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British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority (Saskatchewan)
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Dept. of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon
Superintendent of Securities, Nunavut

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and

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Dear Sirs and Mesdames:

Re: CSA Notice and Request for Comment – Proposed Amendments Relating to Rights Offerings

This letter is provided to you in response to the CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 - *Prospectus and Registration Exemptions* ("**NI 45-106**"), National Instrument 41-101 *General Prospectus*

Requirements, National Instrument 44-101 *Short Form Prospectus Distributions*, and National Instrument 45-102 *Resale Restrictions* and Proposed Repeal of National Instrument 45-101 *Rights Offerings* ("NI 45-101"), published on November 27, 2014 (the "**Proposed Amendments**").

We are generally very supportive of the Proposed Amendments but would like to take this opportunity to offer the following comments on a select number of issues relating to them:

1. Proposed new exemption for reporting issuers

Notice to security holders

We believe that the requirement to send a notice of a proposed rights offering to "security holders" as a condition of availability of the exemption is unclear, if not problematic. Is the reference to "security holders" intended to mean registered holders, or is it intended to mean beneficial owners? If intended to mean registered holders, then the notice delivery requirement will not operate so as to ensure that all beneficial owners are made aware of the rights offering. If intended to mean beneficial owners, then a requirement to ensure delivery to all beneficial owners at a particular point in time may be difficult or impossible for the issuer to comply with, as the process for communication with beneficial owners that is contemplated by National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("**NI 54-101**") is currently limited to proxy-related materials, in addition to being time-consuming and costly. We note that currently, an issuer will distribute its rights offering circular or prospectus to all of its registered shareholders, together with any "rights offering certificates" or other related materials. Typically, The Canadian Depository for Securities Limited ("**CDS**") will be one of those registered shareholders, and will work with the issuer to distribute copies of those materials to beneficial owners through the network of CDS participants holding securities on behalf of those beneficial owners. While an issuer may be expected to use reasonable efforts to help facilitate distribution of those materials to beneficial owners by CDS and its participants, ensuring that they do in fact reach all beneficial owners is outside the issuer's control.

Recommendation: The requirement to deliver the notice to security holders should be clearly limited only to *registered* shareholders, with the possible addition of a requirement that the issuer take certain reasonable steps to bring the rights offering to the attention of beneficial owners (such as, for example, a requirement to issue a press release containing some or all of the information prescribed by the notice).

Offer to all security holders

As currently drafted, Section 2.1.1(3)(e) of the proposed amendments to NI 45-106 requires the issuer to make the "...basic subscription privilege available on a pro rata basis to each security holder of the class of securities to be distributed on the exercise of the rights". We note that most Canadian public companies will have registered or beneficial owners of their securities who are located or resident in countries other than Canada, and the securities laws of those countries may prohibit either the distribution of rights to holders in that country, or the exercise of the rights by holders in that country, or both. Even if legally permissible, distributing or permitting the exercise of rights by holders in another country may subject the issuer to prospectus or registration requirements in that other country, or make it subject to ongoing continuous disclosure or reporting obligations in that jurisdiction, or impose onerous requirements in order to satisfy the conditions of exemptions from those requirements.

Recommendation: We strongly urge that the requirement to make the basic subscription privilege available to each security holder be limited only to registered and/or beneficial security holders *in a jurisdiction of Canada*.

2. Proposed repeal of the prospectus exemption for rights offerings by non-reporting issuers

We note that in our experience most of the non-reporting issuers making use of the current rights offering prospectus exemption in Section 2.1 of NI 45-106 are foreign issuers, who rely on that exemption in tandem with the minimal connection to Canada exemption currently appearing in Section 10.1 of NI 45-101 (the requirements of which we refer to as the "**Minimal Connection Test**"). Subject to our comments on proposed section 2.1.3 of NI 45-106 (appearing below), we agree that it will be helpful to consolidate the current exemptions in Section 2.1 of NI 45-106 and Section 10.1 of NI 45-101 into a single prospectus exemption. More generally, we also agree that it will be helpful to integrate the substantive requirements for rights offerings into the existing national instruments governing prospectus offerings and prospectus exempt offerings, rather than maintaining NI 45-101 as a separate instrument.

5. Proposed exemption for issuers with a minimal connection to Canada

Minimal Connection Test

In our firm's cross-border securities law practice, we often represent companies across the globe that are conducting rights offerings. Typically, they are seeking to allow the broadest possible participation of their beneficial shareholders on a worldwide basis.

These companies want to let all of their investors have equal access to participation in the rights offering, and provide all investors with the opportunity to avoid the dilution of their interests that would occur if they do not participate. Even though Canada may be a more prominent and significant nation than most others, it is only one of more than 190 countries around the world whose securities laws must be complied with, and the costs of compliance (both in terms of legal fees and administrative requirements) quickly become very significant.

