AMENDMENTS TO *POLICY STATEMENT TO REGULATION 41-101 RESPECTING GENERAL PROSPECTUS REQUIREMENTS*

1. Section 3.10 of *Policy Statement to Regulation 41-101 respecting General Prospectus Requirements* is amended by inserting, after paragraph (5), the following:

"(6) Marketing materials prepared under section 13.7 or 13.8 of the Regulation cannot amend a preliminary prospectus, a final prospectus or any amendment.".

2. The title of part 6 and section 6.1 are replaced with the following:

"**PART 6 ADVERTISING OR MARKETING ACTIVITIES IN CONNECTION WITH PROSPECTUS OFFERINGS OF ISSUERS OTHER THAN INVESTMENT FUNDS**

"**6.0. Application**

This Part applies to issuers other than investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.

"**6.1. Scope**

(1) The discussion below is focused on the impact of the prospectus requirement on advertising or marketing activities in connection with a prospectus offering.

(2) Issuers and other persons that engage in advertising or marketing activities should also consider the impact of the requirement to register as a dealer in each jurisdiction where such advertising or marketing activities are undertaken. In particular, the persons would have to consider whether their activities result in the party being in the business of trading in securities. For further information, refer to section 1.3 of *Policy Statement to Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations*.".

3. Section 6.2 of the Policy Statement is amended by adding, at the end of paragraph (9), the following paragraph:

"Although the "testing of the waters" exemption in subsection 13.4(2) of the Regulation allows an investment dealer to solicit expressions of interest from accredited investors before the filing of a preliminary prospectus for an initial public offering, we note that the exemption is

- a limited accommodation to issuers and investment dealers that want a greater opportunity to confidentially test the waters before filing a preliminary prospectus for an initial public offering, and

- subject to a number of conditions to address our regulatory concerns, including conditions to deter conditioning of the market.".

4. Section 6.3 of the Policy Statement is amended by inserting, in the French text and after the third bullet point, the following:

"• les enregistrements;".

5. The Policy Statement is amended by inserting, after section 6.3, the following:

"**6.3A. Research reports**

(1) In order to address regulatory concerns such as conditioning of the market, an investment dealer involved with a potential prospectus offering for an issuer should not issue a research report on the issuer or provide media commentary on the issuer prior to the filing of a preliminary prospectus, the announcement of a bought deal under section 7.2 of

Regulation 44-101 or the filing of a shelf prospectus supplement under Regulation 44-102, unless the investment dealer has appropriate "ethical wall" policies and procedures in place between:

- the business unit that proposes to issue the research report or provide media commentary, and

- the business unit that proposes to act as underwriter for the distribution.

We understand that many investment dealers have adopted written ethical wall policies and procedures designed to contain non-public information about an issuer and assist the investment dealer and its officers and employees in complying with applicable securities laws relating to insider trading and trading by "tippees" (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201: *Disclosure Standards*).

(2) Any research reports would have to comply with section 7.7 of the Universal Market Integrity Rules of the Investment Industry Regulatory Organization of Canada and any applicable local rule.".

6. Section 6.4 of the Policy Statement is amended:

(1) by replacing, in paragraph (2), the words "exception to" with the words "exemption from" and the words "exception is" with the words "exemption is";

(2) by replacing, in paragraph (3), the words "an enforceable" with the words "a bought deal" and the word "press" with the word "news";

(3) by replacing paragraph (4) with the following:

"(4) We consider that a distribution of securities commences at the time when

- a dealer has had discussions with an issuer or a selling securityholder, or with another dealer that has had discussions with an issuer or a selling securityholder about the distribution, and

- those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or the selling securityholder an underwriting of the securities.

CSA staff do not agree with interpretations that a distribution of securities does not commence until a later time (e.g., when a proposed engagement letter or a proposal for an underwriting of securities with indicative terms is provided by a dealer to an issuer or a selling securityholder).

Similarly, we do not agree with interpretations that if an issuer rejects a proposed engagement letter or a proposal for an underwriting from a dealer, the "distribution" has ended and the dealer could immediately resume communications with potential investors concerning their interest in purchasing securities from the issuer. In these situations, we expect the dealer not to resume communications with potential investors until after a "cooling off" period. We have concerns that such interpretations would allow dealers to circumvent the pre-marketing restrictions by continuing to test the waters between a series of rejected proposals in close succession until the issuer finally accepts a proposal.

By way of example, the following are situations which would indicate that "sufficient specificity" has occurred and a distribution of securities has commenced:

- Following discussions with an issuer, a dealer provides the issuer with a document outlining possible prospectus financing scenarios at one or more specified share price ranges. Subsequently, management of the issuer recommends to its board of directors that the issuer pursue a prospectus financing at a share price range contemplated by the dealer, the directors of the issuer give management broad authority to execute on a prospectus financing opportunity within that share price range if one arose and the dealer is advised of this approval.

- Following discussions with an issuer, a dealer advises the issuer that the market was looking good for a possible prospectus offering and that the dealer would likely provide indicative terms for an offering later that day.

CSA staff are aware that a practice has developed for "non-deal road shows" where issuers and dealers will meet with institutional investors to discuss the business and affairs of the issuer. If such a non-deal road show was undertaken in anticipation of a prospectus offering, it would generally be prohibited under securities legislation by virtue of the prospectus requirement.

CSA staff would also have selective disclosure concerns if the issuer provided the institutional investors with material information that has not been publicly disclosed. In this regard, see the guidance in Part V of National Policy 51-201: *Disclosure Standards*.";

(4) by replacing, in paragraph (6), the words "press release that announces the entering into of an enforceable agreement in respect of a bought deal" with the words "news release that announces the entering into of a bought deal agreement";

(5) by adding, after paragraph (7), the following:

"(8) The bought deal exemption in Part 7 of Regulation 44-101 is a limited accommodation to facilitate issuers seeking certainty of financing. This policy rationale is reflected in the terms and conditions of the exemption. In particular, in order for the exemption to be available for use, the issuer must have entered into a bought deal agreement with an underwriter who has, or underwriters who have, agreed to purchase the securities on a firm commitment basis. The definition of bought deal agreement in subsection 7.1(1) in Regulation 44-101 provides that a bought deal agreement must not have:

- a "market-out clause" (as defined in subsection 7.1(1) of Regulation 44-101),

- an upsizing option (other than an over-allotment option as defined in section 1.1 of the Regulation), or

- a confirmation clause (other than a confirmation clause that complies with section 7.4 of Regulation 44-101).

"(9) Section 7.3 of Regulation 44-101 allows a bought deal agreement to be modified in certain circumstances. Subsection 7.3(2) sets out conditions for any amendment to increase the number of securities to be purchased by the underwriters. Subsection 7.3(4) sets out conditions for any amendment to provide for a different type of securities to be purchased by the underwriters, and a different price for the securities. Subsection 7.3(5) sets out conditions for any amendment to add additional underwriters or remove an underwriter. Subsection 7.3(6) provides that a bought deal agreement may be replaced with a more extended form of underwriting agreement if the more extended form of underwriting agreement complies with the terms and conditions that apply to a bought deal agreement under Part 7 of Regulation 44-101. Subsection 7.3(7) provides that the parties may agree to terminate a bought deal agreement if the parties decide not to proceed with the distribution. However, section 7.3 is not intended to prevent a party from exercising a termination right under a provision in a bought deal agreement, or a more

extended form of underwriting agreement, that permits a party to terminate the agreement if:

- another party or person performs, or fails to perform, certain actions, or
- certain events occur or fail to occur.

"(10) Subsection 7.3(3) of Regulation 44-101 provides that a bought deal agreement may be amended to reduce the number of securities to be purchased, or the price of the securities, provided the amendment is made on or after the date which is four business days after the date the original agreement was entered into. As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. This policy rationale has not been met when a bought deal agreement is amended to provide for a smaller offering or a lower share price, particularly within a short period of time after the original agreement has been signed. If an underwriter does not wish to assume the risk of a bought deal, the underwriter may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.

