ALBERTA SECURITIES COMMISSION
NOTICE

Proposed Repeal and Replacement of
Multilateral Instrument 45-102 *Resale of Securities*,
Forms 45-102F1, F2 and F3 and
Companion Policy 45-102CP *Resale of Securities*
and
Proposed Amendments to National Instrument 13-101
***System for Electronic Document Analysis and Retrieval* (SEDAR)**
and
Proposed Amendments to National Instrument 62-101
Control Block Distribution Issues
and
Proposed Repeal of Alberta Securities Commission Rule 45-508
Interim Amendments to Certain Appendices to Multilateral Instrument 45-102 Resale of Securities
and
Proposed Amendments to Alberta Securities Commission Rule 72-501
Distributions to Purchasers Outside Alberta

January 31, 2003

REQUEST FOR PUBLIC COMMENT
The Commission and certain other members of the Canadian Securities Administrators (the "CSA") are publishing for a 90 day comment period the following documents:

- Multilateral Instrument 45-102 *Resale of Securities (*"MI 45-102*");*
- Form 45-102F1 *Notice of Intention to Distribute Securities* under Section 2.8 of MI 45-102 *Resale of Securities* ("Form 1")
- Companion Policy 45-102CP (the "Companion Policy")

collectively, "Proposed MI 45-102".

The text of Proposed MI 45-102 is being published concurrently with this Notice and can be obtained on websites of CSA members, including the following:

- www.albertasecurities.com
- www.bcsc.bc.ca
- www.msc.gov.mb.ca
- www.osc.gov.on.ca
- www.ssc.gov.sk.ca

Proposed MI 45-102 is intended to replace the current resale rule, forms and companion policy (collectively, the "Current Resale Rule") that came into effect in all CSA jurisdictions, except

Québec, on November 30, 2001. We are also proposing to make consequential amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (*SEDAR*)* and National Instrument 62-101 *Control Block Distribution Issues.* We request comments by May 2, 2003.

BACKGROUND

Current Resale Requirements

The Current Resale Rule harmonized certain provincial and territorial resale restrictions imposed on first trades of securities initially distributed under an exemption from the prospectus requirement. The Current Resale Rule also harmonized the regulation of distributions of securities from a control block and provides a prospectus exemption to permit the resale of securities of a non-reporting issuer with a minimal connection to Canada over a foreign exchange or market.

The Current Resale Rule imposes resale restrictions on

- the first trade of securities distributed under a prospectus exemption listed in Appendix D for which the issuer is required to have been a reporting issuer for a specified period of time and the seller is required to have held the securities for a specified period of time (a restricted period);

- the first trade of securities distributed under a prospectus exemption listed in Appendix E for which the issuer of the securities is required to have been a reporting issuer for a specified period of time (a seasoning period); and

- trades of securities from the holdings of a control person (control distributions).

Securities distributed under an exemption listed in Appendix D or E or as a control distribution are subject to restricted periods or seasoning periods of either four or twelve months under the Current Resale Rule, depending on whether the issuer of the securities is a qualifying issuer at the distribution date. If an issuer is not a reporting issuer in any jurisdiction, the securities of the issuer acquired by the purchaser will be subject to an indefinite hold period.

Impact of Continuous Disclosure Harmonization Initiatives on the Current Resale Rule

With the introduction of harmonized, enhanced continuous disclosure rules applicable to all reporting issuers[1], the CSA proposes to make substantive changes to the Current Resale Rule by eliminating the distinction between qualifying issuers and other reporting issuers. The adoption of harmonized continuous disclosure rules for all reporting issuers should lead to better disclosure and in turn eliminate the need to distinguish between qualifying and non-qualifying issuers and to require a current AIF. Better disclosure should enhance the ability of investors to make informed investment decisions and foster confidence in the Canadian capital markets.

[1] See proposed NI 51-102 *Continuous Disclosure Requirements* (applicable to reporting issuers other than investment funds), proposed NI 71-102 *Continuous Disclosure and Other Exemptive Relief for Foreign Issuers* (applicable to foreign reporting issuers) and proposed NI 81-106 *Investment Fund Continuous Disclosure* (applicable to investment fund reporting issuers).

PURPOSE AND SUBSTANCE OF PROPOSED MI 45-102

If adopted, Proposed MI 45-102 will further harmonize certain provincial and territorial resale restrictions imposed on first trades of securities initially distributed under an exemption from the prospectus requirement and control distributions. Proposed MI 45-102 also provides a prospectus exemption to permit the resale of securities of a non-reporting issuer with a minimal connection to Canada over a foreign exchange or market. Lastly, it provides an exemption from the seasoning requirements in sections 2.5, 2.6 and 2.8 if the issuer of securities becomes a reporting issuer after the distribution date by filing and obtaining a receipt for a prospectus in a jurisdiction listed in Appendix B.

Proposed MI 45-102 imposes resale restrictions on

- the first trade of securities distributed under a prospectus exemption listed in Appendix D for which the issuer is required to have been a reporting issuer for at least four months immediately preceding the trade and the seller is required to have held the securities for at least four months from the distribution date (the restricted period);

- the first trade of securities distributed under a prospectus exemption listed in Appendix E for which the issuer of the securities is required to have been a reporting issuer for at least four months immediately preceding the trade (the seasoning period); and

- trades of securities from the holdings of a control person (control distributions).

With the exception of the resale restrictions for control distributions, the resale restrictions in Proposed MI 45-102 do not apply in Manitoba, New Brunswick, or the Yukon Territory as these jurisdictions do not impose resale restrictions on securities distributed under a prospectus exemption. Prince Edward Island will impose resale restrictions on the implementation of Proposed MI 45-102. If an issuer is not a reporting issuer in any jurisdiction, the securities of the issuer acquired by the purchaser will be subject to an indefinite hold period.

SUMMARY OF CHANGES TO THE CURRENT RESALE RULE

The Current Resale Rule continues to be in force in all jurisdictions, except Québec, in accordance with section 2.1 of the Current Resale Rule. If Proposed MI 45-102 is adopted, it will replace the Current Resale Rule. The most significant changes to the Current Resale Rule are summarized in the following outline:

- eliminating the concept of qualifying issuer,

- removing the current AIF requirement as all reporting issuers, except small business issuers, will be subject to a mandatory AIF requirement under the new harmonized continuous disclosure requirements,

- eliminating the concept of a qualified market,
- amending sections 2.5, 2.6 and 2.8 to provide for a four month restricted period, a four month seasoning period, or both, for all reporting issuers and revising the wording of the legend in section 2.5,
- repealing subsection 2.6(5) and Appendix F relating to employee trades,
- repealing section 2.7 dealing with the filing of Forms 45-102F1 and 45-102F2,
- repealing Form 45-102F1 (notice of ceasing to be a private company or private issuer),
- repealing Form 45-102F2 (certificate of qualifying issuer),
- amending and renumbering Form 45-102F3 as Form 45-102F1 to update and streamline the notice of intention to distribute securities required to be filed by a control person,
- adding language to the exemptions listed in Appendix D to clarify that (a) all underlying securities may be subject to hold periods and (b) the word "exemption" includes discretionary exemptions granted by a regulator, and
- adding a new exemption to permit the resale of securities without complying with the seasoning requirements in sections 2.5(2)1., 2.6(3)1. or 2.8(2)1. of MI 45-102 if the issuer of the securities becomes a reporting issuer after the distribution date by filing a prospectus in one of the jurisdictions listed in Appendix B to MI 45-102.

SUMMARY OF PROPOSED MI 45-102

Mandatory elements of Proposed MI 45-102 are set out in MI 45-102 and Form 1. Form 1 also contains instructions to guide users. The Companion Policy provides explanation and additional guidance on elements of Proposed MI 45-102.

MI 45-102

Part 1 of MI 45-102 identifies defined terms used in the proposed instrument. The number of defined terms has been significantly reduced by the proposed repeal of terms like AIF, approved rating, approved rating organization, CPC, CPC information circular, CPC instrument, current AIF, qualified market and qualifying issuer.

Part 2 of MI 45-102 deals with the application and scope of resale restrictions on first trades of securities acquired under private placement exemptions in securities legislation or applicable to control distributions.

Part 3 of MI 45-102 deals with the transition from the Current Resale Rule to MI 45-102. Section 3.1 provides for securities distributed between the effective date of the Current Resale Rule and its repeal that were subject to a restricted period and legending requirement under section 2.5(2) or (3) of the Current Resale Rule to continue to be subject to the legending requirement until the expiry of the restricted period.

Part 4 of MI 45-102 provides that exemptions from MI 45-102 may be granted by the securities regulatory authority or regulator (in Ontario, only by the regulator).

Part 5 of MI 45-102 deals with the coming into force of Proposed MI 45-102. Section 5.1 of MI 45-102 provides for the repeal of the Current Resale Rule while section 5.2 establishes the date MI 45-102 comes into force.

Form 45-102F1
Form 1 provides notice to the market of an intention to sell securities from a control block. The form has been renumbered and simplified to address privacy of personal information concerns.

The Companion Policy
The Companion Policy provides information relating to the manner in which the provisions of MI 45-102 are intended to be interpreted or applied by the securities regulatory authorities of the adopting jurisdictions.

RELATED AMENDMENTS
We intend to make consequential amendments to a number of national and multilateral instruments or local rules in conjunction with implementation of Proposed MI 45-102. These consequential amendments will be published separately in some jurisdictions.

NI 13-101
We propose to amend National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (*SEDAR*)* in order to accommodate the electronic filing of Form 1 and the notice required under section 2.8(7)(b) of MI 45-102. We also plan to make revisions to the software and filer manual used under National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (*SEDAR*).*

Proposed amendments to NI 13-101 are out in Appendix A to this Notice.