As part of the current reform of the rights offering regime in Canada, we strongly urge the CSA to abandon the current Minimal Connection Test and replace it with a test that is simpler and less expensive to administer.

Under the current Minimal Connection Test, an issuer must make "reasonable inquiry" to determine: (i) whether the number of *beneficial holders* in any single province of Canada exceeds 5% of its worldwide total, or more than 10% in all of Canada in the aggregate; and (ii) whether the number of *securities held* by beneficial holders in any single province of Canada exceeds 5% of the worldwide total, or the number held by beneficial holders in all of Canada in the aggregate exceeds more than 10% of the worldwide total. An officer or other representative of the issuer must provide a certificate attesting that reasonable inquiry has been made and confirming that the tests are met. Currently, the Companion Policy to NI 45-101 states that in order to make "reasonable inquiry", the issuer should follow "...procedures comparable to those fund in National Policy 41 – Shareholder Communication, or any successor instrument..." (the successor instrument now being NI 54-101).

Even if the securities laws of the issuer's home country embodied procedures comparable to NI 54-101 that could be used in the context of a rights offering (rather than only for proxy-related materials as in Canada), in our experience most issuers neither have the time nor are willing to bear the significant expense of conducting a global search of their depositories and depository participants in order to confirm that the Minimal Connection Test is satisfied, and provide a certificate to that effect.

Recommendation: At a minimum, we would propose that the Minimal Connection Test should allow a foreign issuer that is not a reporting issuer in Canada to presume that it meets the 5% and 10% Canadian holders and securities held tests in the absence of *actual knowledge to the contrary*, based on its most recently conducted beneficial ownership search procedures conducted for the purpose of distributing proxy material for a shareholders meeting (or, if it is not required to conduct such procedures under the laws of its home country, then based on the best and most current information otherwise available to it). Further, we would propose that the test be simplified to eliminate the 5% prong of the test based on the percentage of shares held and shareholders in a particular

province. The relevant test for the exemption should in our view be based on the issuer's overall connection to Canada, and not any one particular province (where a single large institutional investor may have a position in excess of 5% of number of shares outstanding).

Delivery of rights offering materials

The requirement to deliver materials "sent to any other security holder" to "each security holder" in Canada is becoming more problematic as many countries allow delivery of information about a rights offering through website postings or other electronic means, making it burdensome to ensure that all registered Canadian shareholders (or worse, beneficial shareholders if that is the intended requirement), physically receive copies of materials that may have been sent to a small handful of very significant shareholders outside of Canada (with the vast majority of other non-Canadian shareholders receiving their information through electronic access).

Recommendation: We believe that it would be appropriate to eliminate this requirement as a condition of the proposed exemption in Section 2.1.3 of NI 45-106, especially if a requirement to file materials on SEDAR is adopted. If thought necessary or desirable, the condition in proposed Section 2.1.3 of NI 45-106 might be replaced with a requirement that the issuer communicate information about the rights offering to security holders in Canada in the same or a similar manner that such information is provided to public shareholders generally in other countries.

Filing on SEDAR

You have specifically asked for comments regarding: "...whether we should require the filing of materials with the regulator through SEDAR as part of the Minimal Connection Exemption". We do not believe that requirement would be problematic, so long as the issuer (through its counsel) would be able to create the necessary SEDAR profile and obtain the necessary filing codes with only minimal incremental cost and delay relative to the current paper filing requirement.

Recommendation: If SEDAR filing of rights offering materials is required as a condition of the Minimal Connection Exemption, we recommend that a simplified and expedited procedure be developed so that this information can be submitted electronically by the issuer or its counsel without imposing any undue administrative or financial burden on the issuer or resulting in any procedural delay.

Accredited Investor Exemption

We ask that the CSA consider making a modification to the way in which the "accredited investor" exemption may be used in connection with a rights offering by a foreign issuer. Currently, the distribution of rights to holders in Canada constitutes a "trade" in securities that is a distribution, requiring the use of a prospectus or a prospectus exemption (as evidenced by the existing exemption in section 2.1 of NI 45-106, which would otherwise be unnecessary). The exercise of the right, however, is fully exempt from the prospectus requirement pursuant to section 2.42(1) of NI 45-106, without any conditions, restrictions or additional requirements of any kind. In other words, unlike virtually all of the more than 190 other countries around the world, Canadian securities laws impose the substantive requirements regulating rights offerings on the distribution of the right itself, rather than imposing those requirements at the time of the exercise of the right. In consequence, under the current regime, a foreign issuer seeking to use the "accredited investor" exemption must take measures to ensure that a shareholder is an accredited investor before it receives any rights, rather than only ensuring that persons exercising rights are accredited investors at the time of exercise. Further, the foreign issuer must report distributions of the *rights* under the accredited investor exemption, filing Form 45-106F1 to report distributions of rights rather than the distribution of shares which occurs on the exercise of the rights. In jurisdictions where the trade report fee is based on the value of the securities distributed, this results in the issuer's payment being based on the nil sale price of the rights, rather than exercise (purchase) price of the underlying shares.