"(11) Section 7.4 of Regulation 44-101 provides that a bought deal agreement may not contain a confirmation clause (as defined in section 7.1 of Regulation 44-101) unless certain conditions apply. In particular, confirmation clauses are not permitted unless the confirmation period is only between the day on which the bought deal agreement is signed, and the next business day.

Since "sufficient specificity", as discussed in subsection (4), will have occurred before the time the signed bought deal agreement is presented to the issuer pursuant to paragraph 7.4(1)(a) of Regulation 44-101, underwriters cannot communicate with investors about the issuer or the distribution until the bought deal agreement is signed by the issuer, confirmed by the lead underwriter in accordance with section 7.4 of Regulation 44-101, and announced in a news release. Furthermore, the issuer and underwriters would be bound by insider trading and tippee prohibitions in securities legislation until the news release announcing the bought deal has been broadly disseminated.

"(12) We note that the use of confirmation clauses in bought deal agreements under Part 7 of Regulation 44-101 is different from the practice of "overnight marketed deals". In an overnight marketed offering, the issuer is not relying on the bought deal exemption in Part 7 of Regulation 44-101. Instead, in a typical overnight marketing offering,

- On the first day (day 1), the issuer will file a preliminary prospectus with "bullets" for size of the offering and the price per security.
- After a receipt for the preliminary prospectus is issued on day 1, the underwriters will, after the close of trading, market the deal "overnight" to institutional and other investors.
- On the morning of the second day (day 2), the underwriters will provide the issuer with details of the proposed size of the offering and the price per security. If the issuer accepts the proposed terms, the issuer and the underwriters will sign an agreement in which the underwriters agree to purchase the base amount of the offering on a firm commitment basis. The issuer will then issue and file a news release announcing the agreement.
- Later on day 2, the issuer will file an amended and restated preliminary prospectus that discloses the agreement, the size of the offering and the price per security.
- Alternatively, if the issuer does not accept the terms proposed by the underwriters after the overnight marketing, the issuer will withdraw the preliminary prospectus.

"(13) We note that underwriters often specify in a bought deal agreement, or a more extended form of underwriting agreement, that the issuer must file and obtain a receipt for the final prospectus within a short period of time after the first comment letter in respect of the preliminary prospectus is issued by staff of the principal regulator under Policy Statement 11-202. However, issues may arise in the first comment letter that cannot be resolved within the time frame contemplated in the bought deal agreement or the underwriting agreement. Accordingly, issuers and underwriters should not expect that all comments can be resolved within a particular period of time.

As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. This policy rationale may not have been met if a bought deal agreement is terminated because regulatory comments are not settled within a short period of time after the first comment letter. If an underwriter does not want to assume the risk of a bought deal and allow for a reasonable period of time for the issuer to settle any comments from staff of the principal regulator, the underwriter may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.

"(14) If an underwriter enters into an engagement letter, or similar agreement, with an issuer solely for the purpose of conducting due diligence before a potential bought deal under Part 7 of Regulation 44-101, that event will not, in and of itself, indicate that "sufficient specificity" has been achieved as discussed in subsection (4), provided that the engagement letter does not contain any other information which indicates that "it is reasonable to expect that the dealer will propose to the issuer an underwriting of securities".

If permitted by the issuer, an underwriter may want to conduct sufficient due diligence before proposing a bought deal under Part 7 of Regulation 44-101. Where an issuer is required to file technical reports under *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects*, the underwriter may want to confirm, as part of its due diligence before proposing a bought deal, that the issuer's technical reports are compliant with the requirements of that regulation.

As noted above, the policy rationale of the bought deal exemption is to facilitate issuers seeking certainty of financing. While we recognize that a bought deal agreement or a more extended form of underwriting agreement often contain provisions giving the underwriters a right to terminate the agreement under a "due diligence out", these provisions should not be used in a way that would defeat the policy rationale of the bought deal exemption.

Where underwriters are not willing or able to conduct sufficient due diligence in advance of proposing a bought deal to an issuer, the underwriters may want to consider proposing a fully marketed offering to the issuer, rather than a bought deal.".

7. The Policy Statement is amended by inserting, after section 6.4, the following:

"**6.4A. Testing of the waters exemption – IPO issuers**

(1) The testing of the waters exemption for issuers planning to conduct an initial public offering (IPO issuers) in subsection 13.4(2) of the Regulation is intended for issuers that have a reasonable expectation of filing a long form prospectus in respect of an initial public offering (IPO) in at least one jurisdiction of Canada. The exemption permits an IPO issuer, through an investment dealer, to determine interest in a potential IPO through limited confidential communication with accredited investors. The purpose of the exemption is to provide a way for an IPO issuer to ascertain if there is adequate investor interest before starting the IPO process and incurring costs (e.g., retaining advisors to engage in formal due diligence activities and draft a preliminary prospectus).

The exemption is not intended to allow an investment dealer to "pre-sell" the IPO and "fill their book" before the filing of a preliminary prospectus. Consequently, subsection 13.4(4) of the Regulation provides that if any investment dealer solicits an expression of interest under the exemption, the issuer must not file a preliminary prospectus

in respect of an IPO until the date which is at least 15 days after the date on which an investment dealer last solicited an expression of interest from an accredited investor under the exemption.

(2) The testing of the waters exemption for IPO issuers permits an investment dealer to solicit expressions of interest from accredited investors if the conditions of the exemption are met. Any investment dealer relying on this exemption would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstances) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include soliciting expressions of interest).

(3) In order for the exemption to be used, paragraph 13.4(2)(b) of the Regulation provides that the IPO issuer must not be a "public issuer", as defined in subsection 13.4(1). This means that the IPO issuer must not be a public company in any country, and must not have its securities traded in any country on a stock exchange, marketplace or any other facility for bringing together buyers and sellers of securities and with respect to which trade data is publicly reported. Similarly, subsection 13.4(7) of the Regulation provides that the exemption is not available for use if:

- any of the IPO issuer's securities are held by a control person that is a public issuer, and

- the IPO of the IPO issuer would be a material fact or material change with respect to the control person.

(4) Subsection 13.4(5) of the Regulation requires an issuer to keep a written record of any investment dealer that it authorized to act on its behalf in making solicitations in reliance on the testing of the waters exemption for IPO issuers in subsection 13.4(2) of the Regulation. The issuer must also keep copies of the written authorizations referred to in paragraph 13.4(2)(d) of the Regulation. To meet this requirement, we would expect the issuer to record the name of a contact person for each investment dealer that it authorized and contact information for that person. During compliance reviews, securities regulators may ask the issuer to provide them with copies of these documents.

(5) The testing of the waters exemption for IPO issuers may be used at the same time by more than one investment dealer in respect of the same issuer, provided that the issuer has authorized each investment dealer in accordance with paragraph 13.4(2)(d) of the Regulation.

(6) Paragraph 13.4(6)(a) of the Regulation requires an investment dealer to keep a written record of the accredited investors that it solicits pursuant to the exemption, a copy of any written material and written approval referred to in subparagraph 13.4(3)(a)(i) and a copy of the written confirmations referred to in paragraph 13.4(3)(b). To meet this requirement, we would expect the investment dealer to record the name of the contact person for each accredited investor that it solicited and contact information for that person. During compliance reviews, securities regulators may ask the investment dealer to provide them with copies of these documents.

(7) An investment dealer soliciting expressions of interest in accordance with the testing of the waters exemption for IPO issuers in subsection 13.4(2) of the Regulation may only solicit expressions of interest from an accredited investor if certain conditions are met. One condition in paragraph 13.4(3)(b) of the Regulation is that before providing the investor with information about the proposed offering, the investment dealer must obtain confirmation in writing from the investor that the investor will keep information about the proposed offering confidential, and will not use the information for any purpose other than assessing the investor's interest in the offering, until the earlier of the information being generally disclosed in a preliminary long form prospectus, or the issuer confirming in writing that it will not be pursuing the potential offering. An investment dealer may obtain this written confirmation from an accredited investor by return email. Here is a sample email that an investment dealer could use:

"We want to provide you with information about a proposed initial public offering of securities. Before we can provide you with this information, you must confirm by return email that:

- You agree to receive certain confidential information about a proposed initial public offering by an issuer.

