AMENDMENTS TO *POLICY STATEMENT TO REGULATION 45-106 RESPECTING PROSPECTUS EXEMPTIONS*

1. *Policy Statement to Regulation 45-106 respecting Prospectus Exemptions* is amended by adding, after section 3.9, the following:

"**3.10. Rights offering - reporting issuer**

(1) Offer available to all security holders in Canada

One of the conditions of the rights offering exemption for reporting issuers in section 2.1 of Regulation 45-106 is that the issuer must make the basic subscription privilege available on a pro rata basis to every security holder in Canada of the class of securities to be distributed on exercise of the rights, regardless of how many security holders reside in a local jurisdiction.

(2) Market price and fair value

Paragraph 2.1(3)(g) of Regulation 45-106 provides that if there is no published market for the securities, the subscription price must be lower than fair value unless the issuer restricts all insiders from increasing their proportionate interest in the issuer through the rights offering or a stand-by commitment. If there is no published market for the securities and the issuer restricts all insiders from increasing their proportionate interest in the issuer, the subscription price may be set at any price. Under section 13 of Form 45-106F15, an issuer must explain in its rights offering circular how it determined the fair value of the securities. For these purposes, an issuer could consider a fairness opinion or a valuation.

For the purposes of paragraph 2.1(3)(g) of Regulation 45-106, insiders will not be prohibited from participating in the offering if the published market price or fair value of the securities falls below the subscription price following filing of the rights offering notice.

The rights offering exemption is not intended to be used by insiders or related parties for the purpose of increasing their proportionate interest in the issuer, although we recognize that as a potential outcome. One of the reasons for the above pricing restrictions, and the similar restrictions in paragraph 2.1(3)(g) for issuers with a published market, is to prevent insiders and other related parties from using the rights offering exemption as a means of taking control of the issuer.

(3) Stand-by commitments

To provide the confirmation in subparagraph 2.1(3)(i)(ii) of Regulation 45-106 that the stand-by guarantor has the financial ability to carry out its obligations under the stand-by commitment, the issuer could consider the following:

- a statement of net worth attested to by the stand-by guarantor
- a bank letter of credit
- the most recent annual audited financial statements of the stand-by guarantor.

A registered dealer that acquires a security of an issuer as part of the stand-by commitment may use the exemption in section 2.1.1 of Regulation 45-106. However, we would have concerns if a dealer or other person uses the exemption in section 2.1.1 in a situation where the dealer or other person

(a) is acting as an underwriter with respect to the distribution, and

(b) acquires the security with a view to distribution.

If (a) and (b) apply, the dealer or other person should acquire the security under the exemption in section 2.33 of Regulation 45-106. Please refer to section 1.7 of this Policy Statement.

(4) Calculation of number of securities

In calculating the number of outstanding securities for purposes of paragraph 2.1(3)(h) of Regulation 45-106, CSA staff generally take the view that

(a) if

$x =$ the number or amount of securities of the class of the securities that may be or have been issued upon the exercise of rights under all rights offerings made by the issuer in reliance on the exemption during the previous 12 months,

$y =$ the maximum number or amount of securities that may be issued upon exercise of rights under the proposed rights offering, and

$z =$ the number or amount of securities of the class of securities that is issuable upon the exercise of rights under the proposed rights offering that are outstanding as of the date of the rights offering circular;

then $\frac{x + y}{z}$ must be equal to or less than 1, and

(b) if the convertible securities that may be acquired under the proposed rights offering may be converted before 12 months after the date of the proposed rights offering, the potential increase in outstanding securities, and specifically, "y" in paragraph (a), should be calculated as if the conversion of those convertible securities had occurred,

(c) despite paragraph (b), if the convertible security is a warrant that forms part of a unit and the warrant has nominal or no value, the potential increase in outstanding securities, and specifically, "y" in paragraph (a), should not be calculated as if the conversion of the warrant had occurred.

One of the conditions of the exemption is that the issuer must make the basic subscription privilege available on a pro rata basis to each security holder of the class of securities to be distributed on exercise of the rights. For clarity, this means that an issuer cannot use a rights offering to distribute a new class of securities.

(5) Investment funds

As a reminder, pursuant to section 9.1.1 of *Regulation 81-102 respecting Investment Funds* ("Regulation 81-102"), investment funds that are subject to Regulation 81-102 are restricted from issuing warrants or rights.

"**3.11. Rights offering – issuer with a minimal connection to Canada**

It may be difficult for an issuer to determine beneficial ownership of its securities as a result of the book-based system of holding securities. We are of the view that, for the purpose of determining beneficial ownership to comply with the exemption in section 2.1.2 of Regulation 45-106, procedures comparable to those found in *Regulation 54-101 respecting Communication with Beneficial Owners of Securities of a Reporting Issuer*, or any successor regulation, are appropriate.

In section 2.1.2(1)(a), the issuer must determine the number of beneficial security holders in Canada and the number of securities held by those security holders "to the issuer's knowledge after reasonable enquiry". We think an issuer could generally satisfy this requirement by relying on its most recently-conducted beneficial ownership search procedures conducted for the purpose of distributing proxy material for a shareholders meeting that occurred within the last 12 months, unless the issuer has reason to believe that it would no longer meet the test in section 2.1.2 of Regulation 45-106. For example, if,

after the previous search procedures, the issuer conducted a financing in Canada that could affect the results, they may not be able to rely on those procedures.”.