NI 62-101
We will amend National Instrument 62-101 *Control Block Distribution Issues* by repealing section 2.2 relating to pledgees and Appendix B and C. One of the purposes of NI 62-101 was to modify the application of hold periods imposed under securities legislation as they apply to pledgees disposing of securities that form part of a control block. These local resale provisions have been replaced in all jurisdictions, except Québec, by the harmonized resale restrictions in section 2.8 of MI 45-102. The repeal of section 2.2 and Appendix B and C will permit pledgees to look to one instrument for applicable resale restrictions.

Proposed amendments to NI 62-101 are out in Appendix B to this Notice.

Local Instruments

In Alberta, the consequential amendments to local securities legislation will include

- the repeal of Alberta Securities Commission Rule 45-508 *Interim Amendments to Certain Appendices to Multilateral Instrument 45-102 Resale of Securities,* and
- the amendments to section 3.2 of Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta.*

The Commission intends to publish consequential amendments to Alberta Securities Commission Rule 45-507 *Offerings by CDNX Short Form Offering Document* and to Multilateral Instrument 45-103 *Capital Raising Exemption* separately.

The proposed repeal and amendment of ASC Rule 45-508 and ASC Rule 72-501 are set out in Appendix C to this Notice.

COSTS AND BENEFITS

The CSA developed the Current Resale Rule to harmonize differing resale restrictions in local jurisdictions. Proposed MI 45-102 will further streamline the resale regime by

- providing for a four month restricted and seasoning period for all reporting issuers,
- eliminating the requirement to file a current AIF under MI 45-102,
- reducing filing requirements by eliminating the requirement to prepare and file current Forms 45-102F1 and 45-102F2, and
- exempting securities distributed prior to an initial public offering from the four month seasoning period that those securities would otherwise be subject to under section 2.6 of MI 45-102.

Issuers should see a decrease in their costs of compliance with MI 45-102 with the elimination of the requirement to have a current AIF and other qualifying issuer criteria because there will be no additional disclosure requirements imposed on issuers beyond those in the new harmonized continuous disclosure rules applicable to all reporting issuers.

REQUEST FOR COMMENT

We request your comments on MI 45-102, Form 1 and the Companion Policy as well as on the proposed amendments to NI 13-101 and NI 62-101 discussed above under the heading "Related Amendments.

In Alberta, we also request your comments on the proposed repeal of ASC Rule 45-508 and the proposed amendments to ASC Rule 72-501 also discussed above under the heading "Related Amendments".

HOW TO PROVIDE YOUR COMMENTS

Please provide your comments by May 2, 2003 by addressing your submission to the securities regulatory authorities listed below:

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission

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

Comments on proposed amendments to Alberta local rules should also be delivered to the address below.

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Senior Legal Counsel
Alberta Securities Commission
4th Floor, 300 - 5th Avenue S.W.
Calgary, Alberta T2P 3C4
Fax: (403) 297-6156
marsha.manolescu@seccom.ab.ca

If you are not sending your comments by e-mail, please send a diskette containing your comments (in DOS or Windows format, preferably Word).

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

QUESTIONS

Please refer your questions to any of:

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APPENDIX A

AMENDMENTS TO NATIONAL INSTRUMENT 13-101
System For Electronic Document Analysis and Retrieval (SEDAR)

PART 1 AMENDMENTS TO NATIONAL INSTRUMENT 13-101

1.1 Amendments - Appendix A to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (*SEDAR*)* is amended by

(a) under *Other Issuers - Continuous Disclosure*,

(i) deleting item 15 Annual Information Form,

(ii) deleting item 16 Amended Annual Information Form (SHAIF System),

(iii) deleting item 17 Notice (SHAIF),

(iv) substituting the following items:

15. Form 1 (Resale Rule)

16. Notice (Resale Rule)

PART 2 EFFECTIVE DATE

2.1 Effective Date – This Amendment comes into force on •.

APPENDIX B

AMENDMENTS TO NATIONAL INSTRUMENT 62-101
Control Block Distribution Issues

PART 1 AMENDMENTS TO NATIONAL INSTRUMENT 62-101

1.1 Amendments - National Instrument 62-101 *Control Block Distribution Issues* is amended by

(a) deleting section 2.2 Pledgees;

(b) deleting Appendix B; and

(c) deleting Appendix C.

PART 2 EFFECTIVE DATE

2.1 Effective Date – This Amendment comes into force on •.

APPENDIX C
(ALBERTA ONLY)

REPEAL OF ASC BLANKET ORDER 45-508
Interim Amendments to Certain Appendices to Multilateral Instrument 45-102 Resale of Securities
and
AMENDMENT TO ASC RULE 72-501
Distributions to Purchasers Outside Alberta

PART 1 REPEAL OF ALBERTA SECURITIES COMMISSION RULE 45-508

1.1 Repeal – Alberta Securities Commission Rule 45-508 *Interim Amendments to Certain Appendices to Multilateral Instrument 45-102 Resale of Securities* is repealed.

PART 2 AMENDMENT TO ALBERTA SECURITIES COMMISSION RULE 72-501

2.1 Amendment - Section 3.2 of Alberta Securities Commission Rule 72-501 *Distributions to Purchasers Outside Alberta* is amended by striking "section 2.5(2) or (3)" and substituting "section 2.5".

PART 3 EFFECTIVE DATE

3.1 Effective Date - This repeal and amendment is effective •.

List of Commenters to
January 31, 2003
Proposed Amendments to MI 45-102

	Commenter	Name	Date
1.	Borden Ladner Gervais	Paul A. D. Mingay	May 1, 2003
2.	Canadian Capital Markets Association	Thomas C. MacMillan	May 2, 2003
3.	CIBC Melon	Robert Shier	April 17, 2003
4.	Market Regulation Services Inc.	Noelle Wood	May 2, 2003
5.	Osler Hoskin & Harcourt		May 6, 2003
6.	TSX Venture Exchange	Linda Hohol	May 5, 2003
7.	Securities Transfer Association of Canada		April 29, 2003
8.	Torys LLP		March 19, 2003

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May 1, 2003

Delivered by Email

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission

c/o Marsha Manolescu
Senior Legal Counsel
Alberta Securities Commission
4th floor, 300 – 5th Avenue S.W.
Calgary, Alberta
T2P 3C4

Dear Sirs/Mesdames:

Re: Request For Comments
Proposed Repeal and Replacement of Multilateral Instrument 45-102
Resale of Securities **("Proposed MI 45-102")**

I am writing in response to your request for comments in relation to Proposed MI 45-102. As a general comment, I and other members of this firm are very supportive of the simplification of the resale rules. In particular, the elimination of the distinction between qualifying issuers and others, the elimination of the accelerated insider reporting obligations on control block sales, and the simplification of Form 45-102F3 (now to be F1) are all welcome changes. Our specific comments are to suggest ways in which Proposed MI 45-102 could, in our view, be further improved.

1. Clarification of "Unusual Effort"

Like the current resale rule (the "Current Resale Rule") and its legislative predecessors, Proposed MI 45-102 requires that, in order for a resale to be an exempt distribution, "no unusual effort" can be made to prepare the market or to create a demand for the securities that are the subject of the resale. Although this concept has been a part of the legislation since the closed system was adopted, there is very little guidance as to its meaning. Without having undertaken an exhaustive review of the authorities, it appears that the

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only legislative interpretation is in section 4 of the Alberta Securities Commission Rules, which states as follows:

> "4. Unusual effort to prepare market – For the purposes of sections 2.5(2)5., 2.5(3)., 2.6(3)3., 2.6(4)3., 2.8(3)2. of Multilateral Instrument 45-102 *Resale of Securities*, an unusual effort to prepare the market or to create a demand for securities takes place if 1 or more of the following activities is engaged in by or on behalf of the vendor of the securities:
>
> (a) the dissemination to prospective purchasers of material soliciting orders to purchase, unless the material consists only of a letter or communication
>
> (i) identifying the securities being sold, and
>
> (ii) advising that they are available,
>
> and that letter or communication may comprise or be accompanied by 1 or more of the following:
>
> (iii) an annual report;
>
> (iv) an interim report;
>
> (v) an information circular;
>
> (vi) a take-over bid circular;
>
> (vii) an issuer bid circular;
>
> (viii) a prospectus;
>
> (ix) an offering memorandum;
>
> (x) a document or documents not referred to in sub clause (iii) to (ix) prepared pursuant to a statute or a regulation primarily for some other purpose;
>
> (b) the formation of a selling group or any similar arrangement to co-ordinate the efforts of more than 1 registrant to effect the sale;
>
> (c) the implementation of any transaction or sequence of transactions, plan or other arrangement to manipulate or adjust the market price of the securities, other than price stabilization activities

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(i) reasonably necessary for the maintenance of an orderly market, and

(ii) not going beyond what is accepted on the market where those activities occur;

(d) any sales effort that

(i) is illegal or improper by the standards of the market in which it is made, or

(ii) involves the communication of false or misleading information;

(e) the making of a sale to a purchaser with whom the vendor is not dealing at arm's length in order to put the purchaser in a position where the purchaser may re-sell the securities free of constraints to which the vendor was subject;

(f) in the case of sales made as described in section 2.8(1) of Multilateral Instrument 45-102 *Resale of Securities* where there is a market for the securities, the making of a sale other than

(i) a sale made

(A) in the market in which securities of the particular class are customarily traded, and

(B) in a manner customary in that market, or

(ii) a sale made pursuant to section 131(1) of the Act."