- You agree to keep the information about the proposed offering confidential and not to use the information for any purpose other than assessing your interest in the offering, until the earlier of (i) the information being generally disclosed in a preliminary prospectus or otherwise, or (ii) the issuer confirming in writing that it will not be pursuing the potential offering.".

An accredited investor may respond to this email by simply stating "I so confirm".

We remind investment dealers and accredited investors that they should not be using the information received under the testing of the waters exemption for IPO issuers in a way that may be considered abusive. For example, we would consider it inappropriate for an accredited investor to use information about the IPO issuer to make decisions about trading in securities of competitors of the IPO issuer. We note that CSA staff may investigate subsequent trading in securities of competitors of IPO issuers that have used the testing of the waters exemption.

(8) Subparagraph 13.4(3)(a)(i) of the Regulation requires that any written materials used by an investment dealer to solicit expressions of interest under the testing of the waters exemption be approved by the issuer. We remind issuers and investment dealers that:

- Any preliminary prospectus filed by the issuer subsequent to the solicitation must contain full, true and plain disclosure of all material facts.

- Selective disclosure concerns would arise if accredited investors were provided with material facts that are not disclosed in any subsequent preliminary prospectus.

(9) We would expect an investment dealer seeking to solicit accredited investors in reliance on the testing of the waters exemption for IPO issuers to:

- conduct reasonable diligence to determine that an investor is an accredited investor before soliciting the investor, and

- retain all documentation that they receive in this regard.

(10) Since soliciting accredited investors under the testing of the waters exemption for IPO issuers would be an act in furtherance of a trade, an issuer and an investment dealer acting on behalf of the issuer would not be able to rely on the exemption if the issuer was subject to a cease trade order.

(11) We refer issuers and investment dealers to the guidance in section 6.10 of this Policy Statement. We note that issuers and investment dealers should have procedures in place to prevent "leaks" of information before the filing of a preliminary prospectus for an initial public offering.".

8. Section 6.5 of the Policy Statement is amended:

(1) by replacing paragraph (1) with the following:

"(1) Securities legislation provides for certain exceptions to the prospectus requirement for limited advertising or marketing activities during the waiting period between the issuance of the receipt for the preliminary prospectus and the receipt for

the final prospectus. Despite the prospectus requirement, it is permissible during the waiting period to

(a) distribute a preliminary prospectus notice (as defined in the Regulation) that

- "identifies" the securities proposed to be issued,
- states the price of such securities, if then determined, and
- states the name and address of a person from whom purchases of securities may be made,

provided that any such notice states the name and address of a person from whom a preliminary prospectus may be obtained and contains the legend required by subsection 13.1(1) of the Regulation;

(b) distribute the preliminary prospectus;

(c) provide standard term sheets, if the conditions in section 13.5 of the Regulation are complied with;

(d) provide marketing materials, if the conditions in section 13.7 of the Regulation are complied with; and

(e) solicit expressions of interest from a prospective purchaser, if prior to such solicitation or forthwith after the prospective purchaser indicates an interest in purchasing the securities, a copy of the preliminary prospectus is forwarded to the prospective purchaser.";

(2) by inserting, in paragraph (3) and after the word "security", "contemplated by paragraph 6.5(1)(a) above";

(3) by inserting, in paragraph (4) and after the words "For the purpose of identifying a security", "as contemplated by paragraph 6.5(1)(a) above".

9. The Policy Statement is amended by inserting, after section 6.5, the following:

"**6.5A. Standard term sheets**

(1) The standard term sheet provisions in sections 13.5 and 13.6 of the Regulation, section 7.5 of Regulation 44-101, section 9A.2 of Regulation 44-102 and section 4A.2 of Regulation 44-103 permit an investment dealer to provide a standard term sheet to a potential investor if the conditions of the applicable provision are met.

Any investment dealer relying on these provisions would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstance) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include providing a standard term sheet to an investor).

(2) The Regulation defines "standard term sheet" to mean a written communication regarding a distribution of securities under a prospectus that contains no information other than that referred to in subsections 13.5(2) and (3) or subsections 13.6(2) and (3) of the Regulation, subsections 7.5(2) and (3) of Regulation 44-101, subsections 9A.2(2) and (3) of Regulation 44-102 or subsections 4A.2(2) and (3) of Regulation 44-103 relating to an issuer, securities or an offering. A standard term sheet does not include a preliminary prospectus notice or a final prospectus notice, each as defined in the Regulation.

(3) Standard term sheets are subject to the provisions in applicable securities legislation which prohibit misleading or untrue statements. Furthermore, standard term sheets must contain the legends required by subsections 13.5(2) and 13.6(2) of the Regulation, subsection 7.5(2) of Regulation 44-101, subsection 9A.2(2) of Regulation 44-102 and subsection 4A.2(2) of Regulation 44-103, as applicable.

(4) In the case of a standard term sheet provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.5(1)(b) and 13.6(1)(b) of the Regulation require that, other than contact information for the investment dealer or underwriters, all information in the standard term sheet concerning the issuer, the securities or the offering must be disclosed in, or derived from, the preliminary prospectus or the final prospectus, respectively.

Similarly, in the case of a standard term sheet for a bought deal under Part 7 of Regulation 44-101 that is provided before the filing of the preliminary prospectus, paragraph 7.5(1)(c) of Regulation 44-101 requires that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 7.5(1)(c)(i) of Regulation 44-101, or

- later be disclosed in, or derived from, the preliminary prospectus that is subsequently filed.

In the case of a standard term sheet for a tranche of securities to be offered under the shelf procedures (a draw-down) pursuant to a final base shelf prospectus, paragraph 9A.2(1)(b) of Regulation 44-102 provides that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 9A.2(1)(b)(i) of Regulation 44-102, or

- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed.

In the case of a standard term sheet after a receipt for a final base PREP prospectus, paragraph 4A.2(1)(b) of Regulation 44-103 provides that all information in the standard term sheet must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 4A.2(1)(b)(i) of Regulation 44-103, or

- later be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed.

In this regard, if an investment dealer includes information in a standard term sheet for a bought deal, a draw-down under a shelf prospectus or an offering under the PREP procedures that is not currently on the public record, the investment dealer and the issuer should be mindful of selective disclosure concerns and take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by “tippees” (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201: *Disclosure Standards*). For example, if the information could affect the market price of the issuer’s securities, it should be broadly disseminated in a news release before being included in a standard term sheet. If the information was a material change, it would be subject to the material change news release and reporting requirements set out in Part 7 of Regulation 51-102.

(5) A standard term sheet must not be provided unless a receipt for the relevant prospectus has been issued in the local jurisdiction. Similarly, in the case of a standard term sheet for a bought deal under Part 7 of Regulation 44-101 that is provided before the

filing of the preliminary prospectus, the standard term sheet must not be provided unless the preliminary prospectus will be filed in the local jurisdiction.

"**6.5B. Marketing materials**

(1) The marketing materials provisions in sections 13.7 and 13.8 of the Regulation, section 7.6 of Regulation 44-101, section 9A.3 of Regulation 44-102 and section 4A.3 of Regulation 44-103 permit an investment dealer to provide marketing materials to a potential investor if the conditions of the applicable provision are met.

Any investment dealer relying on these provisions would be required to be registered as an investment dealer (unless an exemption from registration is available in the circumstance) in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include providing marketing materials to an investor).

(2) The Regulation defines "marketing materials" to mean written communications intended for potential investors regarding a distribution of securities under a prospectus that contain material facts relating to an issuer, securities or an offering. The definition does not include a standard term sheet, a preliminary prospectus notice or a final prospectus notice. The definition is not intended to include other communications from an investment dealer to an investor, such as a cover letter or email that encloses a copy of a prospectus, a standard term sheet or marketing materials, but does not include any material facts about issuer, securities or an offering.

(3) The applicable interpretation provisions in the prospectus rules clarify that a reference to "provide" in sections 13.7 and 13.8 of the Regulation, section 7.6 of Regulation 44-101, section 9A.3 of Regulation 44-102 and section 4A.3 of Regulation 44-103 includes showing marketing materials to an investor without allowing the investor to retain, or make a copy of, the materials. This means that the rules apply not only to situations where marketing materials are physically provided to a potential investor, but also to situations where a potential investor is shown marketing materials but is not permitted to retain a copy. For example, the rules would apply where a potential investor is shown a paper copy of marketing materials during a meeting or other interaction with a broker, but is not permitted to retain the paper copy. Similarly, the rules would apply where a potential investor is shown a version of marketing materials on a projector screen or laptop computer.

(4) Marketing materials are subject to provisions in applicable securities legislation which prohibit misleading or untrue statements. Accordingly, the issuer and investment dealers involved should have a reasonable, factual basis for any statement in marketing materials. We remind issuers to be cautious when including disclosure in marketing materials about mineral projects. Where this is the case, the disclosure would be considered "written disclosure" within the meaning of *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects* and would have to comply with the requirements of that regulation.

Marketing materials must contain the legends, or words to the same effect, referred to in subsections 13.7(5) and 13.8(5) of the Regulation, subsection 7.6(5) of Regulation 44-101, subsection 9A.3(5) of Regulation 44-102 and subsection 4A.3(6) of Regulation 44-103, as applicable.

Furthermore, paragraphs 13.7(1)(c) and 13.8(1)(c) of the Regulation, paragraph 9A.3(1)(c) of Regulation 44-102 and paragraph 4A.3(1)(c) of Regulation 44-103 provide that if the cover page or the summary of the prospectus contains cautionary language, other than prescribed language, in bold type (e.g., the suitability of the investment, a material condition to the closing of the offering or a key risk factor), the marketing materials must contain the same cautionary language. For example, if the cover page of the prospectus contained cautionary language in bold type that the offering is suitable only to those investors who are prepared to risk the loss of their entire investment, the marketing materials must contain the same warning. In contrast, the requirement would

not apply to prescribed language that is required to be presented in bold type on the cover page of a prospectus (e.g., section 1.8 and subsections 1.9(3) and 1.11(5) of Form 41-101F1).

(5) In the case of marketing materials provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.7(1)(b) and 13.8(1)(b) of the Regulation require that, other than contact information for the investment dealer or underwriters and any comparables, all information in the marketing materials concerning the issuer, the securities or the offering must be disclosed in, or derived from, the preliminary prospectus or the final prospectus, respectively. For example, marketing materials provided during the waiting period could only include an estimate of the range of the offering price or the number of securities if that estimate was in the preliminary prospectus or any amendment.

Similarly, in the case of marketing materials for a bought deal under Part 7 of Regulation 44-101 that are provided before the filing of the preliminary prospectus, paragraph 7.6(1)(c) of Regulation 44-101 requires that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 7.6(1)(c)(i) of Regulation 44-101, or

- later be disclosed in, or derived from, the preliminary prospectus that is subsequently filed.

In the case of marketing materials for a draw-down under a final base shelf prospectus, paragraph 9A.3(1)(b) of Regulation 44-102 provides that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 9A.3(1)(b)(i) of Regulation 44-102, or

- later be disclosed in, or derived from, an applicable shelf prospectus supplement that is subsequently filed.

In the case of marketing materials after a receipt for a final base PREP prospectus, paragraph 4A.3(1)(b) of Regulation 44-103 provides that all information in the marketing materials must either:

- currently be disclosed in, or derived from, a document referred to in subparagraph 4A.3(1)(b)(i) of Regulation 44-103, or

- later be disclosed in, or derived from, the supplemented PREP prospectus that is subsequently filed.

In this regard, if an issuer and an investment dealer include information in marketing materials for a bought deal, a draw-down under a shelf prospectus or an offering under the PREP procedures that is not currently on the public record, the issuer and the investment dealer should be mindful of selective disclosure concerns and take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by “tippees” (these laws are summarized in sections 3.1 and 3.2 of National Policy 51-201: *Disclosure Standards*). For example, if the information could affect the market price of the issuer’s securities, it should be broadly disseminated in a news release before being included in marketing materials. If the information was a material change, it would be subject to the material change news release and reporting requirements set out in Part 7 of Regulation 51-102.

Under the above provisions, it is permissible for marketing materials to include information derived from the prospectus and information that is presented in a manner that differs from the manner of presentation in the prospectus. For example, it is permissible for marketing materials to summarize information from the relevant prospectus or to include graphs or charts based on numbers in the relevant prospectus.

(6) The term “comparables” is defined in each of the prospectus rules to mean information that compares an issuer to other issuers. Comparables may be based on various factors including, but not limited to, market capitalization, the trading price of the securities on a marketplace or other attributes. If an issuer and an investment dealer want to avoid statutory civil liability for comparables in marketing materials, they must comply with subsections 13.7(4) and 13.8(4) of the Regulation, subsection 7.6(4) of Regulation 44-101, subsection 9A.3(4) of Regulation 44-102 and subsection 4A.3(5) of Regulation 44-103, as applicable. Under these provisions, the issuer may remove any comparables and any disclosure relating to those comparables from the template version of the marketing materials before filing it if:

- The comparables, and any disclosure relating to the comparables, are in a separate section of the template version of the marketing materials.

- The template version of the marketing materials that is filed contains a note advising that the comparables, and any disclosure relating to the comparables, were removed. The note must appear immediately after where the removed comparables and related disclosure would have been.

- If the prospectus is filed in the local jurisdiction, a complete template version of the marketing materials containing the comparables, and any disclosure relating to the comparables, is delivered to the securities regulatory authority. Subject to access to information legislation in each jurisdiction, if a complete template version of the marketing materials is delivered under the applicable prospectus rule, the securities regulatory authority or regulator in each jurisdiction will not make these documents available to the public.

- The complete template version of the marketing materials contains the disclosure referred to in paragraph 13.7(4)(d) of the Regulation.

However, any comparables included in marketing materials provided to an investor would be subject to the provisions in applicable securities legislation which prohibit misleading or untrue statements.

(7) Paragraphs 13.7(1)(d) and 13.8(1)(d) of the Regulation, paragraph 7.6(1)(d) of Regulation 44-101, paragraph 9A.3(1)(d) of Regulation 44-102 and paragraph 4A.3(1)(d) of Regulation 44-103 provide that a template version of the marketing materials must be approved in writing by the issuer and the lead underwriter before the marketing materials are provided to an investor. This written approval may be given by email.

“Template version” is defined in section 1.1 of the Regulation to mean a version of a document with spaces for information to be added in accordance with subsection 13.7(2) or 13.8(2) of the Regulation, subsection 7.6(2) of Regulation 44-101, subsection 9A.3(2) of Regulation 44-102 or subsection 4A.3(3) of Regulation 44-103. “Limited-use version” is defined to mean a template version in which the spaces for information have been completed in accordance with those provisions. A template version can have no other spaces for information to be added in a limited-use version.

The above provisions specify that if a template version of the marketing materials is approved in writing by the issuer and the lead underwriter and filed, an investment dealer may provide a limited-use version of the marketing materials that:

- has a date that is different than the template version,

- contains a cover page referring to the investment dealer or underwriters or a particular investor or group of investors,

- contains contact information for the investment dealer or underwriters,

- has text in a format, including the type’s font, colour or size, that is different than the template version, or

- in the case of a limited-use version of the marketing materials provided after a receipt for a final base PREP prospectus, contains the information referred to in paragraph 4A.3(3)(e) of Regulation 44-103 (the PREP information).

Consequently, other than spaces for a date, a cover page, the contact information or the PREP information described above, a template version of the marketing materials must contain all the information that the issuer and the underwriters would like an investment dealer to be able to provide in a limited-use version.

However, the prospectus rules provide that if the template version of the marketing materials is divided into separate sections for separate subjects, an investment dealer may provide a limited-use version of the marketing materials that includes only one or more of those separate sections.

