



June 4, 2008

BY E-MAIL

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

CSA Request for Comments on Proposed Repeal and Replacement of National Instrument 45-106, Companion Policy 45-106CP and Related Amendments

OSC Request for Comments on Proposed Amendment and Restatement of OSC Rule 45-501, Companion Policy 45-501CP and Related Amendments

We are writing in response to the request of the Canadian Securities Administrators (the "CSA") for comments (the "**Request for Comments**") in respect of the proposed repeal and replacement of National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**") and Companion Policy 45-106CP ("**CP 45-106**"), proposed amendments to National Instrument 45-102 *Resale of Securities* ("**NI 45-102**") and Companion Policy 45-102CP ("**CP 45-102**") and related amendments, all as published on February 29, 2008. In addition, this letter addresses our responses to the request of the Ontario Securities Commission (the "OSC") for comments (the "**OSC Request for Comments**") in respect of the proposed amendment and restatement of OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions* ("**Rule 45-501**") and Companion Policy 45-501CP ("**CP 45-01**").

We appreciate the opportunity provided by the CSA and the OSC to provide comments on these initiatives.

1. NI 45-106, CP 45-106, NI 45-102 and CP 45-102

Generally, we are supportive of the CSA's initiative to harmonize and reorganize Canadian securities regulation. We believe that a simplified structure makes the securities regulatory regime more understandable to the market and increases efficiency. Further we strongly support the CSA's initiatives to codify frequently granted relief in the regulatory regime as such action promotes certainty in regulatory approach and minimizes transactions costs for market participants. Accordingly, the changes made to NI 45-106 in connection with the consolidation of the CSA's rules regarding the dealer registration requirement, exemptions therefrom and other registrant matters are helpful. However, we remain concerned that the members of the CSA have not been able to agree on a unified approach to a variety of issues. We highlight, for example, the registration regime and the fact that Part 3 of NI 45-106 will be preserved indefinitely in certain jurisdictions, but not others, notwithstanding the coming into force of proposed National Instrument 31-103 *Registration Requirements*. We note that not all such divergences across jurisdictions can even be seen to reflect policy disagreements, such as the addition of "grandchildren" to eligible purchasers in the prospectus and registration exemptions relating to private issuers (sections 2.4(2)(c) and 3.4(2)(c) of NI 45-106) and family, friends and business associates (sections 2.5(1)(b) and 3.5(1)(b) of NI 45-106), yet not in the prospectus and registration exemptions available in Ontario relating to founders, control persons and family (sections 2.7 and 3.7 of NI 45-106).

We strongly urge CSA members to re-examine those instances where divergences between applicable regulations across jurisdictions remain, including those set out above, and redouble their efforts to harmonize the regulatory regime across the country.

Form 45-106F1

We respectfully submit that the proposed amendment to the instructions for Form 45-106F1 that requires an issuer to file the same report in each jurisdiction in which a distribution is made should be reconsidered. As acknowledged on Schedule 1 to the proposed Form 45-106F1, a filed Form 45-106F1 is not made public, but freedom of information legislation in certain of the jurisdictions may require that the information contained in such form be made available to the public if requested. We note that submitting a common Form 45-106F1 across jurisdictions will therefore mean that a purchaser in any particular jurisdiction is at greater risk of having its identity (including the fact that it purchased securities) divulged to the public. In many transactions, purchasers in private placements are highly sensitive about divulging the fact that they have acquired securities for legitimate business purposes. As the OSC Request for Comments indicates no stated regulatory concerns that such change is attempting to address, we cannot assess the legitimate interests of the regulators against this increased risk of publicity to investors. In the absence of strong regulatory policy reasons for making such change, we submit that Instruction 1 to Form 45-106F1 retain its current permissive character rather than

compelling issuers to submit the same completed form in each jurisdiction in which sales were made.

2. **Rule 45-501 and CP 45-501**

Rule 45-501 appears to contain a typographical error in section 2.9(1) regarding trades in mutual funds to corporate sponsored plans (the "**CSP Prospectus Exemption**"), as the disjunctive "or" has been replaced by the conjunctive "and" at the end of section 2.9(1)(i). We note that this change is inconsistent with predecessor versions of the CSP Prospectus Exemption that have existed since 1998, such as section 1.2 of OSC Rule 35-503 and section 3.2(a) of the current version of Rule 45-501 (collectively, the "**Predecessor Provisions**"). In addition, this change is inconsistent with the proposed parallel registration exemption contained in section 4.1(c) of Rule 45-501, which uses the disjunctive "or" at the end of section 4.1(c)(i).

If, however, this change to the CSP Prospectus Exemption from the Predecessor Provisions was intentional, we are troubled by both the manner in which the change was made and by the content of the change.

The CSP Prospectus Exemption is, by its nature, used by plans sponsored by an employer for its employees. These employer-sponsored plans are structured so that participants may achieve the benefits of the investment flexibility such plans offer over the term of their employment with the sponsor which, in many cases, will be for the duration of the employee's career. However, in order for employer-sponsors to be willing to provide such plans, and the benefits of flexibility such plans offer to employee-participants, employer-sponsors require a degree of certainty that the regulatory regime will not be subject to unexpected changes. The OSC Request for Comments states no policy rationale for such changes from the Predecessor Provisions and, in fact, does not mention or highlight the fact that any such changes were being contemplated or made. We respectfully submit that the CSP Prospectus Exemption should not be amended from the form it takes in the Predecessor Provisions without specifically canvassing employer-sponsors that have spent significant resources structuring plans for their employees premised on the continued availability of the CSP Exemption.

Because of the absence of discussion in the OSC Request for Comments regarding the proposed changes to the CSP Prospectus Exemption, we cannot comment on the validity of the regulatory policy change that may have prompted the OSC to propose the amendments in Rule 45-501. Further, there was no discussion of the changes when the alternative (as currently drafted) clause in section 1.2(a)(ii) of OSC Rule 32-503 that "the decision to purchase the security is not made by or at the direction of the employee" was originally added in 1998. However, we submit that a compelling rationale for using the disjunctive "or" in this regard can be made as follows. The prospectus requirement should not apply where an employee-participant deals only with the employer-sponsor of the plan in respect of its participation in the plan and the purchase of the mutual fund security by the plan, as

Page 4

the establishment of the plan by the employer-sponsor and the range of the mutual funds determined by the employer-sponsor of the plan to be offered thereunder will provide the necessary safeguards to protect the employee-participant without the necessity of qualification of the mutual fund securities by a prospectus. Similarly, if the employee-participant does not direct the purchase of the mutual fund security, such employee-participant will have the protection afforded by the experience of the registrant that manages the plan on behalf of the employer-sponsor. Finally, we note that the use of the conjunctive "and" rather than the disjunctive "or" between clauses 2.9(a)(i) and 2.9(a)(ii) results in the employee-participant only being able to deal with the employer-sponsor in respect of the plan, even where any decision to purchase a mutual fund security cannot be made by or at the direction of the employee-participant. We do not understand what benefit would be achieved by the limitation that employee-participants deal only with the employer-sponsor in respect of the plan, where the employee-participant is not the person determining when to purchase securities under the plan.

Please do not hesitate to contact the undersigned (416.863.5537) if you wish to discuss any of our comments.

Yours very truly,

(signed) Robert S. Murphy

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British Columbia Securities Commission

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