In Ontario, there is no comparable provision. The ruling in *Re Daon Developments Corp.* (1984) OSCB 3428 is very similar to the Alberta provision and is often relied upon as indicating the view in Ontario. The ruling provided for the following definition of "unusual effort":

> "an 'unusual effort to prepare the market or to create a demand for securities' takes place if one or more of the following activities is engaged in by or on behalf of the vendor of the securities:
>
> (i) the dissemination to prospective purchasers of material soliciting orders to purchase, unless the material consists only of a letter or communication

identifying the securities being sold and advising that they are available, which letter or communication may comprise, or be accompanied by either or both of:

(A) a document or documents prepared pursuant to statute or regulation primarily for some other purpose, such as an annual report, an interim report, an information circular, a take-over bid circular, an issuer bid circular or a prospectus, or

(B) an offering memorandum under which a contractual right of action is available;

(ii) the formation of a selling group or any similar arrangement to co-ordinate the efforts of more than one registrant to effect the sale;

(iii) the implementation of any transaction or sequence of transactions, plan or other arrangement to manipulate or adjust the market price of the securities, but price stabilization activities reasonably necessary for the maintenance of an orderly market and not going beyond what is accepted on the market where the activities occur shall not be considered to constitute such an arrangement;

(iv) any sales effort that is illegal or improper by the standards of the market in which it is made or involves the communication of false or misleading information; and

(v) the making of a sale to a purchaser with whom the vendor is not dealing at arm's length, in order to put the purchaser in a position where the purchaser may re-sell the securities free of constraints to which the vendor was subject."

We would submit that either Proposed MI 45-102 or its Companion Policy should contain a definition of or guidance on the meaning of "unusual effort", for the following reasons:

1. Alberta already has such guidance. It is anomalous that Alberta provides guidance but the other provinces do not.

2. There is potential for different interpretations of Proposed MI 45-102 by different provinces if a common interpretation is not adopted. Having different

interpretations of the same rule is hardly better than having different rules, since the effect in each case is to have different requirements in different provinces. Therefore, we would encourage the securities regulators to adopt a common interpretation to achieve the benefit of the single rule.

3. Failure to adopt a common interpretation results in unnecessary uncertainty in the market. For example, if the other provinces are unwilling to adopt Alberta's definition, is it because they interpret the term differently? Do they interpret it more or less restrictively? As it is, market participants in Alberta have the benefit of having clear guidelines as to what is permissible, while participants elsewhere do not.

We would suggest that the Alberta formulation be adopted since it has the benefit of long use and acceptance and is in line with the *Daon* ruling.

2. Sales by Pledgees

An area which continues to be troublesome is the position of pledgees and the choice between power of sale and foreclosure.[1] The history of what is s. 2.8 in both the Current Resale Rule and Proposed MI 45-102 suggests that the issue may not have been given as full consideration as it deserves when predecessor provisions were proposed.

Very briefly, after two earlier proposals and requests for comments, on October 20, 1995, the Ontario Securities Commission ("OSC") published for comment a proposed Rule entitled "The Early Warning System and Related Take-over Bid, Insider Trading and Control Block Distribution Issues" at (1995), 18 OSCB 4887 ("Early Warning Rule"). The principal purpose of the proposal was to create the exemptions from the early warning requirements which are now found in NI 62-103 – *The Early Warning System and Related Take-over Bid and Insider Reporting Issues*. An ancillary purpose was to "provide pledgees of securities with certain exemptions from control block distribution requirements and early warning requirements, and to restate the current provisions of section 25 of the Regulation as a rule in order to make such exemptions effective". This purpose was achieved through Section 8.1 of the Early Warning Rule which stated that the limitations on use of s. 72(7) of the Securities Act (Ontario) (i.e., what is now, in effect, s. 2.8 of Proposed MI 45-102) did not apply to "a distribution by a lender, pledgee, mortgagee or other encumbrancer (in this section the 'pledgee') for the purpose of liquidating a debt made in good faith by selling or offering for sale a security pledged, mortgaged or otherwise encumbered in good faith as collateral for the debt …"

[1] The distinction between the two remedies is based in the distinction between legal rights and equitable rights and the remedies available at law and in equity. Briefly put, foreclosure was an equitable remedy which allowed the holder of the security interest to terminate the borrower's equity of redemption; that is, the right to return of the property which had been mortgaged or pledged. This resulted in the debt being extinguished and the lender owning the property outright so it could be resold, free of the debtor's equity of redemption. The power of sale began as a contractual right and allowed the lender to sell the property, with the proceeds being used to repay the debt, and any excess being paid to the borrower. With respect to personal property, such as shares and other securities, the procedures for the two remedies are governed by applicable personal property securities laws.

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What is important in the present context is that the above language, which has been carried forward to s. 2.8 of Proposed Rule 45-102, was not considered to cover a realization by way of foreclosure, but only by way of power of sale; the commentary on s. 8.1 of the Early Warning Rule states that the "Commission invites specific comments as to whether prospectus relief would be appropriate or is necessary for foreclosure and/or sales following foreclosure on a similar basis." In other words, this appears to indicate that section 2.8 of Proposed MI 45-102 permits a pledgee to realize on its security by way of power of sale but not by way of foreclosure.

By letter dated February 1, 1996, Borden & Elliot (one of the predecessors to this firm) responded to the invitation to comment and recommended that similar relief for foreclosures be provided. The submission was as follows;

> "You have specifically invited comments on whether prospectus relief would be appropriate or necessary for foreclosures and/or sales following foreclosures. We believe that it is desirable to clarify the application of the Act in such circumstances, particularly for sales following foreclosures.
>
> It is unclear whether the act of foreclosure by a pledgee of securities derived from the holdings of a control person is a "trade" within the meaning of the Act (i.e., a disposition of the security or valuable consideration or some act in furtherance thereof). However, if foreclosure involves a "trade", based on a broad and purposeful interpretation of the Act, pledgees should be entitled to rely upon clause 72(1)(e), although admittedly the wording of the clause is less than clear in these circumstances. Obviously, it would be absurd from a policy standpoint to exempt the pledge of control block securities from the prospectus requirement but subject the realization upon such securities to the prospectus requirement.
>
> The more troublesome issue involves the pledgee's resale rights following foreclosure. Since foreclosure itself liquidates the debt at law, any sale of pledged control block securities by a pledgee subsequent to foreclosure would not be "for the purpose of liquidating a debt" and, thus, the prospectus exemption for pledgees under subsection 72(7) of the Act would not appear to be available. If a pledgee forecloses on pledged control block securities, any subsequent sale of such securities would not have the benefit of subsection 8.1(1) of the Proposed Rule and, accordingly, the pledgee would have to comply with the six month hold period prescribed by subsection 9.1(1) of the Proposed Rule.

> We do not believe that there is any policy reason that would justify this result nor do we believe that resale restrictions of pledged control block securities should be determined by the pledgee's choice of remedy. Accordingly, we would recommend that subsection 8.1(1) be amended to encompass a distribution by a former pledgee who has accepted the security in satisfaction of its debt."

On August 2, 1996, the OSC published a status report on the Early Warning Rule ((1996), 19 OSCB 4221) and, while it discussed the issue of pledged securities, it did not address the above comments or the question of foreclosure at all. The issue does not seem to have been pursued in the legislative process which followed leading up to the Current Resale Rule.

We also note that there are examples of orders having been made by the OSC to permit foreclosure (e.g., *Re Crownbridge Industries Inc.* (1988), 11 OSCB 26: *Re J.D.S. Investments Ltd.* (1996), 19 OSCB 4708).

We would submit that the arguments made in the Borden & Elliot letter remain valid and that there is no reason to distinguish between foreclosure and power of sale. In fact, we understand that, notwithstanding the history we have reviewed above, some market participants take the view that the language of s. 2.8 of MI 45-102 is broad enough to cover foreclosure. This view is supported by the fact that, since often there is little difference in economic effect or sale process, there should not be a different securities law treatment.

The argument is perhaps even stronger today in favour of identical treatment of power of sale and foreclosure. While commercial bank lending on the security of pledged shares continues to be the principal example of where this exemption would apply, it is not the only one. Increasingly, investment banks are creating sophisticated financial instruments which involve pledges and security arrangements. These instruments offer financial advantages to issuers, but may involve the financial institution having to accept securities in satisfaction of an obligation. There is no reason why the institution should be able to use power of sale to immediately effect a resale but not to foreclose and take the securities on its own books for subsequent resale. (As a collateral point, we note that to the extent that the Commissions are concerned that financial instruments may raise disclosure issues, these concerns appear to be addressed by proposed MI 55-103 – Insider Reporting for Certain Derivative Transactions (Equity Monetization).)

We would also suggest that, in a situation where the lender forecloses and takes possession of the securities without a specific purchaser in mind, the lender should be able to file the notice and, after seven days, take possession of the securities (subject, of course, to compliance with personal property security law and the terms of the security agreement). The lender would then hold the securities on the same basis as a third party purchaser. Form 45-102F1 may need to be revised to accommodate such situations by ensuring that a "sale" and "selling" include the act of foreclosing whereby the lender becomes the owner and the borrower's interest is extinguished.

BORDEN
LADNER
GERVAIS

Accordingly, we would strongly urge the Commissions to clarify the situation and to explicitly amend s. 2.8 of Proposed MI 45-102 to cover foreclosure.

3. Time Periods Under Section 2.8

Our last comment is to suggest that section 2.8(5)(a) be modified to eliminate the "not more than 14 days" requirement in relation to filing of the Form 45-102F1. We assume that this requirement is to ensure that control block holders have a real and present intention to sell before filing a notice of intention. In practice, however, it forces sellers to make a sale prior to the expiry of 14 days even if market conditions have become unfavourable since the date of the notice. Such sales are often nominal, intended only to satisfy the timing requirement. A better procedure might be for the notice to lapse if no sale has been made within 30 days, subject to the right to renew.

* * *

Thank you for the opportunity of submitting comments. If you have any questions, please do not hesitate to contact me.

Yours very truly,

(signed): Paul A. D. Mingay

P. A. D. Mingay
PADM:gr
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May 2, 2003

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission

C/o Marsha Manolescu
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Re: Request for Comment on Multilateral Instrument (MI) 45-102: Resale of Securities – Legends

We are writing to you on behalf of the Canadian Capital Markets Association (CCMA) to provide comments on your proposal to amend MI 45-102, as previously amended November 30, 2001. MI 45-102 as previously amended confirmed that legend requirements also require certification – previously there had been some ambiguity on this point. As the CCMA stated in its comment letter of December 8, 2000 on the prior proposed changes and in its August 21, 2002 letter to the Canadian Securities Administrators (CSA) generally, certification creates severe problems for both straight-through processing (STP), the current focus of CCMA activity, and for moving to a shorter settlement cycle should Canada choose to reduce the settlement period from the current standard of trade date plus three days (T+3) to the day following trade date (T+1).

In any case, and regardless of those objectives, certification in the current environment leads to complexity and cost for custodians and other financial intermediaries, as well as risks and possible delays for their clients and investors, while not effectively meeting either regulatory or investor needs.

We believe that there is a better way, described below, to achieve the regulatory objectives reflected in MI 45-102, which will also better serve investor and industry objectives. Furthermore, we are concerned that MI 45-102 continues to be amended without addressing the issues with certification, which are very significant.

The CCMA and Straight-Through-Processing

The CCMA is a federally incorporated, not-for-profit organization, launched to identify, analyze and recommend ways to meet the challenges and opportunities facing Canadian and international capital markets. Participants in the CCMA are listed in the left-hand margin. The CCMA's current priority is to promote STP strategies among Canadian capital market participants to reduce ongoing errors and processing costs; lower operational, market, settlement and systemic risks; maintain the competitiveness of Canadian capital markets; and harmonize wherever possible with STP standards and best market practices in the U.S. and other major securities markets. Industry-wide STP means seamlessly passing financial information electronically – on a timely, accurate, system-to-system basis – to all parties in the end-to-end securities transaction chain, without manual handling or redundant processing.

Purposes and Limitations of Legends/Constrained and Restricted Shares

We believe that the goal of legending is to inform securities investors of certain limitations that may impact their buying decision or ability to sell a security. As well, regulators are concerned that restrictions or constraints on securities are not ignored and that investors are aware of them.

In fact, many investors – even those holding certificates – are unaware of the restrictions set out in the legends. Others, aware of the restrictions, may trade the securities (or transfer a security or other interest in them), but not re-register them until the legend can be removed. As fewer people now see securities and as securities become increasingly issued, cleared and settled in electronic form, legending is no longer an effective way of ensuring disclosure of material information on securities, or adherence to any restrictions which that information may contain. Legends in and of themselves do not guarantee that regulatory concerns are addressed. We discuss below alternatives that do offer such a guarantee.

Effective Legending Alternatives

Proposed book-entry Direct Registration Systems (DRSs) are being, and nominee book-entry options can be, designed to ensure that Canada's regulatory requirements can effectively be met. These alternatives also allow the financial system to operate on an efficient and internationally competitive basis. In relation to corporate law provisions, we note that, under these alternatives, shareholders can receive certificates on request, which would continue to be subject to any legending requirement.

Under a DRS, the existing share registry system can "issue" not only certificates (which can contain legends), but also ownership statements (which would also include any legend). Under a DRS or other well-designed book-entry nominee alternative:

- The investor would be informed more certainly of the restriction/legend by a notation on an ownership statement – we suspect considerably more investors read their ownership statements than read the fine print on certificates
- There would be no power to transfer any interest in the security until the requirements of the restriction/legend are satisfied.

Identification of holders and restrictions through effective system parameters in either a DRS or nominee model book-entry option would prevent prohibited transfers that currently take place in a certificated environment. As well, these book-entry options would help custodians and other financial intermediaries to efficiently and cost-effectively discharge their responsibilities to the benefit of the ultimate holders.

Recommendation

We recommend modifying MI 45-102 without further delay to confirm that transfer restrictions do not require certification. A book-entry environment that is controlled either through a direct registration system or through properly designed nominee holdings provides better guarantees that the intent of the regulatory restrictions or constraints is respected. These alternatives for uncertificated securities need regulatory approval at this time.

We would be pleased to meet with you to discuss how the DRS would work in principle and could work similarly in the nominee model. If you have any questions or would like additional information about our views, please contact Barbara Amsden, (416) 365-8704 (e-mail: bamsden@cds.ca), or me at the co-ordinates above.

Yours truly,

CIBC Mellon Global Securities Services Company
CIBC Mellon Trust Company

Robert Shier
Senior Vice President & Chief Operations Officer

April 17, 2003

Ms. Marsha Manolescu
Senior Legal Counsel
Alberta Securities Commission
4th Floor, 300 - 5th Avenue S.W.
Calgary, Alberta
T2P 3C4

Dear Ms. Manolescu:

Re: Request for Comment on Multilateral Instrument (MI) 45-102 *Resale of Securities*

CIBC Mellon is a leading stock transfer agent and custodian in Canada. We service the needs of more than 2,500 institutional clients, providing stock and bond issuing services and domestic and global custody services for pension funds, investment funds, insurance companies, foreign insurance trust, governments, corporations, foundations, endowments and foreign financial institutions. We thank the Canadian Securities Administrators (CSA) member commissions for giving us this opportunity to comment of MI 45-102.

As transfer agent for a number of publicly traded securities issues, CIBC Mellon is responsible for issuing, when applicable share certificates with an appropriate legend and for enforcing transfer restrictions. In addition, we also provide custodial services for a number of institutional investors where we are responsible for safekeeping securities, some of which contain legends.

CIBC Mellon supports the efforts of the Canadian Capital Markets Association (CCMA) and its various working groups. The CCMA's Dematerialization Working Group and Corporate Actions Working Group are promoting electronic issuance of securities and the conversion of paper certificates to a book-based environment, including legended and restricted securities.

We believe that Part 2 of MI 45-102 conflicts with the goals of the CCMA and with efforts being undertaken globally to establish a dematerialized securities environment. We recommend that MI 45-102 be modified to allow for the issuance of legended securities in a controlled electronic environment. Capabilities do exist today to place electronic notations on security positions specifying a restriction, which prevents transfer until the restriction is been removed or has expired.

We would be pleased to meet with you to discuss dematerialization of legended securities in more detail.

Yours truly,

Robert Shier
Senior Vice-President and Chief Operations Officer

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May 2, 2003.

BY E-MAIL

Alberta Securities Commission,
British Columbia Securities Commission,
Manitoba Securities Commission,
Nova Scotia Securities Commission,
Ontario Securities Commission,
Prince Edward Island Securities Office,
Saskatachewan Securities Commission,

c/o Marsha Manolescu,
Senior Legal Counsel,.
Alberta Securities Commission,
4th Floor,
300-5th Avenue S.W.,
CALGARY, Alberta.
T2P 3C4

Dear Sirs and Mesdames:

Re: Request for Comments – Proposed Repeal and Replacement of Multilateral Instrument 45-102 Resale of Securities, Form 45-102F1, F2 and F3 and Companion Policy 45-102CP Resale of Securities

Further to the Request for Comments on the Proposed Repeal and Replacement of Multilateral Instrument 45-102 Resale of Securities, Form 45-102F1, F2 and F3 and Companion Policy 45-102CP Resale of Securities published in the OSC Bulletin at (2003) 26 OSCB 991, Market Regulation Services Inc. ("RS") would like to comment on the proposal to add a new exemption under the resale restrictions of Multilateral Instrument 45-102 Resale of Securities ("MI 45-102").

The proposed exemption in subsection 2.14(1) of MI 45-102 would exempt the first trade of a security distributed under an exemption from the prospectus requirement if:

i) the issuer of a security that is not a reporting issuer in any jurisdiction at the distribution date but subsequently becomes a reporting issuer in a foreign jurisdiction with shares listed on a foreign exchange, and

ii) at the distribution date, Canadian residents own directly or indirectly 10% or less of the outstanding securities of the class or series or do not represent in number more than 10% of the total number of owners directly or indirectly of securities of the class or series, and

iii) the trade is made through a foreign exchange or market or to a person outside of Canada.

RS would note that this exemption directs order flow to foreign exchanges even though any order potentially may be traded on a recognized Alternative Trading System ("ATS") in Canada. National Instrument 21-101 *Marketplace Operation* allows a recognized ATS to trade securities that are "foreign exchange-traded securities". Consequently, should an issuer become a reporting issuer by listing on a foreign exchange subsequent to the distribution date, such shares would then be eligible to be traded on an ATS in Canada. Assuming the remaining conditions in subsection 2.14(1) are met, the first trade in securities of a non-reporting issuer that had been distributed in Canada under a prospectus exemption would have to be executed through a foreign exchange or market notwithstanding that such security may be trading on an ATS in Canada. RS would suggest that an additional provision be added to paragraph 2.14(1)(c) of MI 45-102 to permit such a trade to be made through the facilities of a recognized ATS.

If you have any questions regarding this matter, please do not hesitate to contact me at 416.646.7275.

Yours truly,

"Noelle Wood"

Noelle Wood
Senior Counsel

cc: Tom Atkinson, Market Regulation Services Inc.
Maureen Jensen, Market Regulation Services Inc.

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May 6, 2003

VIA E-MAIL to marsha.manolescu@seccom.ab.ca

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Financial Services Commission

c/o Marsha Manolescu
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Dear Sirs & Mesdames:

Proposed Amendments to Multilateral Instrument 45-102 *Resale of Securities*

This letter is in response to the request for comments (the "Request for Comments") relating to the proposed repeal and replacement of Multilateral Instrument 45-102 *Resale of Securities* ("MI 45-102"). Defined terms used in the Request for Comments will be used in this comment letter.

We believe that MI 45-102 represents a significant advancement toward the goal of harmonizing securities regulation throughout the provinces and territories of Canada. Harmonizing the rules governing the resale of securities is especially important in light of the fact that Canada's two principal securities markets, the Toronto Stock Exchange and the TSX Venture Exchange, serve investors in all thirteen jurisdictions and effectively operate on a national basis. The proposed amendment of MI 45-102 presents an opportunity to resolve a number of difficulties that have been identified in the current multilateral instrument and make even further improvements.

Section 2.3 and Appendix D

We understand that it may have been the original intention only to list in Appendix D those provisions of securities legislation that were in existence prior to the adoption of MI 45-102. Any subsequently introduced prospectus exemptions would then specify, in the instrument in which they were introduced, whether resales would be subject to Section 2.5 or Section 2.6 of

MI 45-102. Unfortunately, this approach introduces an undesirable level of complexity in using MI 45-102. Ontario's private placement rules are now contained largely in OSC Rule 45-501, which is not referred to at all in Appendix D. Similarly, the new capital raising exemptions of Multilateral Instrument 45-103 ("MI 45-103"), which is in effect in Alberta and British Columbia and under consideration in other jurisdictions, are not referred to.

We recognize that MI 45-102 must be structured so that newly-created prospectus exemptions can be added in various jurisdictions without constantly having to amend Appendix D or Appendix E. However, since the instrument is currently being amended, we urge the CSA to take this opportunity to update it by adding to Appendix D and Appendix E the appropriate references to all prospectus exemptions currently in effect in all provinces and territories, including OSC Rule 45-501 and MI 45-103. Accepting this recommendation would make it significantly easier to use and understand MI 45-102, particularly in light of the current complicated interplay between MI 45-102 and OSC Rule 45-501.

Section 2.5(1)

This section currently provides that a trade specified by Section 2.3, or "other securities legislation of a jurisdiction", is a distribution. We are concerned that there is currently some ambiguity as to whether Section 2.5(1) deems trades specified under the "legislation of a jurisdiction" to be a distribution just within that particular jurisdiction, or rather for the purposes of all jurisdictions that have adopted MI 45-102.

We recommend that, for the avoidance of doubt, this provision be revised to say "…or other securities legislation of *any* jurisdiction *in which this Section 2.5 applies*, is *deemed to be* a distribution *for the purposes of the securities legislation of each jurisdiction in which this Section 2.5 applies*". This will clarify what must already be the intention of Section 2.5, which is to allow each jurisdiction to determine the resale regime that will apply to securities on a national basis, rather than just within the jurisdiction itself. Otherwise, securities privately placed in one province would immediately be freely tradeable in every other jurisdiction, which cannot be the intended result. Take, for example, securities issued in Ontario under the accredited investor provisions of OSC Rule 45-501. Although OSC Rule 45-501 specifies that trades made under that exemption are subject to Section 2.5 of MI 45-102, that rule is only effective under Ontario law and has no authority in British Columbia. Accordingly, it is only by virtue of the wording of Section 2.5 of MI 45-102 (because that provision is also effective under British Columbia law) that a resale by the Ontario accredited investor to a B.C. purchaser would be deemed to be a distribution.

Section 2.5(2)3 – Legend Requirement

(a) Request for an Alternative to the Legend Requirement

Notwithstanding the rationale articulated in Section 1.7 of the Companion Policy to proposed MI 45-102, we do not believe that imposing a requirement to place a legend on a certificate evidencing a security is necessarily the most effective manner of alerting investors to the existence of resale restrictions under Canadian securities laws. In many cases, investors do not even physically receive possession of the certificate. Some private companies, for example, have a practice of keeping all original share certificates in the minute book, so that investors will not lose them. Further, securities sold in a private placement transaction made through an underwriter or selling agent are usually represented by a global note or share certificate which is registered in the name of a depository or other intermediary, and investors only hold beneficial interests in those securities. Finally, if the certificate is not legended it is the holder who suffers the sever consequence that the securities will never become freely tradeable in Canada (although it is only the holder, and not the issuer, who has control over whether or not the certificate is legended).

There are also costs and inconveniences associated with the legending requirement that may greatly outweigh its benefits. Take, for example, an Ontario issuer that has common shares listed on the Toronto Stock Exchange. The issuer proposes to offer convertible debt principally in the United States under Rule 144A, or under a U.S. registration statement. The issuer would also like to be able to make sales to eligible Canadian private placement purchasers under prospectus exemptions. Ordinarily, a single global certificate would be issued and registered in the name of the Depository Trust Company ("DTC") in the United States, which would act as the registered holder for all beneficial purchasers, including institutions in Canada.

We understand from past discussions with DTC that, in a registered U.S. offering, it cannot accept a security that bears any restrictive legend, even one required by the securities laws of another jurisdiction. Further, private placement offerings under Rule 144A typically must be able to trade through the PORTAL market in order to be attractive to U.S. institutional investors. We understand that any legend on a security certificate, other than the legend required under U.S. securities laws, will compromise the ability to make a security eligible for trading through PORTAL.

We understand that some issuers in this type of situation have been reluctant to pursue resolving the logistical difficulties of issuing separate physical certificates to each Canadian investor, or creating – and finding a depository or other nominee willing to hold – a global certificate solely evidencing the beneficial ownership position of Canadian investors. These reasons have, on occasion, led issuers to make sales to Canadian institutional purchasers without satisfying the legending requirements of MI 45-102. In such cases purchasers should be notified that MI 45-102 will not be available and that no resales – either of the convertible debt, or the underlying

TSX-listed shares – will ever be permitted under Canadian law, and that all resales must only be made into the United States. This seems to be a bizarre result, and arguably may do more to undermine the credibility of our regulatory regime than help ensure compliance with it.

We therefore strongly urge the CSA to provide issuers with an alternative option to the legending requirement. One possibility would be to provide that, in lieu of placing a legend on the certificate evidencing the security, the applicable resale restrictions may be brought to the attention of Canadian purchasers through disclosure in the offering document (or a supplement to it). Purchasers could also be required to provide representations and warranties confirming that they are aware of the applicable resale restrictions and will comply with them. If the original purchaser resells the security to a subsequent purchaser during the applicable hold period by means of another private placement exemption, the original purchaser should be required to disclose to the subsequent purchaser the length of the hold period remaining. A subsequent purchaser could also be required to provide representations and warranties to the original purchaser confirming that it is aware of the length of the remaining hold period and that it will comply with it.

(b) Timing

Section 2.5(2)3 requires that "a certificate representing the securities was issued that carried a legend stating…". This requirement is in urgent need of clarification. Does it mean that all securities must, at the time they are issued, be evidenced by a legended certificate or else they will never be eligible for resale under MI 45-102? Some practitioners have taken that view, but it seems unduly harsh and restrictive. What if the securities are shares of a private company that, to reduce administrative costs and complexities, would prefer not to issue any certificates unless and until the investor requests them? Or what if, through oversight, no certificate is issued at the time? If a certificate was issued that inadvertently omitted the legend, can that defect be cured by re-issuing a new certificate with a legend? If so, until what point in time? Can a holder of an unlegended certificate surrender it to the issuer, get a new one with the required legend, and then proceed to make a trade under MI 45-102 all in the same day? What purpose is served by the requirement in that case, especially since the four month restricted period will have already expired? The result of the failure to comply with the legending requirement in Section 2.5(2)3 is that an otherwise lawful resale after the four month hold period will be an illegal distribution. We therefore submit that clarification must be made within the body of MI 45-102 itself, and not merely in a companion policy or through a Frequently Asked Questions document.

(c) Text of the Legend

We also wish to raise several specific comments relating to the text of the legend that has been proposed in new MI 45-102. First, we recognize that the language in proposed Section 2.5(2)3 is an attempt to simplify the legending requirement by creating a single, relatively brief provision that can be used in all circumstances. However, we strongly urge the CSA to revert to two

separate forms of legend, one for an issuer that is a reporting issuer on the distribution date, and one for non-reporting issuers. For a reporting issuer, the legend should simply state that the restriction applies until the date that is four months and a day following the distribution date, as contemplated by current Section 2.5(2)3. A holder of a security bearing this legend need only consult a calendar to determine if the security is freely tradeable. If the issuer is a reporting issuer on the distribution date, this simple and convenient legend should be all that need be said. Requiring all issuers to add the reference in (ii) to the date the issuer became a reporting issuer imposes a due diligence obligation (i.e., to research the date on which reporting issuer status was obtained) on all holders of legended securities, which is unjustified where the issuer is already a reporting issuer. It would be much simpler, and much more convenient for investors, to require reporting issuers and non-reporting issuers each to use the form of legend appropriate to them.

In addition, we would suggest that the words "unless permitted under securities legislation" should be changed to say "except pursuant to a prospectus or a prospectus exemption". Under securities legislation, trades are never "permitted" – rather, trades that constitute a distribution, including a trade in security subject to a hold period, are prohibited unless the prospectus requirements are complied with or an exemption from those requirements is available. The phrase "unless permitted" therefore only serves to beg the question of whether a proposed trade is, or is not, permitted to be made without a prospectus or an available prospectus exemption. If the purpose of the legend is to allow investors to determine whether or not the securities are freely tradeable, it would seem desirable for them to be able to make that determination without having to consult a securities lawyer to find out whether a proposed sale is "permitted under securities legislation".

Further, we would suggest that the legend be clarified, by means of a heading, to indicate that it only addresses Canadian securities law, and further clarified to indicate that the restriction only applies to resales in certain provinces of Canada. As indicated above, it is very common for Canadian issuers to make concurrent private placements in multiple jurisdictions, or public offerings in the United States with a concurrent private placement in Canada. If the issuer determines to use the legend contemplated by MI 45-102, it should be clear to holders in Europe, for example, that the legend is not intended to prevent them from making resales to other European holders. It should also be clear to holders that the restrictions do not apply to resales made in Manitoba, New Brunswick, Prince Edward Island and the Yukon Territory. Currently, the risk of confusion to holders in other jurisdictions is yet another disincentive for issuers to place the MI 45-102 legend on their securities.

We would therefore propose that the form of legend for use by reporting issuers be as follows:

> ***Resale Restrictions Under Canadian Securities Law*** – Except pursuant to a prospectus or a prospectus exemption, the holder of the securities shall not trade the securities in the Provinces of

> Alberta, British Columbia, Saskatchewan, Ontario, Nova Scotia or Newfoundland and Labrador, or in the Northwest Territories or Nunavut, before [insert the date that is four months and a day after the distribution date].

The proposed form of legend for use by non-reporting issuers would be as follows:

> ***Resale Restrictions Under Canadian Securities Law*** – Except pursuant to a prospectus or a prospectus exemption, the holder of the securities shall not trade the securities in the Provinces of Alberta, British Columbia, Saskatchewan, Ontario, Nova Scotia or Newfoundland and Labrador, or in the Northwest Territories or Nunavut, before the date that is 4 months and a day after the later of (i) [insert the distribution date], and (ii) the date the issuer became a reporting issuer in any province or territory.

Section 2.7 – Exemption for a Trade if the Issuer Becomes a Reporting Issuer After the Distribution Date

It is somewhat unclear to us what rationale underlies the provisions of this section.

(a) Restricted Period

Traditionally, the "hold period" of six, twelve or eighteen months that was imposed by Section 72(4) of the *Securities Act* (Ontario) and comparable provisions in other provinces ran for six, twelve or eighteen months from the *later* of the date of the private placement or the date that the issuer became a reporting issuer. We understand that this hold period was thought to serve two purposes by imposing a *gap* requirement and a *history* requirement. First, it required a *gap* – the length of which varied in the circumstances – between the time that an eligible private placement purchaser acquired the securities and the time it could resell the securities to a non-exempt purchaser. Conceptually, the purpose of this gap was to prevent an indirect distribution to a non-exempt purchaser. Second, by requiring the issuer to have a *history* as a reporting issuer for a prescribed minimum period – the length of which was 12 months – it would be assured that the market would possess sufficient information about the issuer, based on the length of time that it had been subject to continuous disclosure requirements, to justify allowing a non-prospectus exempt purchaser to acquire securities initially sold under a prospectus exemption.

The *gap* requirement survives as Section 2.5(2)2., and the *history* requirement survives as Section 2.5(2)1, although the period of each has been reduced to four months.

It is unclear why the *history* requirement should not apply if the issuer becomes a reporting issuer by filing a prospectus after the distribution date. One could argue that, in light of the

advanced speed of communication and the public availability of documents over the internet, the *history* requirement no longer serves a useful purpose. If that is the case, then Section 2.5(2)1. should be deleted completely. On the other hand, if the *history* requirement is still viewed as relevant, then Section 2.7(1) has the perverse effect of relieving an issuer from the *history* requirement if, and only if, it has a public reporting history of less than four months.

Finally, it is unclear why Section 2.7(1) should be limited to issuers that become a reporting issuer only by filing a prospectus and not by any other means. We would submit that the same result should apply whether the issuer has become a reporting issuer by filing a prospectus, or through any other means that entails the preparation, and public dissemination, of a document containing prospectus-level disclosure.

(b) Seasoning Period

Traditionally, the "seasoning period" of twelve months that was imposed by Section 72(5) of the *Securities Act* (Ontario) and comparable provisions in other provinces was solely for the purpose of imposing a *history* requirement. This *history* requirement survives as Section 2.6(3)1, although it has been reduced to four months.

If the *history* requirement is no longer thought to serve a necessary public policy, it would seem appropriate to delete Section 2.6(3)1 completely. Otherwise, the effect of Section 2.7(2) is also perverse as demonstrated by the following example. Issuer A and Issuer B both issue securities on the same day under exemptions that are specified in Section 2.4 as being subject to Section 2.6 (the "Seasoning Period Securities"). Issuer A became a reporting issuer by completing its initial public offering one month before issuing the Seasoning Period Securities. Issuer B becomes a reporting issuer by completing its initial public offering the day after issuing the Seasoning Period Securities. By virtue of proposed Section 2.7(2), shareholders of Issuer B would be able to trade their Seasoning Period Securities immediately after the initial public offering, even though Issuer B only has a one day reporting history. Shareholders of Issuer A, however, must wait three more months before they can trade their Seasoning Period Securities, even though it has a reporting history that is one month longer than that of Issuer B.

Another example shows the potentially unfair effect of Section 2.7(2) as between security holders of the same issuer. A company issues Seasoning Period Securities to Holder A, and then completes an initial public offering by prospectus one month later. The next day, it issues Seasoning Period Securities to Holder B. By virtue of Section 2.7(2), Holder A's securities become freely tradeable immediately. Holder B, however, cannot avail itself of Section 2.7(2), because the issuer became a reporting issuer before (rather than after) the distribution date of Holder B's securities. Potential purchasers of securities from either Holder A or Holder B have the same information regarding the issuer publicly available to them following its initial public offering, but only Holder B must wait for the four month seasoning period to elapse before it can sell its securities.

Again, it is unclear why Section 2.7(2) should be limited to issuers that become a reporting issuer only by filing a prospectus and not by any other means resulting in the preparation of a document containing prospectus-level disclosure.

(c) Control Person

Traditionally, Section 72(7) of the *Securities Act* (Ontario) and the comparable provisions of other provinces required that an issuer have an eighteen-month history as a reporting issuer before a control person would be allowed to make sales into the public market through the use of the provisions contained in Section 72(7). This eighteen-month history requirement survives as Section 2.8(2)1 of proposed MI 45-102, although it has been reduced to four months.

For the same reasons discussed above in the example regarding Seasoning Period Securities, it is difficult to understand the rationale underlying proposed Section 2.7(3). It would seem that the condition in Section 2.8(2)1 should either be deleted entirely or proposed Section 2.7(3) should be removed. Finally, it is unclear why becoming a reporting issuer through the preparation of a prospectus should be distinguished from becoming a reporting issuer by any other means that requires prospectus-level disclosure regarding the issuer to be made publicly available.

Section 2.14 – First Trades in Securities of a Non-Reporting Issuer Distributed under a Prospectus Exemption

We understand that the policy rationale underlying Section 2.14 is that resale restrictions under Canadian securities laws should not apply so as to preclude a Canadian holder of foreign securities from reselling them outside of Canada. We fully support this position, but would submit that it does not go far enough toward achieving its intended objective. If the purpose of Canadian securities laws is to serve as a form of consumer protection legislation for Canadian investors, we do not see what Canadian public policy objective is achieved by imposing any limitation on the ability of Canadians to resell securities through an exchange or market outside of Canada, or otherwise to a person or company outside of Canada. The United States has taken a similar approach (except in the case of distributions by control persons), and Rule 904 of Regulation S may be instructive to the CSA by way of example.

Accordingly, we submit that the exemption in Section 2.14 should be broadened so that it is available for securities of any issuer (whether or not a reporting issuer), and whether or not Canadians hold 10% or more of the outstanding securities, or represent 10% or more of the holders. In light of the purpose of protecting Canadian investors, however, Section 2.14 should contain an anti-avoidance provision that would make the exemption unavailable if the seller knew, or had reason to know, that the securities were ultimately being purchased to or for the benefit, or account, of a Canadian resident.

With respect to the 10% tests contained in Section 2.14(b), we also wish to point out that there are a number of significant difficulties with their application. Section 1.12 of the Companion Policy attempts to give some guidance on how these amounts are to be determined, and states that "an *issuer* should use reasonable efforts" to make the determinations as specified. However, it is of course not the *issuer* that is responsible for compliance with the conditions of Section 2.14, but the *shareholder* who proposes to make the resale. The issuer is under no obligation to provide the shareholder with any of the information that would be necessary to make the determination contemplated by Section 1.12 of the Companion Policy. Consequently, the Canadian shareholders seeking to rely on Section 2.14 will never be able to establish with any certainty whether the 10% tests have been met. The CSA cannot impose any effective requirement for these non-Canadian reporting issuers to provide this information to Canadian

shareholders, as it has no jurisdiction over them. This difficulty is yet another reason why, in our view, the 10% tests should be removed from Section 2.14.

As a final observation, the interrelationship between the exemption in Section 2.14 and the Interpretation Note that replaced Ontario Securities Commission Policy 1.5 (and comparable instruments in other jurisdictions) is not entirely clear. Ontario, and a number of other Canadian provinces, have expressed the view that their securities laws do not necessarily apply to sales of securities to purchasers outside of the jurisdiction. It would be helpful for the CSA to clarify that Section 2.14 is only intended to be a "safe harbour" provision (as we believe must be the case), and that a separate analysis should also be conducted under the local laws and policies of a jurisdiction to determine whether or not its securities laws apply at all.

Section 3.1 – Transitional Provision

This transitional provision relates directly to the comments raised above under *Section 2.5(2)3 – Legend Requirement* (b) Timing. If no certificate was previously issued for securities distributed while former MI 45-102 was in effect, can the absence of the legend be cured by issuing a certificate bearing the new form of legend? If so, when must this be done? Within a specified period after the effective date of new MI 45-102, or any time up to the day before a trade is made? Does the resale regime applicable to a particular security (i.e., Section 2.5 of former MI 45-102 versus Section 2.5 of new MI 45-102) depend entirely upon the text of the legend on the certificate evidencing the security? From a public policy perspective, we believe that a shareholder should be entitled to any applicable benefits of new MI 45-102, even if the share certificate bears the form of legend prescribed by former MI 45-102.

Form 45-102F1

The Instruction to this form indicates that it is to be filed with the securities regulatory authority "in each jurisdiction where you sell securities". It goes on to say that where securities are being sold on an exchange, the form should be filed in every jurisdiction across Canada. However, for those cases where the securities are not being sold on an exchange, it may be helpful to clarify that "in each jurisdiction where you sell securities" is intended to mean each jurisdiction where purchasers of the securities are resident. If the Provinces of Alberta and British Columbia are of the view (as they may be) that a sale occurs in those provinces even if only the vendor, but not the purchaser, resides there, then that should be expressly stated in the Instruction to the form.

Resolution of Conflicts

We believe that MI 45-102 should contain a provision expressly stating what result should apply, on a national basis, where securities are distributed in a single transaction that utilizes an exemption listed in Appendix D in one or more jurisdictions but also utilizes an exemption listed in Appendix E in one or more jurisdictions. For example, take the case of an Ontario issuer

(with a greater than four month reporting issuer history) that distributes securities to holders in Ontario, British Columbia and Alberta under the prospectus exemption for an exempt take-over bid. The securities issued into British Columbia will be subject to a legending requirement and a four-month holder period under Section 2.5. The securities issued into Ontario and Alberta will be freely tradeable immediately, without restriction. This example appears in Question 18 to the Frequently Asked Questions set out in CSA Staff Notice 45-302, which states that "the same distribution may have different resale restrictions applicable in different jurisdictions".

Consider a second example. A British Columbia issuer (with a greater than four month reporting issuer history) distributes securities to holders in Ontario, British Columbia and Alberta under the prospectus exemption for an exempt take-over bid. The Province of British Columbia takes the position that all trades by issuers in that province, even to acquirers outside the province, must comply with its securities laws. For the purposes of British Columbia law, the exemption relied upon for the distribution in British Columbia, Alberta and Ontario results in all of the securities being subject to the Section 2.5 resale restrictions. However, as a matter of Alberta and Ontario law, the governing resale provision is Section 2.6. What are the resale rights of the holders in Alberta and Ontario? Are they permitted to make resales immediately under Section 2.6 in all jurisdictions other than British Columbia? If the securities issued into Alberta and Ontario are not legended, then they will never become freely tradeable under Section 2.5 for the purposes of British Columbia securities laws. What if the Alberta and Ontario holders resell the securities on the Toronto Stock Exchange, in which case the purchaser could well be resident in British Columbia?

We submit that the conflicts and uncertainties raised by these examples are highly undesirable. In order to succeed in the laudable objective of harmonization, MI 45-102 must contain a rule for resolving such conflicts. One possibility would be to say that, if Section 2.5 applies by virtue of the laws of any jurisdiction, then Section 2.5 (and not Section 2.6) will apply nationally, notwithstanding any other provision of MI 45-102 or local law. Another possibility would be to provide that the laws of the jurisdiction to which the issuer has the closest connection must govern on a national basis. In light of the importance of this issue, we believe it should be addressed in the body of MI 45-102 itself, and not in the Companion Policy or another Frequently Asked Questions document.

Securities Initially Issued Outside of Canada

We suggest that it would be helpful to add an express provision to MI 45-102 (or perhaps the Companion Policy) stating that, as we assume must be the case, neither Section 2.5 nor Section 2.6 will apply to securities initially issued outside of Canada in circumstances where Canadian securities laws do not apply (as determined by reference to the laws and policies of the relevant local jurisdiction). It does not appear that any other conclusion could be reached in light of the fact that those distributions would not be made in reliance upon any of the exemptions listed in

either Schedule D or Schedule E, but rather on the basis that no exemption was required as the prospectus requirement did not apply to the issuance outside of Canada.

Participation of Québec in the Multilateral Instrument

It is unfortunate that only one jurisdiction in Canada has not yet agreed to participate in MI 45-102, preventing it from achieving the status of a National Instrument. It is also unfortunate that several jurisdictions, while participating in parts of MI 45-102, have not adopted resale regimes that are in harmony with those applicable in the rest of Canada. The proposed amendments to MI 45-102 may present a timely opportunity to revisit with the Province of Quebec the possibility of its participation, and the harmonization of the resale regime in all provinces and territories.

We understand that, since the date on which MI-102 was initially adopted, the Québec Securities Commission has subsequently embraced its underlying policy through several of its own decisions, including most recently Decision No.: 2003-C-0016 dated January 14, 2003. This is no doubt a positive development toward national harmonization.

The rules governing the resales of securities are among those most important to investors, and special effort is warranted to ensure that they are clear, consistent and fair. Further, the unanimous participation of all Canadian jurisdictions in a single instrument governing the resales of securities in Canada could be a significant first step in demonstrating to the world financial community that the harmonization and integration of Canada's capital markets is not only achieveable, but already well underway.

* * * * *

If you have any questions regarding our comments or wish to discuss them with us, please contact Rob Lando (at 212-907-0504, or by tie-line at 416-862-5928), David McIntyre (at 416-862-6516) or Andrea Whyte (at 212-905-0503).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

RCL/DM/AW

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May 5, 2003

Ms. Marsha Manolescu
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Dear Madam:

Re: Proposed Amendments to Multilateral Instrument 45-102 – *Resale of Securities* ("MI 45-102")

I. Introduction

We thank you for the opportunity to comment on revised MI 45-102. As the TSX Venture Exchange (the "Exchange") operates a national exchange for emerging companies, we have examined revised MI 45-102 in the context of the junior issuer market.

II. General Comments

In general, we support the direction being taken by the CSA in revised MI 45-102. In particular, we support the following changes:

1. the elimination of the concept of a qualifying issuer, subject to certain exceptions as noted below;

2. the standardization of restricted and seasoning periods to four months;

3. the introduction of the exemption to permit resale of securities without complying with the seasoning requirements where the issuer becomes a reporting issuer by filing a prospectus in one of the approved jurisdictions; and

4. the simplified plain language used in Form 45-102F1 Notice of Intention to Distribute Securities Under Section 2.8 of MI 45-102 Resale of Securities.

We believe that these amendments are a positive step toward harmonizing resale rules and reducing costs for emerging companies. In particular, the uniform resale rules and recognition of seasoning periods across jurisdictions will significantly reduce the complexity, confusion and costs inherent in the existing regime. The CSA is to be commended for these initiatives.

We do, however, have a general concern in respect of the combined application of proposed National instrument 51-102 *Continuous Disclosure Obligations* and the provisions of revised MI 45-102. The most significant concern is that revised MI 45-102 provides no incentive for small business issuers to improve their level of continuous disclosure by filing an AIF. We believe there is a benefit to providing such annual disclosure, and that issuers should be encouraged to do so. Unlike the current regime, the proposals do not provide any reason for issuers to consolidate and update their continuous disclosure in one document.

Although we support the removal of the concept of a 12 month hold period in favour of a four month hold period for all issuers, we are of the view that certain advantages should be retained for issuers that elect to comply with a higher standard of disclosure. For example, we would support limiting the availability of the use of the Short Form Offering Document ("SFOD") pursuant to Blanket Order 45-507 (AB) and BC Instrument 45-509, to issuers that have filed an AIF.

The disclosure in the SFOD presupposes the presence of a current AIF. We are of the view that it is inappropriate to extend the advantages of this financing instrument to issuers that cannot provide potential investors with this enhanced disclosure base.

Further to this point, the disclosure in the AIF is only meaningful in relation to issuers that have an active business, therefore we suggest that the SFOD exemptions only be made available to issuers with an active business as evidenced by their listing on an exchange or a board of an exchange that has continued listing requirements based on the existence of an active business, or issuers undertaking a reactivation, where upon closing of the Short Form financing, the issuer will be fully active and listed on an exchange that has continued listing requirements based on the existence of an active business.

In addition to the use of the SFOD regime, there may be other inducements which can be provided to issuers to encourage them to file AIFs. For example, issuers filing AIFs could access public markets through a simplified disclosure document analogous to the short form prospectus, as contemplated by National Instrument 44-101. This type of inducement would be consistent with the CSA's Integrated Disclosure System proposal, which we understand, is intended to be accommodated by the CSA's recent concept proposal on Uniform Securities Legislation.

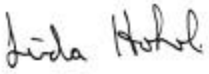
III. Conclusion

In conclusion, subject to the above comments, we support the revisions that you have made to MI 45-102, which we believe will provide substantial benefits for our emerging companies, both from the perspective of assisting them in their capital raising efforts as well as reducing their costs.

If you have questions, please do not hesitate to contact me.

Yours truly,

TSX VENTURE EXCHANGE



Linda Hohol

cc:

British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Commission
Saskatchewan Securities Commission

Securities Transfer Association of Canada

Delivered by e-mail: ***marsha.manolescu@seccom.ab.ca***

April 29th, 2003

To: Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission

c/o Ms. Marsha Manolescu
Senior Legal Counsel
Alberta Securities Commission
4th Floor, 300 - 5th Avenue S.W.
Calgary, Alberta
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Re: Request for Comment on MI 45-102 - Resale of Securities – Legends

The Securities Transfer Association of Canada would like to propose changes to MI 45-102 that would permit the implementation of an alternative process for monitoring and controlling the resale of Securities. This alternative would be complementary to the use of certificates as the means to monitor and control Restricted Securities.

Background:

MI 45-102 as amended (November 30, 2001), clarified that the use of legends restricting the first sale of securities goes hand and hand with the issuance of certificates representing those securities. The use of certificates, however, may create problems for future Straight Through Processing (STP or T+1) initiatives.

Section 1-8 requires certificates to be issued and legends to be applied as the most practical manner of providing certainty as to the applicable restricted period and of ensuring more effective regulation of the exempt market in the closed system jurisdictions.

Within the current registration system, where direct share ownership is evidenced by a share certificate, the restrictive legend prevents the investor from depositing the restricted securities into the depository or indirect registration system where securities are held in fungible form. It also puts prospective purchasers on notice that the securities are restricted and cannot be transferred should they wish to purchase the securities in street form. Despite this, interests in certificated securities can and are passed to others, without the registration/transfer which would require consideration of the restrictions. In the proposed Direct Registration System (DRS) under the Canadian Capital Markets Association (CCMA) White Paper on Dematerialization, investors may elect to hold their securities in certificated form with the appropriate legends applied or in book entry form and receive an Ownership Statement indicating the block of securities that have restrictions/legends. In a book entry environment, the underlying security cannot be moved or transferred until the restriction has been satisfied.

Certification we believe requires not only unwanted "paper", but also imposes a complex and costly environment for custodians and financial intermediaries. In a STP environment, there are, we believe, better ways to achieve regulatory objectives.

Both the U.S. Securities Industry Association (SIA) and the CCMA Dematerialization Working Group support records of share positions on issuer's registers rather than certificates as means to achieve regulatory goals. Both groups recommend:

- The use of a DRS, in addition to certificates, as the best method of book entry control over restricted securities.
- The enforcement and control over restricted securities be achieved through the deposit and withdrawal messaging system of their respective depositories to the transfer agent share register.