(8) In the case of marketing materials provided during the waiting period or after a receipt for the final prospectus, paragraphs 13.7(1)(g) and 13.8(1)(g) of the Regulation require that the marketing materials be provided with a copy of the preliminary prospectus or the final prospectus, respectively, and any amendment. The marketing materials can only be provided if a receipt for the relevant prospectus has been issued in the local jurisdiction.

Similarly, in the case of marketing materials for a bought deal under Part 7 of Regulation 44-101 that are provided before the filing of the preliminary prospectus, the marketing materials can only be provided if the prospectus will be filed in the local jurisdiction. Paragraph 7.6(1)(g) of Regulation 44-101 requires that upon issuance of a receipt for the preliminary prospectus for the bought deal, a copy of that prospectus must be sent to each potential investor that received the marketing materials and expressed an interest in acquiring the securities.

In the case of marketing materials for a draw-down under a final base shelf prospectus, the marketing materials can only be provided if a receipt for the final base shelf prospectus has been issued in the local jurisdiction. Paragraph 9A.3(1)(g) of Regulation 44-102 requires that the marketing materials be provided with a copy of the final base shelf prospectus, any amendment to the final base shelf prospectus and any applicable shelf prospectus supplement that has been filed.

In the case of marketing materials provided after a receipt for a final base PREP prospectus, the marketing materials can only be provided if a receipt for the final base PREP prospectus has been issued in the local jurisdiction. Paragraph 4A.3(1)(g) of Regulation 44-103 requires that the marketing materials be provided with a copy of:

- the final base PREP prospectus and any amendment, or

- if it has been filed, the supplemented PREP prospectus and any amendment.

National Policy 11-201 respecting Electronic Delivery of Documents sets out the circumstances in which a prospectus can be delivered by electronic means. If the investment dealer previously delivered a paper or electronic copy of the prospectus and any amendment to an investor in accordance with applicable securities legislation, it can include a hyperlink to an electronic copy of the prospectus and any amendment with any subsequent marketing materials sent to the investor if no additional amendment to the prospectus has been filed and receipted. The investment dealer should ensure that it is clear to the recipient which of the documents being delivered in the hyperlink constitute the prospectus.

(9) Paragraphs 13.7(1)(e) and 13.8(1)(e) of the Regulation, paragraph 7.6(1)(e) of Regulation 44-101, paragraph 9A.3(1)(e) of Regulation 44-102 and paragraph 4A.3(1)(e) of Regulation 44-103 require that a template version of the marketing materials must be filed on SEDAR on or before the day that the marketing materials are first provided to an investor. In this regard,

- If an investment dealer wants to rely on section 13.7 of the Regulation and provide marketing materials to an investor on the same day that the preliminary prospectus is filed and receipted, the template version of the marketing materials should be filed with the preliminary prospectus pursuant to subparagraph 9.1(1)(a)(vii) of the Regulation or subparagraph 4.1(1)(a)(vii) of Regulation 44-101, as applicable.

- If an investment dealer wants to rely on section 13.8 of the Regulation and provide marketing materials to an investor on the same day that the final prospectus is filed and receipted, the template version of the marketing materials should be filed with the final prospectus pursuant to subparagraph 9.2(a)(xiv) of the Regulation or subparagraph 4.2(a)(xii) of Regulation 44-101, as applicable.

- When a template version of the marketing materials is filed on SEDAR as part of a prospectus filing, they will generally be made public within one business day. However, in the case of a template version of marketing materials for a bought deal under section 7.6 of Regulation 44-101, the template version of the marketing materials will not be made public on SEDAR until after the preliminary prospectus is filed and receipted.

- Staff of securities regulatory authorities will not be "pre-clearing" a template version of the marketing materials.

- If an issuer files a template version of marketing materials after staff of a securities regulatory authority have completed their review of a preliminary prospectus filing and indicated that they are "clear for final" on SEDAR, the filing of the template version of the marketing materials may result in staff revising the filing's SEDAR status to indicate that staff are "not clear for final" so that staff may have an opportunity to review the template version of the marketing materials.

(10) As noted in Item 36A.1 of Form 41-101F1 and Item 11.6 of Form 44-101F1, marketing materials do not, as a matter of law, amend a preliminary prospectus, a final prospectus or any amendment.

(11) The template version of the marketing materials filed on SEDAR is required to be included in the final prospectus or incorporated by reference into the final prospectus. An investor who purchases a security distributed under the final prospectus may therefore have remedies under the civil liability provisions of applicable securities legislation if the template version of the marketing materials contains a misrepresentation. Furthermore, an investor who purchases a security of the issuer on the secondary market may have remedies under the civil liability for secondary market disclosure provisions of applicable securities legislation if the template version of the marketing materials contains a misrepresentation since:

- the template version of the marketing materials is required to be included in the final prospectus or incorporated by reference into the final prospectus (a final prospectus is a "core document" under the secondary market liability provisions), and

- the template version of the marketing materials is required to be filed and is therefore a "document" under the secondary market liability provisions.

(12) If a final prospectus or any amendment modifies a statement of material fact that appeared in marketing materials provided during the waiting period, the issuer is required to:

- prepare and file, at the time the issuer files the final prospectus or any amendment, a revised template version of the marketing materials that is blacklined to show the modified statement, and

- include in the final prospectus, or any amendment, the disclosure referred to in subsection 36A.1(3) of Form 41-101F1 or subsection 11.6(3) of Form 44-101F1, as applicable.

Similar provisions apply for a draw-down under a base shelf prospectus or an offering under the PREP procedures.

If the blacklining software of the issuer or the issuer's service provider has formatting problems or does not function well with certain kinds of documents or formats, the issuer should try to correct the formatting problems or use another method to reflect changes to the marketing materials, such as using the bold type and underlining features of a software package in order to provide easy-to-read blacklines for filing on SEDAR.

(13) For guidance on marketing materials for income trusts and other indirect offerings, see Part 5 of *Policy Statement 41-201 respecting Income Trusts and Other Indirect Offerings*.

"**6.5C. Standard term sheets and marketing materials - general**

In addition to the requirements on standard term sheets and marketing materials in the applicable prospectus rule, issuers and investment dealers should review other securities legislation for limitations and prohibitions on advertising intended to promote interest in an issuer or its securities. For example,

- A standard term sheet and any marketing materials must not contain any representations prohibited by securities legislation, such as:
  - prohibited representations on resales, repurchases or refunds, and
  - prohibited representations on future value.
- A standard term sheet and any marketing materials must comply with the requirements of securities legislation on listing representations.".

10. The Policy Statement is amended by replacing sections 6.6 and 6.7 with the following:

"**6.6. Green sheets**

(1) Some dealers prepare summaries of the principal terms of an offering, sometimes referred to as green sheets, for the information of their registered representatives during the waiting period. However, distributing the green sheet to the public would generally contravene the prospectus requirement unless the green sheet complies with the provisions in the applicable prospectus rule relating to standard term sheets or marketing materials, or other securities legislation relating to information that can be distributed during a prospectus offering.

(2) Including material information in a green sheet or other marketing communication that is not contained in the preliminary prospectus could indicate a failure to provide in the preliminary prospectus full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and result in the prospectus certificate constituting a misrepresentation. For additional guidance on pricing information in a green sheet, see subsection 4.2(2) of this Policy Statement and subsection 4.3(2) of 44-101CP.

(3) We may request copies of green sheets as part of our prospectus review procedures. Any discrepancies between the content of a green sheet and the preliminary prospectus could result in the delay or refusal of a receipt for a final prospectus and, in appropriate circumstances, could result in enforcement action.

(4) For guidance on green sheets for income trusts or other indirect offerings, see Part 5 Sales and Marketing Materials of *Policy Statement 41-201 respecting Income Trusts and Other Indirect Offerings*.

"**6.7. Advertising or marketing activities following the issuance of a receipt for a final prospectus**

Advertising or marketing activities that are permitted during the waiting period may also be undertaken on a similar basis after a receipt has been issued for the final prospectus. In addition, the prospectus and any document filed with or referred to in the prospectus may be distributed.".

11. Section 6.8 of the Policy Statement is amended by deleting, after the words "the prospectus requirement through", the word "the".

12. Section 6.9 of the Policy Statement is amended:

(1) by inserting, in the French text of paragraph (1) and after the words "de déposer", the word "un";

(2) by inserting, after paragraph (2), the following:

"(3) Nevertheless, we realize that reporting issuers need to consider whether the decision to pursue a potential offering is a material change under applicable securities legislation. If the decision is a material change, the news release and material change report requirements in Part 7 of Regulation 51-102 and other securities legislation apply. However, in order to avoid contravening the pre-marketing restrictions under applicable securities legislation, any news release and material change report filed before the filing of a preliminary prospectus or the announcement of a bought deal under section 7.2 of Regulation 44-101 should be carefully drafted so that it could not be reasonably regarded as intended to promote a distribution of securities or condition the market. The information in the news release and material change report should be limited to identifying the securities proposed to be issued without a summary of the commercial features of the issue (those details should instead be dealt with in the preliminary prospectus which is intended to be the main disclosure vehicle).

Furthermore, after the filing of the news release,

- the issuer should not grant media interviews on the proposed offering, and

- an investment dealer would not be able to solicit expressions of interest until a receipt has been issued for a preliminary prospectus or a bought deal was announced in compliance with section 7.2 of Regulation 44-101.".

13. Section 6.10 of the Policy Statement is replaced with the following:

"**6.10. Disclosure practices**

At a minimum, participants in all prospectus distributions should consider the following to avoid contravening securities legislation:

- We do not consider it appropriate for a director or an officer of an issuer to give interviews to the media immediately prior to or during the waiting period. It may be appropriate, however, for a director or officer to respond to unsolicited inquiries of a factual nature made by shareholders, securities analysts, financial analysts, the media and others who have an interest in such information.

- Because of the prospectus requirement, an issuer should avoid providing information during a prospectus distribution that goes beyond what is disclosed in the prospectus. Therefore, during the prospectus distribution (which commences as

described in subsection 6.4(4) of this Policy Statement and ends following closing), a director or officer of an issuer should only make a statement constituting a forecast, projection or prediction with respect to future financial performance if the statement is also contained in the prospectus. Forward-looking information included in a prospectus must comply with sections 4A.2 and 4A.3 and Part 4B, as applicable, of Regulation 51-102.

- We understand that underwriters and legal counsel sometimes only advise the working group members of the pre-marketing and marketing restrictions under securities legislation. However, there are often situations where officers and directors of the issuer outside of the working group also come into contact with the media before or after the filing of a preliminary prospectus. Any discussions between these individuals and the media will also be subject to these same restrictions. Working group members, including underwriters and legal counsel, will usually want to ensure that any other officers and directors of the issuer (as well as the officers and directors of a promoter or a selling securityholder) who may come into contact with the media are also fully aware of the marketing and disclosure restrictions.

- One way for issuers, dealers and other market participants to ensure that advertising or marketing activities contrary to securities legislation are not undertaken (intentionally or through inadvertence) is to develop, implement, maintain and enforce disclosure procedures.

If a director or officer of an issuer (or a promoter, selling securityholder, underwriter or any other party involved with a pending offering) makes a statement to the media after a decision has been made to file a preliminary prospectus or during the waiting period, our regulatory concerns include circumvention of the pre-marketing and marketing restrictions, selective disclosure and unequal access to information, conditioning of the market and the lack of prospectus liability. In addition to the sanctions and enforcement proceedings discussed in section 6.8 of this Policy Statement, staff of a securities regulatory authority may require the issuer to take other remedial action, such as:

- explaining why the issuer's disclosure procedures failed to prevent the party from making the statement to the media and how those procedures will be improved,

- instituting a "cooling-off period" before the filing of the final prospectus,

- including the statement in the prospectus so that it will be subject to statutory civil liability, or

- issuing a news release refuting the statement if it cannot be included in the prospectus (e.g., because the statement is incorrect or unduly promotional) and disclosing the reasons for the news release in the prospectus.".

14. The Policy Statement is amended by inserting, after section 6.11, the following:

"**6.12. Road shows**

(1) Sections 13.9 and 13.10 of the Regulation, section 7.7 of Regulation 44-101, section 9A.4 of Regulation 44-102 and section 4A.4 of Regulation 44-103 provide for road shows for investors. These provisions and the definition of "road show" in section 1.1 of Regulation 41-101 apply to road shows conducted in person, by telephone conference call, on the internet or by other electronic means. The provisions also apply if an investment dealer records a live road show and later makes an audio or audio-visual version of the recorded road show available to investors.

(2) Although members of the media may attend a road show, they should not be specifically invited to the road show by the issuer or by an investment dealer. We note that road shows are intended to be presentations for potential investors and not press

conferences for members of the media. Furthermore, issuers and investment dealers should not market a prospectus offering in the media. In this regard, see the guidance in sections 6.9 and 6.10 of this Policy Statement.

(3) Subsections 13.9(3) and 13.10(3) of the Regulation, subsection 7.7(3) of Regulation 44-101, subsection 9A.4(3) of Regulation 44-102 and subsection 4A.4(3) of Regulation 44-103 provide that if an investment dealer conducts a road show, the investment dealer must establish and follow reasonable procedures to:

- ask any investor attending the road show in person, by telephone conference call, on the internet or by other electronic means to provide their name and contact information;

- keep a record of any information provided by the investor; and

- provide the investor with a copy of the relevant prospectus and any amendment.

However, section 13.11 of the Regulation and section 4A.5 of Regulation 44-103 provide an exception so that, in the case of a road show for certain U.S. cross-border initial public offerings, an investor attending the road show can provide their name and contact information on a voluntary basis.

For a road show held on the internet or by other electronic means, please see the recommended procedures in section 2.7 of National Policy 47-201: *Trading Securities Using the Internet and Other Electronic Means* and, in Québec, *Notice 47-201 relating to Trading Securities Using the Internet and Other Electronic Means*.

(4) An investment dealer must not provide marketing materials to investors attending a road show unless the materials comply with the relevant marketing materials provisions in sections 13.7 and 13.8 of the Regulation, section 7.6 of Regulation 44-101, section 9A.3 of Regulation 44-102 and section 4A.3 of Regulation 44-103, as applicable. In this context, see the discussion on the meaning of "provide" in subsection 6.5B(3) of this Policy Statement. For example, the provisions would apply where a potential investor is shown a version of marketing materials on a projector screen during a road show conducted in person. Similarly, the provisions would apply where a potential investor is able to view a slide show version of marketing materials during a road show presented online, whether live or recorded.

The above provisions require that a template version of the marketing materials be filed on SEDAR on or before the day they are first provided and included in, or incorporated by reference into, the relevant prospectus.

However, section 13.12 of the Regulation, section 7.8 of Regulation 44-101, section 9A.5 of Regulation 44-102 and section 4A.6 of Regulation 44-103 provide an exception from these filing and incorporation requirements for marketing materials in connection with road shows for certain U.S. cross-border offerings. The exception does not apply to marketing materials other than the marketing materials provided in connection with the road show. Among other things, an issuer relying on the exception must deliver a template version of the marketing materials to the securities regulatory authority in each jurisdiction of Canada where the prospectus was filed. Subject to access to information legislation in each jurisdiction, it is the policy of the securities regulatory authority or regulator in each jurisdiction that the template version of the marketing materials delivered under the applicable prospectus rule will not be made available to the public.

(5) In the past, issuers conducting internet road shows for cross-border IPOs applied for relief from the waiting period restrictions in Canadian securities legislation. However, given the above-noted road show provisions and the exceptions for certain U.S. cross-border offerings, we do not anticipate a need for similar relief in the future and will instead expect these issuers to comply with the applicable road show provision.

In the past, issuers conducting internet road shows for cross-border IPOs also applied for relief from the dealer registration requirements of Canadian securities legislation. However, if a road show is conducted on behalf of an issuer under the above-noted road show provisions, the issuer will not require relief from the dealer registration requirement since the road show will be conducted by an investment dealer that is registered in the appropriate jurisdictions (see subsection 6.12(6) of this Policy Statement). Consequently, we do not expect to grant the relief from the dealer registration requirements that has been granted in the past to cross-border IPO issuers.

(6) The road show provisions permit an investment dealer to conduct a road show for potential investors if the conditions of the applicable provision are met. As noted above, a road show may be conducted in person, by telephone conference call, on the internet or by other electronic means. Unless an exemption from the requirement to register as a dealer is available in the circumstances, any investment dealer relying on one of these provisions would have to be registered as an investment dealer in any jurisdiction where it engages in the business of trading, including engaging in acts in furtherance of a trade (which would include conducting a road show for potential investors). For example, if one or more investment dealers acting as underwriters for a prospectus offering allow potential investors in each jurisdiction of Canada to participate in a road show that the dealers conduct by telephone conference call, then at least one of those dealers must be registered as an investment dealer in every jurisdiction of Canada.

(7) Issuers should note the following with respect to oral statements made at a road show:

- In giving oral presentations at a road show, issuers should generally only discuss information that is contained in, or derived from, the relevant prospectus that has been filed on SEDAR.

- We recognize that issuers need to respond to questions from investors at a road show. In responding to these questions, issuers should avoid making selective disclosure.

- In particular, issuers should take measures to ensure compliance with applicable securities laws relating to selective disclosure, insider trading and trading by "tippees" when:

    - participating in a road show, and

    - including information in marketing materials for a bought deal road show before the filing of a preliminary prospectus that is not in the bought deal news release or the other continuous disclosure documents filed by the issuer.

  These laws are summarized in sections 3.1 and 3.2 of National Policy 51-201: *Disclosure Standards*.

- If an issuer discloses material facts at a road show that are not in a preliminary prospectus that has been filed on SEDAR the final prospectus should contain that information in order to comply with the statutory requirement that the final prospectus contain full, true and plain disclosure of all material facts.

- Depending on the context, oral statements of a "responsible issuer", as defined in securities legislation, at a road show may be "public oral statements", as defined in securities legislation, and subject to statutory provisions for secondary market civil liability.

- Depending on the nature of the statement, oral statements of an issuer at a road show in relation to mineral projects may fall within the purview of *Regulation 43-101 respecting Standards of Disclosure for Mineral Projects*.

- Oral statements made during a road show are subject to the provisions of securities legislation against making misleading or untrue statements.

"**PART 6A ADVERTISING AND MARKETING IN CONNECTION WITH PROSPECTUS OFFERINGS OF INVESTMENT FUNDS**

"**6A.1. Application**

This Part applies to investment funds filing a prospectus in the form of Form 41-101F2 or Form 41-101F3.

"**6A.2. Scope**

(1) The discussion below is focused on the impact of the prospectus requirement on advertising or marketing activities in connection with a prospectus offering.

(2) Issuers and other persons that engage in advertising or marketing activities should also consider the impact of the requirement to register as a dealer in each jurisdiction where such advertising or marketing activities are undertaken. In particular, the persons would have to consider whether their activities result in the party being in the business of trading in securities. For further information, refer to section 1.3 of *Policy Statement to Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

(3) Advertising or marketing activities are also subject to regulation under securities legislation and other rules, including those relating to disclosure, and insider trading and registration, which are not discussed below.

"**6A.3. The prospectus requirement**

(1) Securities legislation generally provides that no one may trade in a security where that trade would be a distribution unless the prospectus requirement has been satisfied, or an exemption is available.

(2) The analysis of whether any particular advertising or marketing activity is prohibited by virtue of the prospectus requirement turns largely on whether the activity constitutes a trade and, if so, whether such a trade would constitute a distribution.

(3) In Québec, since securities legislation has been designed without the notion of a "trade", the analysis is dependent solely on whether the advertising or marketing activities constitute a distribution.

(4) **Definition of "trade"** – Securities legislation (other than the securities legislation of Québec) defines a "trade" in a non-exhaustive manner to include, among other things:

- any sale or disposition of a security for valuable consideration,
- any receipt by a registrant of an order to buy or sell a security, or
- any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

(5) Any advertising or marketing activities that can be reasonably regarded as intended to promote a distribution of securities would be "conduct in furtherance" of the distribution of a security and, therefore, would fall within the definition of a trade.

(6) **Definition of distribution** – Even though advertising or marketing activities constitute a "trade" for the purposes of securities legislation (other than the securities legislation of Québec), they would be prohibited by virtue of the prospectus requirement only if they also constitute a distribution under securities legislation. Securities legislation (other than the securities legislation of Québec) defines a distribution to include a "trade"

in, among other things, previously unissued securities and securities that form part of a control block.

(7) The definition of distribution under the securities legislation of Québec includes the endeavour to obtain or the obtaining of subscribers or purchasers of previously unissued securities.

(8) **Prospectus exemptions** – It has been suggested by some that advertising or marketing activities, even if clearly made in furtherance of a distribution, could be undertaken in certain circumstances on a prospectus exempt basis. Specifically, it has been suggested that if an exemption from the prospectus requirement is available in respect of a specific distribution (even though the securities will be distributed under a prospectus), advertising or marketing related to such distribution would be exempt from the prospectus requirement. This analysis is premised on an argument that the advertising or marketing activities constitute one distribution that is exempt from the prospectus requirement while the actual sale of the security to the purchaser constitutes a second discrete distribution effected pursuant to the prospectus.

(9) We are of the view that this analysis is contrary to securities legislation. In these circumstances, the distribution in respect of which the advertising or marketing activities are undertaken is the distribution pursuant to the anticipated prospectus. Advertising or marketing must be viewed in the context of the prospectus offering and as an activity in furtherance of that distribution. If it were otherwise, the overriding concerns implicit and explicit in securities legislation regarding equal access to information, conditioning of the market, tipping and insider trading, and the provisions of the legislation designed to ensure such access to information and curb such abuses, could be easily circumvented.

(10) We recognize that an issuer and a dealer may have a demonstrable bona fide intention to effect an exempt distribution and this distribution may be abandoned in favour of a prospectus offering. In these very limited circumstances, there may be two separate distributions. From the time when it is reasonable for a dealer to expect that a bona fide exempt distribution will be abandoned in favour of a prospectus offering, the general rules relating to advertising or marketing activities that constitute an act in furtherance of a distribution will apply.

"**6A.4. Advertising or marketing activities**

(1) The prospectus requirement applies to any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a distribution unless a prospectus exemption is available. Accordingly, advertising or marketing activities intended to promote the distribution of securities, in any form, would be prohibited by virtue of the prospectus requirement. Advertising or marketing activities subject to the prospectus requirement may be oral, written or electronic and include the following:

- television or radio advertisements or commentaries;
- published materials;
- correspondence;
- records;
- videotapes or similar material;
- market letters;
- research reports;
- circulars;
- promotional seminar text;

- telemarketing scripts;

- reprints or excerpts of any other sales literature.

(2) Advertising or marketing activities that are not in furtherance of a distribution of securities would not generally fall within the definition of a distribution and, therefore, would not be prohibited by virtue of the prospectus requirement. The following activities would not generally be subject to the prospectus requirement:

- advertising and publicity campaigns that are aimed at either selling products or services of the issuer or raising public awareness of the issuer;

- communication of factual information concerning the business of the issuer that is released in a manner, timing and form that is consistent with the regular past communications practices of the issuer if that communication does not refer to or suggest the distribution of securities;

- the release or filing of information that is required to be released or filed pursuant to securities legislation.

(3) Any activities that form part of a plan or series of activities undertaken in anticipation or in furtherance of a distribution would usually trigger the prospectus requirement, even if they would be permissible if viewed in isolation. Similarly, we may still consider advertising or marketing activities that do not indicate that a distribution of securities is contemplated to be in furtherance of a distribution by virtue of their timing and content. In particular, where a private placement or other exempt distribution occurs prior to or contemporaneously with a prospectus offering, we may consider activities undertaken in connection with the exempt distribution as being in furtherance of the prospectus offering.