Recommendation: To resolve this anomaly and simplify compliance with the "accredited investor" exemption in connection with a rights offering in circumstances where the Minimal Connection Exemption is not or cannot be used, we propose that the CSA consider the following as an additional, new exemption to be added to NI 45-106:

> *Foreign issuer rights offering to accredited investors*
>
> 2.x (1) The prospectus requirement does not apply to a distribution of a right granted by the issuer to purchase a security of its own issue to a security holder of the issuer, provided that all of the following conditions are satisfied:
>
> (a) the issuer is not incorporated or organized under the laws of Canada or any province or territory of Canada;
>
> (b) the issuer is not a reporting issuer in any jurisdiction of Canada;

(c) no person or company in Canada who acquires a right pursuant to this section 2.x(1) is permitted to exercise that right unless that person or company is an accredited investor; and

(d) any distribution of securities pursuant to the exercise of a right acquired by the holder thereof pursuant to this section 2.x(1) is made pursuant to and in accordance with the prospectus exemption afforded by Section 2.3.

(2) The exemption afforded by section 2.42(1) does not apply to the distribution of a security in accordance with the terms and conditions a security previously issued in reliance upon subsection (1).

Resales

We believe that rights offerings by foreign issuers that are not reporting issuers in Canada should be treated as a special case in terms of resale restrictions, as imposing resale restrictions in connection with either the rights themselves or the underlying shares may result in significant prejudice to Canadian shareholders relative to the issuer's investors in other countries.

If the rights are transferrable (and especially if they have a liquid trading market outside of Canada, as is often the case), investors in other countries will be entitled to elect whether to sell their rights or exercise them. In either case, the right will constitute a valuable benefit to them. Canadian shareholders should be entitled to share in the receipt of this value.

Imposing any hold period or seasoning period on such right effectively precludes a shareholder from realizing economic value by selling the right. Individual shareholders will not be in a position to obtain legal advice regarding whether such a resale may be made in compliance with the securities laws of their own province or territory, and will not have access to the information necessary to determine whether or not the exemption afforded by section 2.14 of NI 45-102 is available in the circumstances.

In consequence, Canadian shareholders will be deprived of the ability to derive value from the rights they are entitled to, offsetting the dilution they may experience as a result of the rights offering, unless they exercise the right – that is, the resale restriction applicable to the right could effectively force Canadian shareholders to make a further investment in the issuer that they do not wish to make.

We also note that any shares issued on the exercise of rights will be subject to a permanent hold period – whether the original shares to which the rights relate are also

subject to a permanent hold period (having been acquired under a prospectus exemption), or whether the original shares to which the rights relate were purchased through open market purchases and not subject to any resale restrictions. We believe this is an anomalous and unfortunate result, and that shares obtained in a rights offering should not be subject to any more onerous restrictions on resale than the shares upon which the rights were distributed.

Recommendation: We propose for your consideration the following as an additional provision of NI 45-102:

First Trades in Foreign Rights Offering Securities

2.15 (1) The prospectus requirement does not apply to a first trade of a right granted by the issuer to purchase a security of its own issue to a security holder of the issuer, provided that all of the following conditions are satisfied:

(a) the issuer is not incorporated or organized under the laws of Canada or any province or territory of Canada;

(b) the issuer was not a reporting issuer in any jurisdiction of Canada at the distribution date or is not a reporting issuer in any jurisdiction of Canada at the date of the first trade; and

(c) the trade is made through an exchange, or a market, outside of Canada, or to a person or company outside of Canada.

(2) The prospectus requirement does not apply to a first trade of a security issued by an issuer pursuant to the exercise of a right that was granted by the issuer to purchase a security of its own issue to a security holder of the issuer, provided that all of the following conditions are satisfied:

(a) the issuer is not incorporated or organized under the laws of Canada or any province or territory of Canada;

(b) the issuer was not a reporting issuer in any jurisdiction of Canada at the distribution date or is not a reporting issuer in any jurisdiction of Canada at the date of the first trade;

(c) the trade is made through an exchange, or a market, outside of Canada, or to a person or company outside of Canada; and

(d) if the security held by the security holder of the issuer in respect of which the right was granted was acquired by the security holder pursuant to a prospectus exemption to which section 2.5 applies, at least four months have elapsed since the date the security holder first acquired the security in respect of which the right was granted.

* * * *

We would like to take this opportunity to thank the CSA for its efforts to pursue improvements to Canada's rights offering regime. Should you wish to discuss any of our comments, please direct your inquiries to Rob Lando at (212) 991-2504, or by e-mail at rlando@osler.com.

Yours very truly,

Osler, Hoskin & Harcourt LLP

RCL: