian capital markets. Adoption of the Concepts, as set forth, however would involve a significant departure from the existing preliminary prospectus, regulatory review and receipted final prospectus process which has served the Canadian capital markets well for a considerable period of time. Accordingly, we urge the CSA in its further study and deliberations regarding the Concepts to ensure that any specific proposals resulting from the Concepts strike a practical public interest balance between market efficiency and investor protection.

In pursuing this balance, we believe it is relevant for the CSA to consider not only the indigenous needs of the Canadian capital markets but also to be aware of and sensitive to capital market developments in the United States and in other world markets. In our view, Canadian capital markets have more to gain from continuing to be a market leader embracing and reflecting

fundamental principles and market practices of well-regarded capital markets similar in operation to our Canadian capital markets, such as the capital markets in the United States.

It is our understanding that the United States Securities and Exchange Commission ("SEC") released (the " SEC Release") in November 2004 proposals embodying a major liberalization of the process for conducting registered securities offerings in the United States (*Proposed Rule: Securities Offering Reform;* Release Nos. 33-8501 and 34-506, November 17, 2004). In terms of the Concepts' outline of a final prospectus only offering process, we note that the SEC Release proposes limited "on-demand" shelf registration for a new category of very senior issuer, known as the "well-known seasoned issuer" or a "WKSI". The WKSI classification would include only those issuers that have a reporting history under the United States Exchange Act of 1934 and are widely followed in the marketplace. For "on-demand" equity shelf registration, a WKSI would have to be current for twelve months in filing periodic reports, otherwise be eligible to use Form S-3 or F-3 and have a public common equity float of $700 million (or for "on-demand" debt registration have sold $1 billion of SEC-registered debt in the past 3 years).

We are supportive in principle and encourage further study and development by the CSA of the Concepts' outline of an offering system whereby certain eligible issuers could access public capital based solely on the filing of a final prospectus. In our view, the principal benefits of such a system include more timely and certain market access for issuers, potentially at a lower cost. However, a final prospectus only offering system would represent a significant change to our traditional means of offering securities by prospectus. Accordingly, we recommend that the development of any such offering system be carefully engineered, and by way of initial impression, we suggest that any final prospectus only or similar offering system include appropriate issuer eligibility criteria, such as a one year seasoning requirement. We believe the need for adequate information about an issuer to be available and accessible for a period of time dictates such an eligibility requirement. As well, in light of the conceptual SEC approach as reflected in the SEC Release to "on-demand" registration eligibility being limited to only certain WKSI S-3 issuers, we strongly urge that consideration be given to devising a harmonized but tailored set of Canadianized eligibility requirements (including a minimum market cap threshold) for determining those issuers able to effect these types of offerings.

We are also concerned that a final prospectus only or an "on demand" offering regime and, to a lesser extent, the specific changes to the short form prospectus regime contemplated under either Alternative A or B for issuer eligibility criteria for Part 2 of Proposed NI 44-101 represent changes which would add significantly to the pressure and strain already being placed on the role and efficacy of the underwriter and director due diligence processes in connection with prospectus offerings of securities.

The conceptual role and utility of due diligence in the statutory prospectus offering process is well-recognized and accepted by market participants, Canadian and U.S. courts and securities regulators. Due diligence is vital to the prospectus offering process and contributes significantly

to fair and efficient markets. However, we are concerned that the statutory due diligence framework may no longer accommodate the practical realities of today's capital markets, particularly in the case of accelerated offerings. Due diligence must be available not only in theory but also in practice as a complete third party defence to a civil liability claim for materially misleading prospectus disclosure. The continuation of a civil liability regime for prospectus disclosure with respect to non-issuers, in market circumstances where due diligence and reliance defences cannot practically be established by non-issuer parties, such as underwriters, would at a minimum be inappropriate.

Several recent developments in the Canadian and American capital markets have raised serious issues regarding the practical utility or role of due diligence generally in today's capital markets (e.g. investor protection and capital market implications of Yield Advantage Income Trust offering structure, December 2004) or have significantly exacerbated liability concerns for underwriters [and others] in the context of prospectus offerings. Recent regulatory and Court decisions (*In The Matter Of YBM Magnex International Inc., Griffiths McBurney & Partners, First Marathon Securities Limited et al* (Ontario Securities Commission, June 27, 2003), *Douglas Kerr et al v. Danier Leather Inc., Irving Wortzman, Jeffery Wortzman and Bryan Tatoff* (Ontario Superior Court of Justice, May 7, 2004) and *In re WorldCom, Inc. Securities Litigation* (Southern District of New York, December 14, 2004)) have raised genuine concerns. These concerns relate both to the concept of due diligence generally as it pertains to underwriters, directors and officers as well as specific concerns relating to the practical ability of an underwriter defendant subject to a civil liability securities claim pertaining to misleading disclosure in a prospectus to invoke effectively the due diligence defence and the reliance on an expert defence notionally available under the statutory framework for underwritten prospectus offerings, including short form, shelf and other accelerated offerings. Indeed, the *WorldCom* decision has been identified by one United States legal commentator as "….the most important decision in at least 10 years on….due diligence obligations of underwriters and directors." (John C. Coffee Jr., "Corporate Securities", New York Law Journal, January 20, 2005). Within 100 days of the *WorldCom* decision being rendered, all seventeen major underwriter defendants had agreed to settle this securities class action and pay more than $6 billion. As well, all the directors of WorldCom (other than Mr. Bernard Ebbers) have agreed to personally pay a total of $25.5 million to settle the same action and the former directors' insurance will pay an additional $35 million. It has been reported that *WorldCom* defendants have now agreed to settlements which represent more than one-half of the total damages sought in the class action.

Both market participants and securities regulators have a role to play in striking an appropriate balance between the statutory civil liability provisions relating to prospectus offerings, including accelerated offerings, and the practical efficacy of the statutory due diligence defence and the reliance on an expert defence. In connection with the IDA's role, a sub-committee of this Committee has been established to develop non-exclusive due diligence guidelines and best practices for purposes of attempting to satisfy in the circumstances of any given offering the statutory due diligence defence and the reliance on an expert defence available with respect to prospectus offerings in Canada. This sub-committee has prepared draft guidelines and practices

and is consulting with organizations such as The Canadian Institute of Chartered Accountants with respect to the guidelines and practices and their possible role.

We strongly urge the CSA to examine and consider formally the current reality regarding the statutory due diligence defence and the reliance on an expert defence in the context of prospectus offerings, particularly accelerated offerings, in today's Canadian capital markets so as to ensure there is, not only in theory but also in substance, an appropriate balancing of gatekeeper responsibilities and potential civil liability. For instance, in today's markets what constitutes a "reasonable investigation" or "reasonable grounds" for a belief about the information in a prospectus for purposes of the affirmative due diligence defence and the reliance on an expert defence for a short form or shelf offering are exceedingly difficult questions to answer due, in part, to these developments. In the past, the SEC has periodically attempted to provide assistance on this issue (e.g. SEC Release No. 6335: *Circumstances Affecting the Determination of What Constitutes Reasonable Investigation and Reasonable Grounds for Belief Under Section 11 of the Securities Act,* August 6, 1981 and SEC's adoption of "safe-harbour" Rule 176 under the Securities Act of 1933). We understand similar "due diligence" consideration is being undertaken by certain U.S. capital market participants (See, "Scared Straight: Wall Street May Do More Due Diligence", The Wall Street Journal, April 7, 2005, page C1). We strongly believe that due diligence guidelines, best practices or safe-harbour provisions can and should be developed in a manner which both serves the public interest and the Canadian capital markets and enhances the current as well as future accelerated securities offering processes in Canada. In our respectful submission, it is incumbent upon market participants and regulators to act responsibly and address the current need for such due diligence guidelines, practices or provisions.

C. Discussion Regarding Certain Questions

Part I: Proposed Qualification Criteria – Alternative A or Alternative B for Part 2 of Proposed NI 44-101?

1. The changes reflected in Alternative A for Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system.

(a) Do you believe this broadening of access is appropriate?

We believe the broadening of access contemplated by Alternative B for Part 2 of Proposed NI 44-101 is appropriate. Our belief is based on our assessment of the efficacy of the current disclosure regime applicable to Canadian reporting issuers. We believe that the timeliness and quality of

information provided by Canadian reporting issuers has improved generally over the past five years and provides a reasonable foundation for broadening issuer access to the short form offering regime without compromising investor protection.

(b) What are your views on the proposed qualification criteria set out as Alternative B?

We support and recommend the adoption of the qualification criteria set out as Alternative B for Part 2 of Proposed NI 44-101. For the reasons set forth above, we submit that neither a seasoning requirement nor a quantitative (size) requirement is necessary in the public interest in terms of qualification criteria for access to the short form prospectus system. We do note explicitly that our level of comfort with Alternative B is significantly influenced by the maintenance of a Canadian listing requirement for issuer eligibility for the short form prospectus system and our understanding based on your comments in the Request that the adoption of either Alternative A or B would not adversely affect the ability of Canadian issuers to continue to access and use the multi-jurisdictional disclosure system ("MJDS") with the SEC. We believe that it is imperative that the Proposed Rule not adversely affect the ability of Canadian reporting issuers to access and use the MJDS.

Other Aspects of the Proposed Rule

2. (a) Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market?

We support in principle the objective of making available periodic and timely disclosure of the credit supporter in the subject circumstances. However, consideration might be given to the following possible modifications: (i) could the undertaking come from either the issuer or the credit supporter? and (ii) could the undertaking be limited to periodic and timely disclosure required by applicable home jurisdiction corporate/securities laws?

4. (a) Does Item 15 of Proposed Form 1 accomplish its objective, which is to ensure disclosure of any ownership interests that would be perceived as creating a potential conflict of interest on the part of an expert?

Item 15 of Proposed Form 1 contains a detailed set of requirements with significant exceptions nestled deep in the wording of subsections 15.2(4) and (5). While the principle underlying Item 15 may be meritorious, we are concerned that the prolixity of Item 15 may compromise the objective.

(b) If not, what changes should be made to the parameters?

We would suggest consideration be given to including as a line item requirement of Proposed Form 1 affirmative issuer disclosure confirming, or explaining otherwise, that each person or company described in paragraphs 15.1(a) and (b) has been determined by the board of directors, or similar body, of the issuer to be independent of the issuer and its management. The concept of "independence" underlying this requirement would include consideration of any registered or beneficial interests, direct or indirect, in any securities or other property of the issuer, its associate and affiliates.

Part II: Request for Comment on Possible Further Changes in Prospectus Regulation

5. (a) Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review?

While we believe that issuers, investors and other market participants could in certain circumstances benefit from the elimination of preliminary prospectuses and prospectus review, we are concerned that the elimination of preliminary prospectuses and prospectus review could undermine the integrity of the public securities offering system in Canada and create additional strain on a statutory due diligence scheme which we are concerned may no longer be aligned with market reality in the context of accelerated offerings.

(b) What are the principal benefits of such a system?

The principal benefit of such a system would be expedited access to the capital markets.

(c) Are there any potential drawbacks?

This approach would require additional formal reliance on the existing disclosure profile of eligible issuer. Additionally, we are concerned that it may forfeit some of the long-standing market integrity created by the preliminary and final prospectus receipt regime which has served Canadian capital markets well for decades. See also (d) and (e) below.

(d) Are you concerned about a lack of regulatory review in the context of a prospectus offering?

From a marketplace perspective, we are concerned about a lack of regulatory review in the context of a prospectus offering. The existing and predecessor Canadian prospectus offering regimes have created a significant degree of market integrity and afforded market participants efficient and fair markets and the opportunity generally to perform their obligations and discharge their legal responsibilities. However, recent developments suggest that certain aspects of the current prospectus offering regime, such as the practical availability of certain underwriter and director defences, may no longer be in alignment with the theoretical statutory model and, accordingly, we strongly recommend that any final prospectus only or "on-demand" registration system be made available only to seasoned adequately-capitalized reporting issuers. For instance, we would strongly recommend that the CSA study carefully the SEC Release's WKSI concept and, at a minimum, develop a "made in Canada" equivalent equity float test for any such super-accelerated prospectus offering regime.

(e) Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?

As discussed above, we are concerned that expediting the prospectus filing process would exacerbate the significant existing market pressure on the due diligence process.

6. (a) If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering?

Yes.

Such restrictions could include additional qualification criteria and restrictions, such as the following:

(i) a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD.

Yes.

Such restrictions could include additional qualification criteria and restrictions, such as the following:

(ii) a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD.

We agree only if the identified significant unresolved issues would currently result in the issuance of a cease trade order under applicable securities legislation. Otherwise, we believe disclosure is a preferable alternative to regulatory prohibition.

Such restrictions could include additional qualification criteria and restrictions, such as the following:

(iii) a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.

We agree that issuer eligibility should be aligned generally with different types of securities. For example, eligibility to issue debt should not necessarily qualify an issuer to issue equity.

7. Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by issuers and dealers? If so, should the press release or public notice be required on "the issuer forming reasonable expectation that an offering will proceed" or on some other event?

A marketing regime involving a public notification of a forthcoming offering through a media release or term sheet, in tandem with reliance on the continuous disclosure regime, still leaves potential for abuse in the offering process. The decision of the issuer to offer treasury shares is typically material undisclosed information as market prices will likely be affected significantly by an announcement to proceed with an offering of new equity securities.

The issuance of a press release announcing a forthcoming securities offering once the issuer forms "a reasonable expectation" to proceed with an offering is a necessary requirement, but is not sufficient to prevent potential abuse in the marketplace. At a minimum, regulators should remind investors and dealers that upon receipt of material undisclosed information, such as information about a forthcoming offering, the dealer and investor become "a person or company in a special relationship with the reporting issuer", and as such is ineligible to purchase or sell securities of the reporting issuer as long as the material fact or material change has not been generally disclosed.

Despite statutory restrictions on trading based on material non-public information, the IDA has imposed specific pre-marketing restrictions in bought deal offerings to provide an added safeguard to prevent trading abuse in secondary markets. Whether or not these pre-marketing restrictions remain necessary, the CSA could in any event permit the elimination of the requirement for underwriters to provide written certification for compliance with the pre-marketing rules that have been in place since the early 1990's.

The Committee respectfully requests CSA staff to consider carefully the foregoing comments outlined in this letter. Representatives of the Committee would be pleased to discuss our comments in greater detail with CSA staff. Please do not hesitate to contact Ian Russell, Senior Vice-President, Industry Relations & Representation, at (416) 364-6133.

Yours sincerely,

Joseph J. Oliver

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April 8, 2005

SECTIONS

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Administrative Law
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Business Law
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Taxation Law
Trusts & Estates
Worker's Compensation
Young Lawyers

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Dear Sirs and Mesdames:

RE: REQUEST FOR COMMENTS — SHORT FORM PROSPECTUS DISTRIBUTIONS

This letter is submitted in response to the request for comment published January 7, 2005 by the Canadian Securities Administrators ("CSA") on proposed amendments to National Instrument 44-101 *Short Form Prospectus Distributions*, Form 44-101F1 *Short Form Prospectus* and Companion Policy 44-101CP (collectively, the "Short Form Prospectus Rules").

This submission is provided by the Securities Law Subcommittee (the "OBA Subcommittee") of the Business Law Section of the Ontario Bar Association (the "OBA"). The members of the OBA Subcommittee are listed in the attached Appendix. Please note that not all of the members of the OBA Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the OBA Subcommittee.

General

In general, we support the proposed amendments to the Short Form Prospectus Rules and the initiative to harmonize them with the continuous disclosure rules and eliminate redundant disclosure. We offer the following specific comments.

We note that the CSA has stated that adopting the proposed changes to the Short Form Prospectus Rules should not affect eligibility for Canadian issuers to use the Multijurisdictional Disclosure System ("MJDS"). Should the CSA receive any indication of concern about the proposed amendments from the U.S. Securities and Exchange Commission or its staff, we strongly urge the CSA to consider and address these concerns prior to adopting these amendments.

Broadening Eligibility

Subject to our concern noted below, we support the proposal to broaden eligibility to use the short form prospectus to all listed issuers on the TSX and Tiers 1 and 2 of the TSX Venture Exchange. However, we believe that issuers listed on the Canadian Trading and Quotation System Inc. should also be eligible as they are subject to the same continuous disclosure rules. In general, we do not believe specific marketplaces should be "hard coded" into regulatory instruments, as this can make it difficult to accommodate new entrants, particularly as some jurisdictions do not have the ability to issue blanket orders. Instead of listing specific exchanges, we believe it would be preferable to allow any issuer that is listed on any stock exchange recognized in any jurisdiction to use a short form prospectus. If concerns about issuers listed on NEX cannot be addressed by the requirement that the issuer have an active business and that its principal asset not be cash or its exchange listing, NEX-listed issuers should explicitly be excluded. Furthermore, while we support broadening access, we question whether venture issuers (as defined in National Instrument 51-102 and other instruments) should be eligible without first complying with the more stringent disclosure and governance obligations that are placed on non-venture issuers.

While we support broadening eligibility generally, we question whether, absent pre-filing consultations, any issuer that proposes a distribution of novel securities should be eligible to use a short-form prospectus. Although this is covered off to some extent by section 5.3(20 of National Instrument 43-201, we believe that it is important that the terms and economic effect of securities that have not previously been marketed to the public in Canada be clearly and accurately disclosed so their investment attributes can be assessed by advisers, analysts and investors. Although novel securities are frequently offered by new issuers this is not always the case. Where it is not the case we

are concerned that the limited review and market exposure provided by the short form prospectus system will not highlight the risks to investors of securities which the public may assume carry minimal risk because they are issued by established issuers.

Credit Supporter Disclosure

We believe that this issue is satisfactorily addressed in the continuous disclosure rule, where the issuer does not have to file continuous disclosure if the credit supporter does so. The filing of an undertaking would appear to result from the CSA taking the position that the guarantee is not a security and that continuous disclosure is the obligation of the issuer, not the guarantor. Although this is a somewhat awkward solution, it has worked well to date and we do not recommend any changes.

In practice, the indenture between the issuer and the credit supporter will contain covenants to ensure the credit supporter is in compliance with applicable rules. Therefore, the risk of the credit supporter not providing the required disclosure is minimal.

We also believe that the exemptions for certain issuers of guaranteed securities contained in Item 13 of proposed Form 44101-F1 are appropriate.

Disclosure of Expert Conflict of Interests

We believe the disclosure requirements contained in Item 15 of Proposed Form 44-101F1 are appropriate.

Possible Further Changes in Prospectus Regulation

At this time we do not support the development of a system which permits issuers to access public capital based solely on the filing of a final prospectus. We see at least two problems with this concept. First, we believe that it has adverse implications for MJDS since it does not parallel any offering system administered by the SEC, which could lead to the absurd result that only the very largest issuers are subject to a requirement to file a preliminary prospectus. Second, we are concerned that dispensing with all preliminary prospectus requirements may create a situation where an issuer who is (unknown to it) the subject of a pending investigation or continuous disclosure review that raises serious concerns sells securities without the buyers being made aware of the possible problems. While we acknowledge that investors may buy or sell securities of these issuers on stock exchanges while these investigations and reviews are ongoing, we believe that it is qualitatively different from both the issuers' and the investors' perspective if

an issuer sells new securities without any disclosure of the potential problems.

In addition, if Alternative B is adopted we believe that the advantages of the proposed system will be provided by the shelf prospectus system. Once the eligibility criteria for filing a short form prospectus are eliminated, any issuer who has cleared a base shelf prospectus will be able to access the capital markets immediately. It will not need to file a preliminary prospectus or await prospectus review. There are some risks to eliminating the eligibility criteria for the shelf prospectus system. However, this approach does not raise the same concerns about the future of MJDS and should permit regulators to take steps to limit the potential for the completion of an offering without appropriate disclosure of an investigation or problematic continuous disclosure review. We acknowledge that senior issuers have not used the shelf system to market equity securities because of the perception that the market will treat the equity which may be issued under their shelf as having been issued. However, we believe that regulators should wait to see if this situation changes, after the eligibility criteria for the shelf prospectus system are eliminated, before introducing a new continuous market access system.

We thank you for this opportunity to comment. If you have any questions, please direct them to Susan McCallum (simccallum200650@aol.com, 416-483-6687) or Timothy S. Baikie (tbaikie@abanet.org; 416-995-7844).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

Appendix
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Aaron J. Atkinson/Janne M. Duncan, *Fasken Martineau DuMoulin LLP*
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April 8, 2005

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Dear Sirs/Mesdames:

Re: Proposed Repeal and Replacement of National Instrument 44-101, *Short Form Prospectus Distributions*

This is the undersigned's response to the request for comment on proposed repeal and replacement of National Instrument 44-101, *Short Form Prospectus Distributions*, published by the Canadian Securities Administrators on January 7, 2005.

We favour all the proposed changes to the short form offering system as the first step in achieving the integrated offering system. We also support the other potential changes that you suggested in the discussion of the "next steps in prospectus regulation" where eligible issuers would be able to issue securities simply by filing a final prospectus with the securities regulators. Given the robust continuous disclosure requirements that must be met under National Instrument 51-102, *Continuous Disclosure Obligations*, it seems logical to focus both the issuer's and the regulator's resources on ensuring that accurate information is disseminated to the market in a timely manner for the benefit of all investors. Under the proposed replacement of NI44-101, we believe that investors will receive the same quality of disclosure as is currently required, while being more efficient for issuers, underwriters and other market participants.

We set out below our thoughts about a few of the specific questions which were asked in the request for comments and make a few suggestions, principally about conforming National Instrument 51-102, *Continuous Disclosure Obligations*, to the proposed NI44-101.

Eligibility Requirements

We favour adopting the eligibility criteria set out in Alternative B whereby all but the smallest issuers can access the short form prospectus system. Investors are now receiving timely, comprehensive information from reporting issuers through continuous disclosure filings and there is no reason to discriminate against issuers based on their market capitalization or the length of time the issuer has been a reporting issuer. Provided the issuer's continuous disclosure record is up-to-date, and the other eligibility requirements set out in Alternative B are met, we believe the issuer should have recourse to the streamlined offering process.

Disclosure About Significant Acquisitions

We concur with the proposed elimination of the disclosure about most completed significant acquisitions, because substantially the same information is now required in a Business Acquisition Report (BAR). There may be some acquisitions, however, that have taken place in the last three completed financial years for which disclosure is currently required but for which a BAR was not required to have been filed (because the acquisition closed before March 30, 2004). You might consider whether any transitional rules are required to fill the gap until the BAR rules have been in place for three years.

Under the proposed Item 10.1 of Form 44-101F1, the short form prospectus must include disclosure about a proposed acquisition if it has progressed to a state where it is reasonable to believe that the acquisition will be completed. Furthermore, the financial statements of an acquired business (or a business proposed to be acquired), that would be required in a BAR, must be included if it is necessary to include them to make the short form

prospectus contain full, true and plain disclosure of all material facts.[1] If the acquisition is completed, there will be no exemption from the obligation to file a BAR in respect of the acquisition. We suggest that subsection 8.1(2) of NI51-102 be amended to provide an exemption from the requirement to file a BAR where a prospectus (filed under either the short form or long form system) contains the information and financial statements that would be required under the BAR rules if the acquisition is completed within nine months of the date of the receipt for the final prospectus and there have been no material changes in the terms of the acquisition. This exemption would parallel the present exemption when disclosure is contained in an information circular.

Disclosure of Interests of Experts

We agree with the changes to Item 15 of proposed Form 44-101F1 relating to the disclosure of the interests of experts, and the interests of the auditor in particular. Given the auditor independence requirements, the carve-out for auditors is sensible and we suggest that a similar amendment be made to Item 16 of Form 51-102F2, *Annual Information Form*.

References to Periodic and Timely Disclosure

There are reference in several places in the instrument and the companion policy to the phrase "periodic and timely disclosure" which is not defined. In the qualification criteria provisions, the phrase is "periodic and timely disclosure documents that [the issuer] is required to have filed in that jurisdiction *under applicable securities legislation*" (emphasis added). We think that the italicized phrase could and probably should refer to NI51-102, since that instrument now forms the complete code of continuous disclosure filing obligations for companies that are eligible to file a short form prospectus. In other cases, such as in section 4.3(b)(2), the phrase "periodic and timely disclosure" is not referenced to any particular law, rule or obligation. In that example, we are therefore not sure of the meaning of the phrase "the periodic and timely disclosure of the credit supporter," particularly if the credit supporter is a foreign public company that is not a reporting issuer in Canada.

* * * * *

We appreciate the opportunity to comment on the proposed changes to NI44-101 and would be pleased to discuss any aspect of this submission with you. We have discussed in general terms the contents of this submission with some of Torys' other securities law practitioners, who support the views we express. Although we are not aware of contrary views, we have not done a complete canvass to determine whether other lawyers at Torys hold contrary views.

---

[1] The companion policy states that there is a rebuttable presumption to this effect if the acquisition is or the proposed acquisition would be significant at the 40% level.

Yours truly,

"Robert H. Karp"

"Jennifer L. Friesen"

RHK/jj

cc: Jim Turner, *Torys LLP*
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April 8, 2005

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Dear Members of the Canadian Securities Administrators,

Re: Request for Comments on Proposed Repeal and Replacement of National Instrument 44-101 *Short Form Prospectus Distributions* (the "National Instrument" or "NI 44-101")

TSX Group Inc. welcomes the opportunity to comment on behalf of both Toronto Stock Exchange ("TSX") and TSX Venture Exchange ("TSX Venture") (collectively, the "Exchanges") on NI 44-101, and the accompanying Companion Policy and Form, as published by the Canadian Securities Administrators (the "CSA") on January 7, 2005.

All capitalized terms have the same meanings as defined in NI 44-101, unless otherwise defined in this letter.

I. GENERAL COMMENTS

The Exchanges support the CSA's efforts to harmonize the short form prospectus rules with the current continuous disclosure regime. This harmonization, along with National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") and proposed National Instrument 81-106 *Investment Fund Continuous Disclosure* (together, the "CD Rules"), represents a positive step towards the implementation of an integrated disclosure system ("IDS") in Canada.

II. REQUEST FOR COMMENTS ON THE PROPOSED RULE

Proposed Qualification Criteria - Alternative A or B?

1. *The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out in Alternative B?*

Alternative B:

The Exchanges support the broader set of basic qualification criteria for the short form prospectus system set out in Alternative B. We believe that Alternative B will not only benefit issuers on both Exchanges, it will significantly improve the ability of more junior issuers, in particular, to access equity markets on a more timely and cost efficient basis. The removal of the twelve month seasoning and minimum capitalization requirements would remove the largest obstacles to the short form prospectus regime currently facing junior issuers.

TSX Venture Issuers:

Currently, TSX Venture issuers must undertake distributions in the exempt market if they wish to take advantage of financing opportunities which may be time sensitive, and avoid the longer timelines associated with a long form prospectus filing. As a result, the majority of financings undertaken by junior issuers are exempt offerings, which are subject to resale restrictions. These resale restrictions make investment less attractive to potential investors. The reliance on exempt offerings also limits the ability of retail investors to participate in the junior market.

If Alternative B is adopted, TSX Venture issuers can offer free trading securities to a broader investor base. This will allow them to attract capital more easily from a wider variety of sources. Given that cash flow issues and the ability to attract financing are two of the most significant challenges facing junior issuers, we believe this proposal will benefit the junior market as a whole.

AIF:

We believe that the proposal in Alternative B could be broadened further in order to be more accessible TSX Venture issuers. We recommend that the proposed definition of annual information form ("AIF") in NI 44-101 be consistent with the definition of AIF in National Instrument 45-106 *Prospectus and Registration Exemptions* (the "Exemption

Instrument"). The definition of AIF in the Exemption Instrument takes into account alternate forms of an acceptable AIF other than an AIF under the CD Rules.

In the Exemption Instrument, the CSA recognizes that TSX Venture issuers are not required to file AIFs in accordance with NI 51-102. The broader definition is intended to permit TSX Venture issuers to use either a prospectus or an information circular in respect of a qualifying transaction for a capital pool company ("QT Circular") , as an alternate form of AIF. This alternate form of AIF allows a TSX Venture issuer to use the TSX Venture short form offering document exemption ("SFOD"), as prescribed by Part 5 of the Exemption Instrument (this exemption is currently available only in British Columbia, Alberta and Saskatchewan). Similar to comments we provided on the Exemption Instrument, we also recommend that information circulars prepared for reverse takeovers or changes of business ("RTO Circular") by TSX Venture issuers also be included as an alternate form of AIF.

We believe that these alternate forms of AIF are appropriate for TSX Venture issuers who wish to rely on the short form prospectus regime. The QT Circular and RTO Circular (the "Circulars") provide prospectus like disclosure that, when filed, become a part of the issuer's continuous disclosure record. The Circulars are pre-cleared and vetted by TSX Venture staff, and are posted on SEDAR. Based on this, the Circulars should provide TSX Venture issuers with the disclosure record they require in order to use a short form prospectus as proposed under Alternative B.

Exchange Listing:

We support the definition of "short form eligible exchange" as being either TSX or Tier 1 or 2 of TSX Venture Exchange, as a basic qualification criteria under Alternative B. This standard is consistent with that used in the CD Rules, and it makes the criteria simple and clear.

However, the criteria under section 2.2, 5. of Alternative B requires further clarification. The intent of this provision is to not allow companies without current business operations (i.e. shells) listed on the Exchanges to be eligible to use a short form prospectus. However, there may be circumstances where an issuer has not ceased operations, but whose principal asset is cash or cash equivalents. As a result, we recommend that either the term "principal asset" be defined appropriately, or in the alternative, that the criteria under 2.2., 5. (a) and (b) be required jointly, therefore replacement of the word "or" with "and" at the end of section 2.2, 5.(a).

Other Aspects of the Proposed Rule

2., 3. and 4. Questions

We have no comment.

III. REQUEST FOR COMMENT ON POSSIBLE FURTHER CHANGES IN PROSPECTUS REGULATION

5. Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a

lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the process would put undue pressure on the due diligence process?

The Exchanges believe investors and other market participants could benefit from an offering system permitting eligible issuers to access capital based solely on the filing of a final prospectus (a "Final Prospectus Regime"). Such a system would strike an appropriate balance between a pure continuous disclosure based system or IDS, and the current prospectus based regime.

An offering system based only on a final prospectus would provide issuers, and investors, with more timely and predictable access to capital. The cost and time savings that would result by eliminating regulatory review would be substantial, thus decreasing the cost of raising capital and allowing issuers to focus more resources on their actual business.

The Final Prospectus Regime provides a distinct advantage over a pure disclosure based system like an IDS - investors would be provided with a consistent form of disclosure in the final prospectus, enabling them to easily locate information relevant to their investment decisions. It also assists investors in comparing investment opportunities.

Provided that the standard of disclosure and the rights of the purchasers remain intact, the proposed system would not result in an erosion of investor protection.

If such a system is implemented however, it is critical that a regulatory review of issuers' disclosure occur on a regular basis in order to ensure that there is an adequate and consistent level of disclosure in the public domain. Although this review may not take place at the time of an offering, issuers must be motivated to ensure that their continuous disclosure as well as any supplementary disclosure included in a prospectus meets the full, true and plain disclosure standard. If an issuer's disclosure is found to be inadequate, the penalties must be significant enough to motivate them to comply in the future. In addition to certain prohibitions and restrictions as discussed in Question 6, such a system must be introduced against a backdrop of civil liability for continuous disclosure.

6. *If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include the following:*

- *a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;*
- *a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD;*
- *a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD?*

Do you think these are appropriate?

We recommend the second and third options noted above. Rather than restrict new, but potentially compliant issuers, from using the system for a seasoning period, the objective may be better achieved by penalizing non-compliant issuers.

7. *Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by issuers and dealers? If so, should the press release or public notice be required on "the issuer forming a reasonable expectation that an offering will proceed" or on some other event?*

   It is crucial that the marketing regime be triggered by some form of public disclosure. While the suggested trigger is somewhat subjective, it may prevent premature disclosure that may occur if the trigger is based on more objective measures such as the engagement of an agent. Further, this trigger may also assist in preventing illegal insider trading in advance of a public announcement of the offering. We also recommend that notice be provided to the market in the event the transaction is not completed within a reasonable period.

Thank you for the opportunity to comment on the proposed repeal and replacement of NI 44-101. Should you wish to discuss any of the comments with us in more detail, we would be pleased to respond.

Sincerely,

TSX INC.

"Rik Parkhill"

TSX VENTURE EXCHANGE

"Linda Hohol"

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April 11, 2005

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Ladies and Gentlemen:

Re: Proposed amended and restated National Instrument 44-101 *Short Form Prospectus Distributions*, Form 44-101F1 and Companion Policy 44-101CP (collectively, the Proposed Short Form Rule or the Rule)

We have read the Proposed Short Form Rule and provide you with our comments herein. We welcome these amendments to the current short form prospectus rule. As the CSA has pointed out, the proposed amendments will help integrate and streamline the disclosure regimes for the primary and secondary securities markets now that the harmonized continuous disclosure rule is issued, and we believe all these measures will result in a more efficient and effective capital market in Canada.

The first section of this letter contains our comments on specific issues, and the second section addresses the questions you posed in your request for comments. Capitalized terms in this letter have the same meaning as those in the Proposed Short Form Rule, except as otherwise indicated.

COMMENTS ON SPECIFIC ISSUES

Qualification Criteria

We believe the qualification criteria issue represents a significant matter of broad principle. Hence we will address this issue first.

We support Alternative B proposed in the Rule. With the establishment of a harmonized continuous disclosure regime by the implementation of National Instrument 51-102, investors and market participants are well aware of the continuous disclosure requirements reporting issuers are subject to. The implementation of the CDR Program and the introduction of the "Investor Confidence Rules" (National Instrument 52-108, and Multilateral Instruments 52-109 and 52-110) further enhance investors' confidence in the Canadian securities market. We believe these factors have rendered the seasoning requirement in proposed Alternative A redundant. In addition, we agree that an issuer's size is not relevant in determining its qualification to use the short form regime, as the CD Rule and the Investors Confidence Rules already have a system to differentiate the disclosure and regulatory requirements among issuers of different sizes. Therefore, we find Alternative B to be the better of the two alternatives.

Auditor's Comfort Letter Requirement

The Proposed Short Form Rule has removed the current requirement to file with the final short form prospectus an auditor's comfort letter regarding unaudited interim financial statements. We agree that this approach enhances efficiency when Canadian auditors are involved, as they are already subject to CICA section 7110, which requires a review to be done on unaudited interim financial statements included in prospectuses. Nevertheless, we would like to point out that foreign auditors are not required to (and usually do not) comply with Canadian generally accepted auditing standards (GAAS). Depending on the local GAAS the foreign auditors are subject to, there may or may not be professional responsibilities to perform a review of unaudited interim financial statements included in the prospectus. Absence of a regulatory requirement to provide a comfort letter, the issuer may choose not to have the foreign auditor to review the unaudited interim financial statements. The determination of whether the prospectus still provides full, true and plain disclosures in this situation is a difficult one to make, and hence we believe investors are more adequately protected if the Rule explicitly addresses situations where foreign auditors are involved.

Requirement to File Notice Declaring Intention to Qualify

Section 2.2(6) requires an issuer to file, at least 10 business days prior to filing the preliminary short form prospectus, a notice declaring the issuer's intention to be qualified to file a short form prospectus. The Proposed Short Form Rule does not indicate whether this notice would be made available on SEDAR to the public. Obviously, there are market implications if this notice is made available to the public, particularly if the issuer decides subsequently not to file a prospectus. In addition, there are other questions relating to the use of the notice. For example, it is not clear whether there is any limit to the time between the filing of this notice and the filing of a preliminary short form prospectus (i.e., whether the notice has an "expiry date"), and whether there are any procedures required to be taken by the issuer if it subsequently decides not to file a prospectus. You should consider clarifying these questions in the companion policy.

Disclosure of Earnings Coverage Ratio

Proposed Form 1 has removed the current requirement to disclose, in a situation where the earnings coverage ratio is less than one-to-one, such fact on the cover page of the prospectus. We believe the earnings coverage ratio is an important factor to consider in a debt or preferred securities offering, and appropriate disclosure should be made on the cover page of the prospectus if the ratio is below one-to-one.

Disclosures related to Significant Business Acquisitions

Item 10.1 of Proposed Form 1 requires disclosure of significant acquisitions completed within 75 days of the prospectus or of probable acquisitions. In particular, paragraph (2)(d) of item 10.1 requires disclosure of how the significant acquisition or proposed acquisition will impact the operating results and financial position of the issuer. This paragraph is not clear as to whether the Rule expects a quantitative or qualitative disclosure of the impact. A quantitative disclosure is probably not going to be very accurate in these situations, since audited results of the acquired business are not yet available. A clarification of the Rule's expectation in the companion policy would be helpful.

RESPONSES TO QUESTIONS LISTED IN REQUEST FOR COMMENT

The numbers for the responses below correspond to the numbers of the questions in the request for comment with respect to the Proposed Short Form Rule.

1. *Alternative A or B*

   As indicated above, we support Alternative B. See our comments above in relation to this issue.

2. *Undertaking to file credit supporters disclosures*

   We agree with the proposed approach.

3. *Exemptions in Item 13 of Proposed Form 1*

   We note that the exemptions provided in Item 13 are similar to the requirements under Rule 3-10 of Regulation S-X and would achieve the same results, except in one scenario. For recently acquired subsidiary issuers or subsidiary guarantors, paragraph (g) of Rule 3-10 of Regulation S-X provides guidance as to when audited financial statements of the subsidiary are required. The Proposed Short Form Rule does not appear to address this scenario. You should consider whether Item 13 needs to deal specifically with this issue.

4. *Disclosure of Expert Interests*

   We agree with the proposed approach, which we believe represents an improvement from the requirements under Form 51-102F2 *Annual Information Form*. Even though this comment is outside the scope of the Proposed Short Form Rule, we would like to recommend that the same clarifications (in particular, subsection 15.2 (5) of the Rule relating to independent auditors) be made to Form 51-102F2.

5. *Elimination of Preliminary Prospectuses and Prospectus Reviews*

   We are concerned about a lack of regulatory review in the context of a prospectus offering if the CSA entirely eliminates the filing of a preliminary prospectus and the prospectus review process. Under the Proposed Short Form Rule, there may still be situations where a short form prospectus is required to provide complex disclosures; for example, in a transaction that involves a reverse takeover or whose significance is over 40%, the prospectus has to include significant acquisition disclosures per Part 8 of NI 51-102. Disclosures required in these situations are no less onerous than those currently required in a long form prospectus, and there is no reason to reduce regulatory oversight from what is currently imposed. We suggest the CSA to incorporate these considerations into their selection process for reviews of short form prospectuses, instead of entirely eliminating the requirement to file a preliminary prospectus and the prospectus review process.

6. *Qualification Criteria when the Preliminary Prospectus Requirement is removed*

   As we do not support the elimination of the preliminary prospectus requirement, we have no comment on this question.

7. *Marketing Restrictions*

As we do not support the elimination of the preliminary prospectus requirement, we have no comment on this question.

Should you have any questions or comments on this letter, we would be pleased to hear from you.

Yours sincerely,

Ernst & Young LLP

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April 11, 2005

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And

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Ontario Securities Commission
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And

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Dear Sirs/Mesdames:

Proposed Repeal and Replacement of National Instrument 44-101 "Short Form Prospectus Distributions", Form 44-101F3 Short Form Prospectus and Companion Policy 44-101CP Short Form Prospectus Distributions

This letter is in response to the Notice and Request for Comments in respect of the above noted instrument, published on January 7, 2005 at (2005) 28 OSCB 117. The answers will follow the numbering of the specific questions set out on pages 127 to 129.

1. Proposed qualification criteria – Alternative A or Alternative B?

We support the broadening of access to the short form prospectus system which is represented by Alternative B. We agree with the Canadian Securities Administrators ("CSA") that a listed issuer that has prepared and filed a long-form prospectus or other disclosure document containing prospectus-level disclosure in order to become a reporting issuer and that maintains up-to-date continuous disclosure relating to its business, including an initial annual information form, should be able to access the capital markets using a short form prospectus without regard to its market capitalization or the period of time that it has been a reporting issuer. The CSA should ensure that the initial annual information form of any new reporting issuer that did not file a long-form initial public offering prospectus is reviewed with the same rigour as an initial public offering prospectus to maintain the integrity of the capital markets.

2. Other aspects of the Proposed Rule – requirement to deliver an undertaking with respect to credit support providers.

We believe that the requirement that the issuer deliver an undertaking to file the periodic and timely disclosure of its credit support provider is an appropriate method to ensure there is sufficient disclosure about the credit support provider in the secondary market.

3. Other aspects of the Proposed Rule – exemptions in item 13 of proposed Form 1.

With respect to the exemption in Item 13.1(e), we believe this exemption is redundant given that under (a) the credit support provider must have provided "full" and unconditional credit support for the securities being offered.

In offerings where there is a credit support provider, investors are most concerned about the financial situation of the credit support provider. We therefore suggest that Items 13.1(f)(i), 13.2(f)(i) and 13.3(f)(i) should simply require the incorporation by reference of the financial statements of the credit support provider in all situations.

We are of the view that the consolidating summary financial information for the credit support provider contemplated by Items 13.1(f)(ii), 13.2(f)(ii) and 13.3(f)(ii) would not

add meaningful disclosure for an investor to that provided by the credit support provider's consolidated financial statements and therefore should be deleted.

4. Other aspects of the Proposed Rule – item 15 of proposed Form 1.

We have no comments on this question.

5. Possible further changes in prospectus regulation – elimination of preliminary prospectuses and prospectus review.

We endorse the alternative approach proposed by the CSA which would permit issuers to access the capital markets by filing a final prospectus and delivering that final prospectus to a potential investor before entering into an agreement of purchase and sale with an investor, subject to a right of withdrawal and rights of rescission and damages if there is a misrepresentation in the prospectus ("Alternative C"). In light of the anticipated adoption in Ontario and possibly other jurisdictions of civil liability for continuous disclosure filings which are not subject to the prior review of securities regulators, there does not appear to be a valid policy rationale to support the current requirements relating to the filing and review of a preliminary prospectus other than in the context of an initial public offering.

We also note that the implementation of Alternative C would be consistent with recent proposals by the United States Securities and Exchange Commission (the "SEC") which, if adopted, would in effect permit certain issuers to access the capital markets by the filing and delivery of only a final prospectus. We strongly urge the CSA to introduce, at a minimum, amendments to the prospectus system for interlisted issuers that are eligible to access this regime in the United States (i.e., well-known seasoned issuers). The failure to adopt such amendments would preclude Canadian issuers from taking full advantage of this United States system once it is adopted in light of concerns related to the "flow-back" of securities into Canada.

We do acknowledge that a move to Alternative C will have implications for the due diligence process, in much the same way that the introduction of the "bought deal" financing had implications for the due diligence process. However, this is a matter to be worked out between issuers and their underwriters, rather than to be dealt with by regulation.

6. Possible further changes in prospectus regulation – qualification criteria.

We note that the CSA seeks comments on whether to introduce qualification criteria for accessing Alternative C. While it may be appropriate to initially limit access to this system on the basis of market capitalization, consistent with the SEC proposals, we believe that it would be inconsistent with the policy rationale supporting Alternative B to

impose a seasoning requirement. We also note that "substantial issuers" may access the current short-form system without compliance with the current seasoning requirement. Accordingly, we would not support a seasoning requirement as one of the qualification criteria.

7. Possible further changes in prospectus regulation – marketing triggered on the issuance of a press release.

We acknowledge and agree with the concerns of the CSA regarding the use of undisclosed information about an offering; however, we believe that the obligation of an issuer to issue a press release upon having determined to proceed with a public offering is a timely disclosure matter that should not be separately regulated by NI 44-101. In particular, we are concerned that some participants in the capital markets or their counsel interpret the current press release requirement in the shelf prospectus regime to require disclosure prior to the time that disclosure would otherwise be required by the timely disclosure regime, including the insider trading provisions of applicable securities laws, and we believe this result is inconsistent with the efficient operation of the capital markets. Issuers and their underwriters should not be permitted to trade securities with knowledge of undisclosed material information regarding the issuer but issuers should not be subject to a requirement that requires premature disclosure of an issuer's consideration of its capital requirements thereby inhibiting an issuer's ability to access the capital markets on an efficient basis.

Separately, we wish to draw the attention of the CSA to a separate but somewhat related matter. Section 7.1(c) of NI 44-101 provides that solicitations of expressions of interest are permitted before the filing of a preliminary short form prospectus only if, among other things, "the issuer has issued and filed a news release announcing the agreement immediately upon entering into the agreement". We would ask the CSA to revise this provision to require that the news release be issued prior to the solicitation of expressions of interest but that it need be filed only as soon as practicable thereafter and in any event within one business day of the issuance of the press release. The dissemination of the press release is the more important of the two steps in this process and once that has been completed solicitations of expression of interest should be permitted to begin, whether or not the filing of the press release has been completed. Although this distinction may seem like a minor one, in our experience the practical implications in the context of "bought deal" financings can be significant.

* * *

We are pleased to have had an opportunity to comment on the proposals contained in this request for comment. If you have any questions or comments, please do not hesitate to contact Doug Marshall (416-4218), Jean Fraser (416-862-6537), Mark DesLauriers (416-862-6709), Steven Smith (416-862-6547) or Robert Lando (212-907-0504).

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP
JS:vkl

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BY TELECOPIER

April 11, 2005

Autorite des marches financiers
800 Square Victoria, Tour de la Bourse
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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 NI 44-101, NI 51-102 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 new NI 44-101, NI 51-102 and related matters. They are in no particular order.

The removal of significant acquisition financial statement requirements from prospectuses is welcome, as they can impose severe difficulties. However, NI 51-102 also retains some severe difficulties in this regard, as follows:

1. The definition of "income from continuing operations", by including depreciation and amortization but excluding tax effects, can lead to strange results, particularly in the context of income trusts. Should it not be before interest expense, depreciation and amortization, and taxes, adjusted to exclude extraordinary or discontinued operations?

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2. Should it be clarified when exchange rates should be computed for purposes of the various significant acquisition tests?

3. While the Business Acquisition Report purports not to require auditor consent, the requirement for Canadian GAAP reconciliation in the notes is effectively an indirect form of consent where foreign businesses are concerned. Also, in the case of smaller acquisitions, foreign auditors may be unfamiliar with Canadian GAAP, thus requiring an expensive re-audit if a reconciliation is required. Perhaps a separate management reconciliation (or no reconciliation) could be provided for as an alternative option. In the further alternative, one could only require reconciliation for acquisitions that are significant at, say, the 50% or 100% level.

Thank you for considering these comments.

Yours truly,

Simon Romano

SAR/he

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

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April 12, 2005

Dear Sirs/Mesdames:

Proposed Repeal and Replacement of National Instrument 44-101 Short Form Prospectus Distributions

I am enclosing our response to the proposed changes to this instrument. We believe the significant enhancements made in 2004 to the continuous disclosure requirements provide an appropriate foundation for expanding access to the short form distribution system. We are pleased to see the CSA moving forward with integrating the enhanced continuous disclosure requirements into the short form prospectus contents, but see considerable room for improvement in the proposed approach to integrating the Business Acquisition Report requirements.

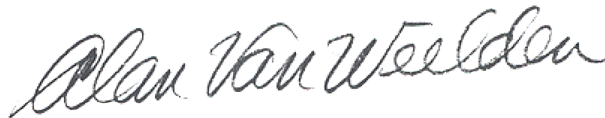
We strongly support the elimination of auditor's comfort letters on unaudited financial statements, but would like to see the CSA's recognition of the enhanced professional standards for an auditor's association with an offering document in CICA Handbook Section 7110 extended to eliminate requirements for a compilation report on pro forma financial statements. We also would like to see

section 4.4 of proposed NI 44-101 amended to accept the inclusion in the short form prospectus of the form of auditor's consent in CICA Handbook Section 7110 as satisfying the consent requirements that would otherwise apply under section 4.4.

We strongly object to including Canadian auditors within the scope of Item 15 "Interests of Experts" of Form 44-101 and Item 16 of Form 51-102F2 "Annual Information Form". Recent developments to establish oversight of auditors by the Canadian Public Accountability Board under NI 52-108 and by the audit committees of reporting issuers under NI 52-110, coupled with professional standards in CICA Section 5751 "Communications with Those Having Oversight Responsibility for the Financial Reporting Process" requiring an auditor to communicate at least annually to the audit committee on matters relating to auditor independence, more than adequately address the disclosure objectives of Items 15 and 16 of the short form prospectus and AIF forms, respectively, as they would otherwise apply to the auditors of the reporting issuer.

We would welcome any opportunity to discuss our responses with you in greater detail.

Yours very truly



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I. Response to Specific Questions

Proposed Qualification Criteria - Alternative A or Alternative B?

1. The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out as Alternative B?

Response: We support broadening the access to the short form prospectus system. However, we are concerned about one major area in which the financial reporting needs to be enhanced for those issuers who qualify for and choose to access the short form prospectus system. There presently are no regulatory requirements for a reporting issuer to file restated annual financial statements for "Type A" subsequent events such as retroactive changes in accounting principles and discontinued operations. Absent any action on the part of Canadian securities administrators, these restatements will happen for the most part only when an issuer must obtain the auditor's consent in connection with a short form prospectus filing. The professional standards in CICA Handbook paragraph 7110.52 state: "When a Type A subsequent event requires restatement and/or additional disclosure in the audited financial statements…the auditor would not consent to the use of the auditor's report in the prospectus until the appropriate changes are made". In the context of a short form prospectus CICA Handbook paragraph 7110.57 states: "…it may not be possible to describe the required restatement adequately in the short form prospectus or in another document incorporated by reference. Accordingly it will be necessary for the entity to restate the financial statements". In similar circumstances SEC requirements do not permit financial statements requiring restatement to be included or incorporated by reference in a registration statement.[1] We believe similar requirements should be formally recognized in the Instructions to Form 44-101F1. We recognize this would create an inconsistency between the primary and secondary market financial disclosure requirements; however, the rapid pace of accounting change as world accounting standards continue

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[1] Part I of Appendix C to the SEC Training Manual indicates audited restated financial statements "…must be furnished if a registrant is required to include its financial statements in a filing made under the Securities Act or Exchange Act that will be made effective subsequent to an event requiring retroactive restatement under GAAP." Requirements for restated financial statements are also embedded in certain SEC forms. For example, SEC Form F-3, Part I, Item 5(b)(ii) contains a requirement to include restated financial statements in the prospectus where an error or a change in accounting principles requires a material retroactive restatement.

to converge would place too great a burden on reporting issuers if they had to file restated annual financial statements after every retroactive accounting change.

From the inception of NI 44-101 until the implementation of NI 51-102 last year, an issuer accessing the short form distribution system was subject to an accelerated annual financial statement filing deadline. As it stands, Alternative B permits a venture issuer to access the short form distribution system without accelerating the financial statement filing deadlines. We believe a venture issuer that chooses to access the short form distribution system should be subject to a requirement to file its annual financial statements, annual MD&A and AIF within 90 days of its financial year end.

We also have some specific concerns about continuous distributions under the existing shelf prospectus procedures that could cause considerable uncertainty for the auditors of the issuers should the number of these distributions significantly increase as a result of broadened access to the short form distribution system. These concerns are addressed in our separate response to the proposed revisions to NI 44-102.

Other Aspects of the Proposed Rule

2. Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market? If not, why not? Please also suggest alternatives to this requirement.

We believe it is appropriate because in many cases, such as an issue of medium term notes of the Canadian subsidiary, the investor essentially is investing in unsecured debt of the guarantor.

3. Is each of the exemptions in Item 13 of Proposed Form 1 appropriate? If not, why not? Are there any other exemptions we should include? If so, why? Is each of the conditions to the exemptions in Item 13 of Proposed Form 1 necessary to ensure that investors have all the information they need to make informed investment decisions? If not, why not? Are there any other conditions we should include? If so, why?

From a financial information perspective, we don't believe the exemptions in Item 13 are appropriate. We already have national instruments designed to facilitate the direct offering of securities in Canada by foreign issuers – NI 71-102 and NI 52-107. In addition, certain U.S. issuers may benefit from the exemptions provided in NI 71-101. We are not convinced that comparable exemptions are warranted when the foreign parent company chooses to access our capital markets through a wholly-owned Canadian subsidiary. If the Canadian subsidiary has little or no operations, the investor in notes payable guaranteed by a foreign parent company essentially holds unsecured debt of the foreign parent. In contrast, if the Canadian subsidiary is a substantive operating entity,

the guarantee may be little more than a "sweetener" and the prospects of having to take recourse against the foreign guarantor may be extremely remote. We believe the investor should be provided with GAAP financial statements of the Canadian subsidiary to enable them to judge whether it is a conduit (i.e., an entity with no or minimal operations), a substantive operating entity with substantial borrowing capacity on its own merit, or something in between. The summary financial information described in Item 13 is too sparse to allow any meaningful financial analysis of the issuer's financial position and results of operations. As an accommodation to a foreign parent company, the CSA should consider providing an option for the Canadian subsidiary to prepare its financial statements in accordance with accounting principles the foreign parent company would be eligible to use under NI 52-107.

We also have concerns for the form and content of the auditor's report on the proposed summary financial information. We assume an auditor's report will be required but this is not clear. The "summary financial information" cannot be properly described as "financial statements" and thus would not be subject to the general audit requirement for financial statements included in a prospectus. Since Item 13 obviously was drafted with a close eye on Rule 3-10 of Regulation S-X, we looked at the corresponding U.S. requirements and found that this information generally is required to be included in a note to the audited annual financial statements filed with the SEC, in which case the information in the note is covered by the auditor's report. When consolidating information is presented outside of the basic financial statements, the U.S. auditor reports on it in accordance with paragraph 19 of AU 551 "Reporting on Information in Auditor-Submitted Documents". This report provides an opinion that the information "…is fairly stated in all material respects in relation to the basic financial statements taken as a whole". The SEC rules require the consolidating financial information to be presented in sufficient detail to allow investors to determine the assets, results of operations and cash flows of each of the consolidating groups. Given the substantial difference in the nature and extent of the consolidating financial information typically included in SEC filings and the proposed summary financial information, we are uncertain whether a U.S. auditor of a U.S. credit supporter would be able to opine that the summary financial information is "fairly stated". In the case of a Canadian credit supporter we point out that (i) there are no Canadian professional standards for preparing consolidating information and (ii) the type of opinion expressed in paragraph 19 of AU 551 is not covered under Canadian GAAS.

It is our understanding that neither Rule 3-10 nor AU 551 requires an audit of the underlying financial statements of the subsidiary entities of the credit supporter. In contrast, instruction 1(c) to Item 13 requires the summary financial information of the subsidiary entities to be derived from financial statements of the subsidiary that are audited for the same periods that the parent company's financial statements have been audited. This audit requirement alone is certain to render the exemptions useless to most multinational issuers.

4. Does Item 15 of Proposed Form 1 accomplish its objective, which is to ensure disclosure of any ownership interests that would be perceived as creating a potential conflict of interest on the part of an expert? If not, what changes should be made to the parameters?

Response: Including the auditors of the issuer within the scope of this Item is contradictory to the objective. The auditors of a reporting issuer are subject to:

- rigorous standards under the Rules of Professional Conduct of the various provincial institutes/ordre that prohibit the holding of any financial interests that could be seen as impairing their professional judgment or objectivity;
- the direct oversight of the Canadian Public Accountability Board ("CPAB") under NI 52-108;
- the direct oversight of the audit committee of the reporting issuer under NI 52-110; and
- the professional standards in CICA Handbook Section 5751 "Communications with Those Having Oversight Responsibility for the Financial Reporting Process", which require written communication to the audit committee, at least annually, on matters relating to the auditors' independence.

No other group of professionals typically involved with a prospectus filing is subject to such intensive independence requirements and regulatory oversight. The Canadian securities regulatory authorities have had significant input into the development of all of the foregoing requirements and we believe that auditors subject to the oversight of CPAB (or a comparable authority in the case of a foreign auditor) should be exempt from the scope of the disclosure requirements for interests of experts. If the CSA believes it is desirable for an auditor to confirm independence every time a reporting issuer files a prospectus, then they should work with the Auditing and Assurance Standards Board of the CICA to effect appropriate amendments to the professional standards in Section 5751 and/or Section 7110.

We assume that conforming changes will be made to Item 16 of Form 51-102F2.

General

5. Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?

Response: We will not attempt to answer each of the questions posed above.

We believe the preliminary prospectus is a very important document in the marketing of a prospective distribution of securities. As a document filed on SEDAR it also contains information relevant to the secondary market trading of the securities of an existing reporting issuer. We support enhancing the stature of the preliminary prospectus by eliminating items that tend to give it the appearance of a "draft" document, such as the "red herring", the use of bullets, the inclusion of incomplete financial statements of entities that have yet to be constituted and the provisions for unsigned auditors' reports. The final prospectus as we know it today would become an amended prospectus reflecting matters such as the terms of the underwriting agreement, changes arising from the prospectus review process, updated financial statement disclosure, etc.

We believe the emphasis on harmonized continuous disclosure reviews as described in CSA Notice 51-312 warrants a reduction in, but not elimination of, the regulatory review of prospectus filings. We support a substantial broadening of the access to the short form distribution system, but would be concerned if the securities regulatory authorities concurrently eliminated prospectus reviews. The North American capital markets are in the process implementing substantial new and revised processes to rebuild investor confidence. In addition, time pressures are already tight for performing due diligence in short form prospectus offerings. A substantial increase in the number of eligible issuers could strain the limited human resources of the underwriters, legal counsel and auditors. Securities regulators should not let down their guard at this juncture. After a transition period of a couple of years we foresee the standard level of the regulatory review of prospectuses evolving into a targeted review of specific areas of interest arising from market developments, economic circumstances or new/changed requirements under Canadian securities legislation.

Qualification Criteria

6. If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include additional qualification criteria and restrictions, such as the following:

- *a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;*
- *a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and*
- *a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.*

Do you think these are appropriate?

Response: We believe some restrictions would be absolutely necessary and appropriate. We do not believe a "blanket" prohibition from offering securities is justified where there significant unresolved issues relating to the issuer's CD. This is best addressed as it is today with the standard caution in

the regulator's CD letters noting the possible impact unresolved issues may have on a future prospectus filing. The facts and circumstances need to be assessed on a case-by-case basis, taking into consideration the nature and complexity of the issues. Obviously, if a possible misrepresentation is involved, the issuer and its professional advisers will want to work diligently towards a timely resolution.

II. Comments on Other Specific Matters

1. Form 44-101F1 Item 6 - Earnings Coverage Ratios

We note and support the changes "…to clarify the requirements and the transition year expectations where there has been a change in year end". However, in our view there is a greater need to provide clarification that will ensure uniform interpretation and calculation of the earnings coverage ratios. In surveying practice in this area we have identified two significantly different methods of calculating earnings coverage ratios. One method is the "all interest" method, whereby all interest expense is added back to pre-tax earnings for purposes of the numerator, and all interest requirements are included in the denominator. The second method is the "long-term debt interest" method, whereby only the interest on long-term debt is added back to pre-tax earnings for purposes of the numerator, and only the interest requirements on long-term debt are included in the denominator.

We believe the different interpretations of the existing guidance are due to inconsistencies in the wording of the instructions to Item 6. Instructions (2), (3), (6) and (7) make no reference to "long-term" debt or interest thereon, whereas Instruction (4) and the new Instruction (5) clearly refer to or contemplate only the inclusion of long-term debt or interest thereon.

The existence of two widely-used methods makes it impossible to base comparisons based solely on the calculated coverage ratios. A simple example can illustrate the potentially significant differences.

Issuer A has $200 million of current bank indebtedness bearing interest at 6% and $50 million of long-term debt bearing interest at 8%. A summary of its earnings is as follows:

Earnings before interest and taxes	$44
Interest on bank indebtedness	(20)
Interest on long-term debt	(4)
Earnings before income taxes	20
Income taxes	(8)
Net earnings	12

Earnings coverage – "all interest" = 44/24 = **1.8 times**.

Earnings coverage – "long-term debt interest" = 24/4 = **6.0 times**.

Based on published materials we have seen, an issuer's capacity to meet its interest obligations is best indicated by including all interest requirements in the earnings coverage calculation. When NI 44-101 was implemented the CSA expressly rejected the "prior deduction method" because investors might falsely interpret the higher ratio as indicating less risk. The 6.0 times coverage calculated in the above example similarly provides an undue degree of "comfort" as to the ability of the Issuer A to meet its interest requirements.

The clear affirmation of the "all interest" method in the revised Form 44-101F1 would eliminate the need for new Instruction (5) because the ability of an issuer to meet its interest requirements is not impacted by the classification of debt as current or non-current. We encourage the CSA to consult with financial analysts to confirm the superiority of the all interest calculation and to obtain and provide further guidance on dealing with computational matters such as seasonal borrowings, equity method investments, and non-controlling interests.

2. Form 44-101 Item 11 - Documents Incorporated by Reference

Integration of Business Acquisition Reports in the Short Form Distribution System

The proposed approach to integrating a Business Acquisition Report ("BAR") filed under NI 51-102 into the short form prospectus diminishes the historical importance placed on pro forma financial statement in Canadian prospectuses and falls significantly short of the comparable SEC requirements. We believe an issuer should be required to include updated pro forma financial statements in subsequently filed short form prospectuses and that the pro forma financial statements should reflect all significant acquisitions made during the current and immediately preceding financial years.

In the U.S. an SEC registrant must update the pro forma financial information in a subsequently filed registration statement even if the financial statements of the acquired business do not require updating. **[8.029 of DPP Guide]** This is comparable to the existing Canadian requirements.

> For example, assume Issuer A files a BAR on July 5, 20X4 containing pro forma income statements for the year ended December 31, 20X3 and the three months ended March 31, 20X4. Under the existing Canadian and SEC rules a prospectus filed on December 15, 20X4 requires an updated pro forma income statement for the nine months ended September 30, 20X4. This statement should be deemed to supersede the pro forma income statement for the three months ended March 31, 20X4 included in the BAR. Also, the pro forma balance sheet as at March 31, 20X4 included in the BAR should be deemed to be superseded by the unaudited balance sheet as at September 30, 20X4 which presents the actual accounting effects of the acquisition.

> Further, a prospectus filed on April 10, 20X5 should require an updated pro forma income statement for the year ended December 31, 20X4. This updated pro forma statement should supersede all previous pro forma financial statements related to that acquisition included in previously filed documents incorporated by reference in the short form prospectus.

The impact of the lack of updated pro forma financial information is compounded in circumstances where multiple significant acquisitions have occurred in the current and immediately preceding financial years. Pro forma financial statements under SEC rules reflect the effects of all of the significant acquisitions in this period on a combined basis (with note disclosure of the individual transactions) or on a disaggregated basis. **[8.019]** Under the proposed revisions to NI 44-101 financial analysts and other interested parties will be left to compile their own updated pro forma income statements when considering the financial information included or incorporated by reference in a short form prospectus. Among other things, this will require a guess as to the "stub period" operating results of the acquired businesses between the date of the most recent financial statements of the business in the BAR and the acquisition date.

A practical drawback to the approach in the proposed Instrument is that any interim pro forma financial statements in a BAR is likely to contain a column derived from the issuer's interim financial statements that may not have been reviewed by the issuer's auditors at the time the BAR was filed. The professional standards in CICA Handbook Section 7110 would require the auditors to review the underlying interim financial statements for this period in addition to reviewing any more recently filed interim financial statements of the issuer included or incorporated by reference in the prospectus. Updating pro forma financial statements for purposes of the prospectus would provide better information and would be supported by the financial statements of the issuer included or incorporated by reference in the prospectus.

We acknowledge our recommendation would create an inconsistency between the continuous disclosure system and the prospectus system. One way of mitigating this inconsistency would be to amend the pro forma financial statements requirements in NI 51-102 to require them to reflect, in addition to the acquisition that is the subject of the BAR, all significant acquisitions made during the periods covered by the audited and unaudited pro forma income statements of the issuer included in the BAR, to the extent not already reflected in the underlying historical statements.

Compilation Reports on Pro Forma Financial Statements

Last fall the AICPA International Practices Task Force discussed whether Canadian compilation reports should be permitted to be included in SEC filings. SEC Staff indicated they would follow up with appropriate Canadian regulators, but we are unaware of the outcome of any further discussions. Revisions to Canadian securities legislation to eliminate the requirement for a compilation report on

pro forma financial statements are long overdue. While appropriate assurance standards exist for an auditors' examination of pro forma financial statements, even under the high standards of the U.S. capital markets the perceived benefits of obtaining auditors' reports on pro forma financial statements consistently have not warranted the costs of such assurance.

By proposing to eliminate the auditors' comfort letter on unaudited financial statements, the CSA displays its willingness to rely on the professional standards in CICA Handbook Section 7110 applicable to the unaudited financial statements included in a prospectus. We strongly encourage the CSA to eliminate the requirements for any report (compilation or otherwise) on pro forma financial statements for the same reasons.

3. 44-101CP Subsections 1.8(7) and 2.6(4) – Successor Issuer

The example using a portion of the business that was "spun-off" is helpful. Consider expanding it to cover a "reverse spin-off" where, in accordance with the substance of the transaction, the entity legally spun-off should be considered to be the successor issuer (for more information on reverse spin-offs see EITF 02-11).

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission

Jo-Anne Bund, Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
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April 12, 2005

Dear Sirs/Mesdames:

Proposed Repeal and Replacement of National Instrument 44-102 Shelf Distributions

We are pleased to provide our comments on the proposed changes to this Instrument. In our response to the proposed changes to National Instrument 44-101 Short Form Distributions we supported broadening the access to the short form distribution system. This in turn may significantly increase the number of shelf distributions under this Instrument. Most of our response outlines our concerns about the need to improve the clarity and guidance on the nature and timing of an auditor's involvement with continuous distributions under this Instrument. Our concerns echo those presently being raised on certain aspects of the SEC's Securities Offering Reform, which as drafted would attach Section 11 liability to prospectus supplements without any requirement for updated consents from independent accountants.

We would welcome the opportunity to discuss with you any aspect of our response.

Yours very truly

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Auditor Involvement with MTN or other Continuous Distributions

We support the proposal in NI 44-101 and the corresponding proposal in NI 44-102 to eliminate the requirement for filing an auditor's comfort letter on interim financial statements included or incorporated by reference in a short form prospectus. We understand the CSA's intention is to rely on the professional standards in CICA Handbook Section 7110 for an auditor's involvement with offering documents, which include a requirement for review of interim financial statements. ***We believe, however, there is room for improvement in both Section 7110 and NI 44-102 in providing clarity and guidance on the timing and nature of an auditor's involvement with a continuous distribution of securities.***

Auditor's responsibilities for interim financial statements subsequently filed and incorporated by reference

There are at least two reasons why the issuer of securities offered on a continuous basis might conclude that no auditor involvement is necessary with interim financial statements filed after the filing of the base shelf prospectus or shelf prospectus supplement establishing the continuous distribution. Firstly, there already are other documents that may subsequently be filed and incorporated by reference without the auditor's involvement. For example, CICA Handbook paragraph 7110.65 states: "The auditor may not be required to issue a new consent when a client files either a shelf prospectus supplement or a supplemented PREP prospectus." In such a case the paragraph goes on to state: "…there is no requirement…to perform additional procedures with respect to this document". Secondly, in the analogous circumstance of a continuous distribution of mutual fund units under NI 81-102 the auditor's review of the fund's interim financial statements filed after the date of the simplified prospectus is not required even though such statements are incorporated by reference into the fund's simplified prospectus (section 3.1 of Form 81-102F1). Section 2.12 of NI 81-106 requires only a notification by the issuer that the interim financial statements have not been reviewed by an auditor.

We believe the preparation of interim financial statements is a significantly more complex process for a POP issuer making a continuous distribution under NI 44-102 than it is for a mutual fund issuer. Accordingly we believe a distinction can be made between these two types of issuers and continuous offerings. ***We recommend an amendment to NI 44-102 to mandate an auditor review of interim financial statements included or incorporated by reference in the short form prospectus or supplements thereto that establishes a continuous distribution.***

Auditor's responsibilities for other documents subsequently filed and incorporated by reference

The SEC is proposing significant changes to U.S. securities legislation in a proposed rule entitled "Securities Offering Reform". In one of the proposed changes issuers would have to agree that information filed in prospectus supplements are deemed to be part of and included in the relevant registration statements and that new effective dates would occur. Our U.S. firm is concerned about the absence of a corresponding requirement for an updated consent from the issuer's independent accountants in such circumstances. In their submission to the SEC our U.S. firm argued that independent accountants named as experts in the original registration statement or post-effective amendment must be given the opportunity to perform the procedures required under AU Section 711 (the equivalent of our CICA Handbook Section 7110) as part of a reasonable investigation and to reconfirm their ability or desire to be associated with that registration statement. Our U.S. firm is calling for clarification of the circumstances under which consents would and would not be required, bearing in mind the professional standards in AU Section 711. They acknowledge that changes to these professional standards may be necessary to address changes in the auditor's responsibilities under the Proposed Rule. Similar concerns are expressed in the response letters submitted to the SEC by PricewaterhouseCoopers, Deloitte & Touche, Ernst & Young and BDO Seidman.

We believe it is impossible for an auditor to be continuously updating his or her reasonable investigation throughout the period of a continuous distribution. It is also impracticable and contrary to the objectives of a continuous distribution system to require an issuer to obtain an updated auditor's consent every time additional information is deemed to be incorporated by reference into the base shelf prospectus. NI 44-102 presently requires the issuer and underwriter to provide forward looking prospectus certificates that are "…as of the date of the last supplement to this prospectus relating to the securities offered by this prospectus and the supplement(s)". ***We believe the CSA should amend NI 44-102 to align the consent requirements of auditors and other experts associated with the continuous offering with the related certificate requirements of the issuer and underwriter (and promoter and credit supporter, where applicable). This is consistent with the view that the due diligence process entailed in a securities offering represents a collective effort of the issuer and its counsel, the underwriter and their counsel, the auditors and others.*** If the CSA determines that in certain circumstances (e.g., a pricing supplement under NI 44-103) an auditor's consent requirement may unduly delay the offering process, then the Instrument should clearly indicate that the auditor's prospectus liability is not extended in such circumstances. Similarly, an expert should not be required to provide a consent that is dated subsequent to the date of the most recent certificates provided by the issuer and underwriters.

Since the AIF disclosure requirements under NI 51-102 have been upgraded to a level comparable to a non-offering prospectus, ***we believe the CSA should regard the filing of the AIF as the filing of an amended prospectus, and add a requirement to file updated prospectus certificates and experts'***

consents when it is incorporated into a base shelf prospectus underlying a continuous distribution of securities.

We would like to see securities legislation amended to accept the inclusion in the prospectus or prospectus supplement of the form of auditor's consent in CICA Handbook Section 7110 as satisfying the applicable regulatory consent requirements such as those in existing section 10.4 of NI 44-101 and section 7.2 of NI 44-102.

Guidance on Auditor's Consents

The consent requirements in section 7.2 of NI 44-102 have been a source of on-going confusion to many of our partners and other professionals. We support the efforts of the CSA to provide an example illustrating the application of the requirements. However, after circulating the guidance in proposed section 2.6.1 of the Companion Policy to a group of experienced securities partners, the guidance was found to be of limited help in clarifying the requirements in section 7.2.

We present below for your consideration our attempt to illustrate these requirements.

Type of Prospectus Filed	Timing of inclusion of expert's report	Timing of filing of expert's consent
MTN or non-MTN base shelf prospectus	Expert's report included in the base shelf prospectus at the date the base shelf prospectus is filed.	Expert's consent is filed at the date the prospectus is filed.
MTN base shelf prospectus	Expert's report included in a Document, filed after the base shelf prospectus is filed, that is incorporated by reference into the prospectus.	Expert's consent is filed at the date the Document is filed.
Non-MTN base shelf prospectus "in distribution"	Expert's report included in a Document, filed after the base shelf prospectus is filed, that is incorporated by reference into the prospectus.	Expert's consent is filed at the date the Document is filed.
Non-MTN base shelf prospectus "out of distribution"	Expert's report included in a Document, filed after the base shelf prospectus is filed, that is incorporated by reference into the prospectus.	Expert's consent is filed no later than the date of filing of the next prospectus supplement corresponding to the base shelf prospectus. (Note)

Note: In the case of an auditor, the auditor's consent normally would be filed at the date of filing of the next prospectus supplement upon completion of all of the applicable procedures in Section 7110 of the Handbook.

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April 13, 2005

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Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
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Dear Sirs/Mesdames:

Re: Request for Comments: Proposed Repeal and Replacement of National Instrument 44-101 – *Short Form Prospectus Distributions*, Form 44-101F3 - *Short Form Prospectus* and Companion Policy 44-101CP - *Short Form Prospectus Distributions*.

We are pleased to provide our comments to the members of the Canadian securities administrators (CSA) on the proposed Repeal and Replacement National Instrument 44-101 – *Short Form Prospectus Distributions*, Form 44-101F3 - *Short Form Prospectus* and Companion Policy 44-101CP - *Short Form Prospectus Distributions* ("Proposed NI 44-101").

Our comments on the proposed instruments have been compiled with input from the lawyers in our Securities and Capital Markets Group, and therefore reflect a consensus of our views. Our comments do not necessarily reflect the opinions of, or feedback from,

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our clients and we expect that our clients will provide their comments directly to the CSA. For purposes of this comment letter, we have adopted and use the same defined terms as in the Request for Comments.

General Comments

We applaud the CSA for this important initiative. We agree with the concept of more fully integrating the disclosure regimes for the primary and secondary markets. We also agree with eliminating the AIF filing and acceptance procedure.

We support the extension of the period within which the underwriting agreement must require the filing of a preliminary short form prospectus from two business days to up to four business days. This extension should assist with due diligence and the preparation of the preliminary prospectus in more complex transactions.

We recommend deleting the requirement for Item 3 (Consolidated Capitalization) in Form 44-101F1. It is not clear to us why there should be a focus on share and loan capital as opposed to any other financial statement item or, for that matter, any other material item. If there is a previous material change there should have been a material change report filed disclosing this information, which would be incorporated by reference.

As a drafting point, eligibility for the use of the short form prospectus system under section 2.2 of both Alternative A and the Current NI 44-101 depends upon what is called "market capitalization" being at least $75 million. The use of this term could be misleading as the holdings of 10% shareholders are to be eliminated from this calculation. Accordingly, we suggest defining the term as "public float" or "adjusted market capitalization".

We strongly endorse the CSA's decision to remove Part 4 of the Current NI 44-101 so as to eliminate the extensive requirements for financial statements relating to acquisitions and dispositions, and to place reliance on the BAR requirements in the CD Rules. In particular, the elimination of the requirement to include financial statements where there have been multiple insignificant acquisitions is a great improvement. Our experience with this suggests that, when this requirement applied, it could result in great expense and inconvenience to an issuer with little benefit to investors. Because the disclosure requirement for insignificant acquisitions might only become apparent in retrospect, as a result of the subsequent occurrence of other insignificant acquisitions, it can be very difficult for an issuer to obtain the necessary audited and interim financial statements and to obtain the necessary information to prepare pro forma financial statements. Accordingly, we strongly support this change.

We note that, notwithstanding the timing requirements for filing of a BAR following a significant acquisition, the proposed Form 44-101F1 requires the filing of financial statements if they are necessary to provide full, true and plain disclosure in the prospectus. Paragraph 4.10 of Companion Policy 44-101CP suggests this is presumed to apply if the significance tests are satisfied at the 40% level. Two questions arise in this context. First, in light of the requirement to file a BAR including financial statements at the 20% level, which presumably reflects a regulatory view on materiality, one wonders

whether issuers will feel bound to include financial statements at the 20% threshold anyway. Accordingly, we would recommend that, rather than leaving this to the discretion of issuers, there be a hard and fast rule that financials statements are only required at and above the 40% level.

Second, if our above recommendation is not accepted, the statements in paragraph 4.10(c) of 44-101CP needs to be clarified. Issuers can "rebut this presumption [regarding the requirement for financial statement disclosure if the significance tests are satisfied at the 40% level] if they can provide compelling evidence that the financial statements are not required for full, true and plain disclosure." At what point is this evidence to be provided, and to whom? Is an exemption required or some other dispensation? If it is contemplated that some formal process is to be followed prior to filing the preliminary prospectus, or some other procedure, it should be spelled out. Conversely, does this mean that the securities regulatory authorities will not question a decision to omit financial statements where the 40% level is not exceeded? If such financial statements were suddenly required due to regulatory review, they could be very difficult to obtain on a timely basis in the context of a bought deal in reliance on a short form prospectus. This again suggests a bright line test for inclusion of financial statements would be better. The flexibility of leaving such statements out could be preserved by providing for an explicit exemption process where it can be demonstrated that the inclusion of financial statements is not justified based on materiality and other factors.

While perhaps not directly raised in the context of the Proposed NI 44-101, we would also strongly recommend to the CSA that the income test be eliminated from the significance tests contained in the CD Rules. While there are a number of reasons for this, the two principal reasons are that it may produce perverse results and that income is already reflected in the investment test. As an example of the first reason, we note that because absolute values of loss and earnings numbers are sometimes compared in applying the test, an issuer with a large loss may not be caught by the test, while an issuer with a small profit would be. Regarding the second reason, because the amount of most investments is at least in part based upon an analysis of earnings (or EBIT or EBITDA), earning power is already reflected in the issuer's investment in the target company.

If the income test cannot be eliminated in its entirety, and it is considered necessary to have a test based on the earnings statement, we would recommend that it be replaced with a revenue-based test.

Responses to Specific Request for Comments

We are also pleased to provide answers to certain of your specific questions using the same numbering scheme as set out in your request for comments.

1. *The changes reflected in Alternative A of Part 2 of Proposed NI 44-101 are necessary to update and harmonize Current NI 44-101 with the CD Rules and other regulatory developments. Alternative B, however, represents a significant broadening of access to the short form prospectus system. Do you believe this broadening of access is appropriate? What are your views on the proposed qualification criteria set out as Alternative B?*

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We support the proposal to conform the qualification criteria for Proposed NI 44-101 with NI 51-102. There is an obvious need to harmonize the instrument with the CD Rules.

With respect to broadening access to the system as set out in Alternative B, we are generally supportive of the alternative but have the following comment. Proposed Alternative B relies on compliance with all of the CD Rules but venture issuers are exempt from many of the CD Rules (e.g. annual information form, filing of voting results, composition and reporting requirements of MI 52-110, proposed MI 52-111, certain aspects of the proposed corporate governance disclosure under proposed NI 58-101). Therefore, Alternative B may not be appropriate for venture issuers, unless they voluntarily comply with all the CD Rules.

2. *Is the requirement to deliver an undertaking of the issuer to file the periodic and timely disclosure of applicable credit supporters under paragraph 4.3(b)2 of Proposed NI 44-101 an appropriate response to our concern about the lack of adequate credit supporter disclosure in the secondary market? If not, why not? Please also suggest alternatives to this requirement.*

It was not clear to us if the requirement under 4.3(b)2 of Proposed NI 44-101 applied to sections 12.1(1), (2) and (3). Presumably under sections 12.1(1) and (2) the credit supporter would already be filing under section 12.1(1) CD documents as a reporting issuer or filing under section 12.1(2) 1934 Act filings. If neither section 12.1(1) nor (2) apply to the credit supporter it may be difficult for the issuer on an on-going basis to undertake that certain information will be filed. As an alternative, we suggest that an issuer be mandated to deliver an undertaking that the issuer use its "best efforts" to adhere to the credit supporter disclosure requirements in Section 12.1.

5. *Do you believe that issuers, investors or other market participants would benefit from the elimination of preliminary prospectuses and prospectus review? What are the principal benefits of such a system? Are there any potential drawbacks? Are you concerned about a lack of regulatory review in the context of a prospectus offering? Are you concerned that expediting the prospectus filing would put undue pressure on the due diligence process?*

We are supportive of the elimination of the preliminary prospectus and prospectus review for senior issuers. It has been our experience that with senior issuers seldom are there substantial comments from the review process and therefore, in certain cases, days are wasted.

6. *If we eliminate the preliminary prospectus and prospectus review as contemplated above, do you think we should impose more onerous restrictions on this offering system, given the lack of regulatory review at the time of the offering? Such restrictions could include additional qualification criteria and restrictions, such as the following:*

- *a one year seasoning requirement to ensure eligible issuers have filed required CD for a minimum period and to allow for regulators to review such CD;*
- *a prohibition from offering securities if the regulator has identified significant unresolved issues relating to the issuer's CD; and*
- *a restriction on types of eligible securities to disallow securities which may not be supported by the issuer's CD.*

Do you think these are appropriate?

If access is broadened under Alternative B of Proposed 44-101 and preliminary prospectus and prospectus reviews are eliminated then we believe certain criteria should be imposed on issuers. The three criteria that are listed above would be appropriate to be included in a list of criteria which an issuer must satisfy in order to file a short form prospectus which would not be subject to review.

7. *Do you believe that a marketing regime triggered on the issuance of a press release or other public notice announcing a proposed offering is workable and would be utilized by issuers and dealers? If so, should the press release or public notice be required on "the issuer forming a reasonable expectation that an offering will proceed" or on some other event?*

Generally, we expect that given the opportunity issuers would use this alternative, although the ability of an issuer to trigger a marketing regime on the issuance of a press release or other public notice would depend on the issuer and the securities being marketed.

We hope that our comments will be considered as constructive by the CSA. Please contact either Paul A.D. Mingay at 416-367-6006 or Michael C. DeCosimo at 416-367-6222 if you wish to discuss our comments with us.

Yours very truly,

"Borden Ladner Gervais LLP"

Securities and Capital Markets Group
Borden Ladner Gervais LLP