"**6A.5. Pre-marketing and solicitation of expressions of interest**

(1) In general, any advertising or marketing activities undertaken in connection with a prospectus prior to the issuance of a receipt for the preliminary prospectus are prohibited under securities legislation by virtue of the prospectus requirement.

(2) A distribution of securities commences at the time when:

- a dealer has had discussions with an issuer or a selling securityholder, or with another dealer that has had discussions with an issuer or a selling securityholder about the distribution, and

- those distribution discussions are of sufficient specificity that it is reasonable to expect that the dealer (alone or together with other dealers) will propose to the issuer or the selling securityholder an underwriting of the securities.

(3) We understand that many dealers communicate on a regular basis with clients and prospective clients concerning their interest in purchasing various securities of various issuers. We will not generally consider such ordinary course communications as being made in furtherance of a distribution. However, from the commencement of a distribution, communications by the dealer, with a person designed to have the effect of determining the interest that it, or any person that it represents, may have in purchasing securities of the type that are the subject of distribution discussions, that are undertaken by any director, officer, employee or agent of the dealer

(a) who participated in or had actual knowledge of the distribution discussions, or

(b) whose communications were directed, suggested or induced by a person referred to in (a), or another person acting directly or indirectly at or upon the direction, suggestion or inducement of a person referred to in (a),

are considered to be in furtherance of the distribution and contrary to securities legislation.

(4) From the commencement of the distribution no communications, market making, or other principal trading activities in securities of the type that are the subject of distribution discussions may be undertaken by a person referred to in paragraph 3(a) above, or at or upon the direction, suggestion or inducement of a person or persons referred to in paragraph 3(a) or (b) until the earliest of

- the issuance of a receipt for a preliminary prospectus in respect of the distribution, and

- the time at which the dealer determines not to pursue the distribution.

"**6A.6. Advertising or marketing activities during the waiting period**

(1) Securities legislation provides an exception to the prospectus requirement for limited advertising or marketing activities during the waiting period between the issuance of the receipt for the preliminary prospectus and the receipt for the final prospectus. Despite the prospectus requirement, it is permissible during the waiting period to:

(a) distribute a preliminary prospectus notice (as defined in the Regulation) that:

- "identifies" the securities proposed to be issued,

- states the price of such securities, if then determined, and

- states the name and address of a person from whom purchases of securities may be made,

provided that any such notice states the name and address of a person from whom a preliminary prospectus may be obtained,

(b) distribute the preliminary prospectus, and

(c) solicit expressions of interest from a prospective purchaser, if prior to such solicitation or forthwith after the prospectus purchaser indicates an interest in purchasing the securities, a copy of the preliminary prospectus is forwarded to the prospectus purchaser.

(2) The use of any other marketing information or materials during the waiting period would result in the violation of the prospectus requirement.

(3) The "identification" of the security contemplated by paragraph 6A.6(1)(a) above does not permit an issuer or dealer to include a summary of the commercial features of the issue. These details are set out in the preliminary prospectus which is intended as the main disclosure vehicle pending the issuance of the final receipt. The purpose of the permitted advertising or marketing activities during the waiting period is essentially to alert the public to the availability of the preliminary prospectus.

(4) For the purpose of identifying a security as contemplated by paragraph 6A.6(1)(a) above, the advertising or marketing material may only:

- indicate whether a security represents debt or a share in an incorporated entity or an interest in a non-corporate entity,

- name the issuer if the issuer is a reporting issuer, or name and describe briefly the business of the issuer if the issuer is not already a reporting issuer (the description of the business should be cast in general terms and should not attempt to summarize the proposed use of proceeds),

- indicate, without giving details, whether the security qualifies the holder for special tax treatment, and

- indicate how many securities will be available.

"**6A.7. Green Sheets**

(1) Some dealers prepare summaries of the principal terms of an offering, sometimes referred to as green sheets. Typically green sheets include information beyond the limited information for which an exemption to the prospectus requirement is available during the waiting period. If so, we would consider the distribution of a green sheet to a potential investor to contravene the prospectus requirement.

(2) Including material information in a green sheet or other marketing communication that is not contained in the preliminary prospectus could indicate a failure to provide in the preliminary prospectus full, true and plain disclosure of all material facts relating to the securities offered by the prospectus and result in the prospectus certificate containing a misrepresentation.

(3) We may request copies of green sheets and other advertising or marketing materials as part of our prospectus review procedures. Any discrepancies between the content of a green sheet and the preliminary prospectus could result in the delay or refusal of a receipt for a final prospectus and, in appropriate circumstances, could result in enforcement action.

"**6A.8. Advertising or marketing activities following the issuance of a receipt for a final prospectus**

Advertising or marketing activities that are not prohibited by the prospectus requirement during the waiting period may also be undertaken on the same basis after a receipt has been issued for the final prospectus relating to the distribution. In addition, the prospectus and any document filed with or referred to in the prospectus may be distributed.

"**6A.9. Sanctions and enforcement**

Any contravention of the prospectus requirement through advertising or marketing activities is a serious matter that could result in a cease trade order in respect of the preliminary prospectus to which such advertising or marketing activities relate. In addition, a receipt for a final prospectus relating to any such offering may be refused. In appropriate circumstances, enforcement proceedings may be initiated.

"**6A.10. Media reports and coverage**

(1) We recognize that an issuer does not have control over media coverage; however, an issuer should take appropriate precautions to ensure that media coverage which can reasonably be considered to be in furtherance of a distribution of securities does not occur after a decision has been made to file a preliminary prospectus or during the waiting period.

(2) We may investigate the circumstances surrounding media coverage of an issuer which appears immediately prior to or during the waiting period and which can reasonably be considered as being in furtherance of a distribution of securities. Action will be taken in appropriate circumstances.

"**6A.11. Disclosure practices**

At a minimum, participants in all prospectus distributions should consider the following practices to avoid contravening securities legislation:

- We do not consider it appropriate for a director or an officer of an issuer to give interviews to the media immediately prior to or during the waiting period. It may be appropriate, however, for a director or officer to respond to unsolicited inquiries of

a factual nature made by shareholders, securities analysts, financial analysts, the media and others who have a legitimate interest in such information.

- Because of the prospectus requirement, an issuer is not permitted to provide information during a prospectus distribution that goes beyond what is disclosed in the prospectus. Therefore, during the prospectus distribution (which commences as described in subsection 6A.5(2) of this Policy Statement and ends following closing), a director or officer of an issuer can only make a statement constituting a forecast, projection or prediction with respect to future financial performance if the statement is also contained in the prospectus.

- We understand that underwriters and legal counsel sometimes only advise the working group members of the pre-marketing and marketing restrictions under securities legislation. However, there are often situations where officers and directors of the issuer outside of the working group also come into contact with the media before or after the filing of a preliminary prospectus. Any discussions between these individuals and the media will also be subject to these same restrictions. Working group members, including underwriters and legal counsel, will usually want to ensure that any other officers and directors of the issuer (as well as the officers and directors of a promoter or a selling securityholder) who may come into contact with the media are also fully aware of the marketing and disclosure restrictions.

- One way for issuers, dealers and other market participants to ensure that advertising or marketing activities contrary to securities legislation are not undertaken (intentionally or through inadvertence) is to develop, implement, maintain and enforce disclosure procedures.

"**6A.12. Misleading or untrue statements**

In addition to the prohibitions on advertising and marketing activities that result from the prospectus requirement, securities legislation in certain jurisdictions prohibits any person from making any misleading or untrue statement that would reasonably be expected to have a significant effect on the market value of securities. Therefore, in addition to ensuring that advertising or marketing activities are carried out in compliance with the prospectus requirement, issuers, dealers and their advisers must ensure that any statements made in the course of advertising or marketing activities are not untrue or misleading and otherwise comply with securities legislation.".