On December 8th 2000, Mr. Al Cooper, president of CDS and chair of the CCMA sent a letter to CSA Chairs re Resale Securities – Legends, which recommended that an amendment to MI 45-102 be made to provide also that the information that would otherwise be on a legend can be made available to purchasers and prospective purchasers in other ways that do not presume the existence of a physical certificate (letter attached as appendix A).

In the current certificate environment, the ultimate control over restricted securities lies in the issuer's security register. However, securities represented by certificates can and do trade in street form. Leaving the securities in book form on the share register as proposed by DRS is the ultimate control, as the underlying security cannot be transferred, sold or disposed of until the restrictive conditions have been satisfied. The same register control as stated above for certificates is used in DRS; in DRS the owner is provided with a statement of ownership clearly indicating the restriction/legend, but that statement is non-negotiable and can't be used to transfer any interest in the security.

The current National Policy for Escrow NP 46-201, another form of restricted security controlled on resale, has been amended (June 2002) to clarify that certification is not required to achieve its objectives. Today, almost all Escrow securities are kept in book-entry form on the share register until their release from Escrow and then moved into the indirect nominee system or certificated, if that is the wish of the investor.

The current trend world-wide in securities ownership is to dematerialize the certificate and provide a book entry alternative. The most common form of book entry until Direct Registration has been Depositories, which hold securities in nominee name, and do not provide the control at the security holder level. DRS does provide the control at the holder level to restrict movement in compliance with the regulatory requirement until the legend conditions have been met and the legend notation has been removed from the issuer's register.

In the U.S. a similar initiative addressing restricted securities in book entry form is being proposed by the SIA under the heading of "Network for Equities". Under NFE, legended and restricted securities are maintained and controlled in DRS on the share register in the same manner as proposed in Canada.

Recommendation:

Providing regulatory requirements can be met, and shareholders can receive certificates on request, the proposed DRS ensures Canada's financial systems operate in an efficient and internationally competitive manner.

The DRS is the existing share registry system with the option of issuing a certificate with a legend or an Ownership Statement with a legend notation. The DRS provides a book-entry alternative (in achieving regulatory objectives), to the issuing of a certificate with a legend.

- The investor is informed of the restriction/legend by a notation on the ownership statement.
- The ownership statement gives no power to transfer any interest in the security until the restriction/legend has been satisfied.
- Ownership rights remain on the share register, where control is exercised.

Effective identification of holders and restrictions through effective system parameters prevents prohibited transfers that could otherwise take place in a certificate environment by physical delivery of an endorsed certificate. Legends on paper certificates are not as effective as DRS in relation to meeting regulatory requirements. DRS offers more efficiencies and a better fit with current financial industry projects such as in helping custodians and other financial intermediaries (where legended securities are already immobilized) to efficiently and cost effectively discharge their responsibilities. At the same time, DRS can easily co-exist with paper, where wanted by investors, to which the current legending requirements would still apply.

We recommend modifying MI 45-102 without further delay to allow for the controlled issuance of legended securities through certificates and/or a book-entry environment controlled on the issuer's register of holders.

Yours truly

SECURITIES TRANSFER ASSOCIATION OF CANADA

Per:

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Appendix A

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December 8, 2000

Mr. Dean Murrison
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Dear Mr. Murrison:

Re: Proposed Multilateral Instrument 45-102 - Resale of Securities

The Canadian Capital Markets Association is making this submission to propose an amendment to Multilateral Instrument 45-102 - Resale of Securities to more effectively address legending in an electronic securities clearing and settlement environment. Part 2 of the Instrument provides that, to reduce the hold period if securities are distributed in reliance on a private placement exemption, "… the certificate representing the securities must carry a legend stating that, subject to securities legislation, the holder shall not trade the securities before the expiry of the appropriate hold period."

The Canadian Capital Markets Association (CCMA)

The CCMA is a national, not-for-profit organization created in August 2000 (refer left margin for the organizations represented on our Board of Directors and Observers). Its purpose is to participate in and promote the development and implementation of government legislation, regulatory policies, and industry practices and standards to enhance the efficiency, competitiveness, integrity and stability of capital markets. Among its first priorities are:

- Raising awareness and co-ordinating industry readiness for the transition from settling securities from the current three days after trade date (T+3) to the day following a trade (T+1)
- Promoting implementation of straight-through processing throughout the industry
- Promoting the mandatory reporting of securities entitlements (e.g., stock splits, rights issues) to a centralized database accessible to all Canadian investors.

Moving to T+1

As you may be aware, the United States is scheduled to change the settlement period for securities from T+3 to T+1, likely in 2004. A November 2000 economic analysis, commissioned by the securities industry, shows that Canadian capital market activity would shift to the U.S. if Canada does not reduce its settlement period to one day in conjunction with the U.S.

To move to T+1 will require not just doing the same things faster, but fundamental changes to the settlement process and considerably greater automation to allow for straight-through processing (STP). STP is the process of seamlessly passing financial information to all parties to the transaction chain without manual handling or duplicate processing.

In response to this challenge, the CCMA has established a number of committees, including the Elimination of Certificates Working Group and Legal/Regulatory Working Group on which the OSC has an observer. These two committees are looking at what legislation, regulation and policies must change to promote greater electronic transfer of securities and alternative ways of achieving, for example, the intent of legending.

Analysis

We believe that the goal of legending is to inform securities purchasers of certain limitations that may impact their buying decision or ability to sell a security.

- As fewer people now see securities, legending is not an effective way of ensuring disclosure of material information on securities.

- As securities become increasingly issued, cleared and settled in electronic form, the Instrument should address the case of non-certificated securities.

Recommendation

As the CCMA committees looking at legending and other issues that will be problematic in a T+1 environment have not had an opportunity to fully develop alternatives, we believe that the Instrument should be amended to allow flexibility in communicating the hold period information.
Parts 2.5(2)3 and 2.5(3)4 state that "The certificate representing the securities carries a legend…." We recommend that you amend this to provide also that the information that would otherwise be on a legend can be made available to purchasers and prospective purchasers in other ways that do not presume the existence of a physical certificate.

As mentioned above, the CCMA's Elimination of Certificates Working Group is examining how to handle issues such as legends in a paperless environment. The Association and its working group would like to work with the Canadian Securities Administrators to determine practical alternatives. We would be pleased to discuss your goals, our concerns and mutually satisfactory solutions with you.

Yours truly,

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May 1, 2003

Alberta Securities Commission
British Columbia Securities Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission
Prince Edward Island Securities Office
Saskatchewan Securities Commission

c/o Marsha Manolescu, Senior Legal Counsel
Alberta Securities Commission
4th Floor, 300 - 5th Avenue S.W.
Calgary, Alberta
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Dear Ms. Manolescu:

Re: Request for Comments
Proposed Multilateral Instrument 45-102 *Resale of Securities*

This is our firm's response to the request for comments regarding the proposed revisions to Multilateral Instrument 45-102 *Resale of Securities* (the "Proposed Revisions") made on January 31, 2003 by the securities regulatory authorities of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

General Comments

We strongly support the Proposed Revisions for two main reasons. First, the Proposed Revisions will simplify a very complex rule by removing the distinction between "qualifying issuers" and "non-qualifying issuers", and simplification of the closed system is an important step in the right direction. Second, the approach in proposed section 2.7 recognizes that, as a matter of policy, the seasoning periods can be eliminated if an IPO prospectus is filed after the distribution date, because accurate and complete disclosure is publicly made and the information is quickly absorbed by the market. This is a very welcomed step although, as discussed below, we think a bigger step could be taken.

Our comments are directed to the following two areas: (i) the necessity of preserving seasoning period requirements in light of the approach in section 2.7; and (ii) the use of "offeror" in the resale exemptions for securities exchange take-over bids and securities exchange issuer bids. We also suggest that clarification be given about hedging activities that involve restricted securities, although this may be beyond the scope of the current initiative.

Seasoning Periods

Under proposed section 2.7, the filing of an IPO prospectus dispenses with the four month seasoning period (in sections 2.5(2)1, 2.6(3)1 and 2.8(2)1) for securities distributed on an exempt basis before the prospectus is filed. As discussed above, this welcome change rightly recognizes that investors who bought securities before the filing of an IPO prospectus, as well as potential purchasers of the shares they hold, have access to current and accurate information contained in the prospectus, and so the rationale for a seasoning period likely disappears.

We do not understand, however, why the seasoning period should not also be dispensed with for exempt distributions done *after* the filing of an IPO prospectus, given the continuing obligation on reporting issuers to make timely disclosure of material changes. For example, if a person received shares in an exempt distribution one day before the filing of an IPO prospectus, those shares would become freely tradeable under section 2.7 immediately after a final receipt is issued for the IPO prospectus. But if the same person received shares from the same issuer the day after the final receipt of the IPO prospectus, the shares would be subject to a seasoning requirement under section 2.5(2)(1). There does not appear to us to be a policy justification for the different treatment.

We also note that section 2.7 is restricted to situations where a issuer becomes an issuer by virtue of a prospectus. Issuers may also become reporting issuers as a result of the filing of other public disclosure documents that carry an obligation to provide prospectus level disclosure, such as securities exchange take-over bid or securities exchange issuer bid circulars, or an information circular for a meeting to approve a plan of arrangement involving a predecessor reporting issuer under to which securities will be distributed. If the theory behind section 2.7 is the public availability of current and accurate information about the reporting issuer, each of those documents will suffice.

Use of "Offeror" in Sections 2.11 and 2.12

Proposed sections 2.11 and 2.12 exempt certain trades from the seasoning requirements, but only for securities issued by the an "offeror". In many securities exchange bids, however, the entity that issues securities is not the offeror. For example, the offeror might be a special purpose acquisition vehicle in a transaction where the public parent company of the offeror issues its own securities to shareholders of the target company.

We suggest, therefore, that the exemption in sections 2.11 and 2.12 should include securities issued by an entity other than the offeror. This expansion would be consistent with the former treatment of securities exchange take-over bids under sections 72(1)(j) and 72(5) of the OSA, the

definition of "reporting issuer" (which contemplates that in a securities exchange take-over bid, an entity other than the offeror might be issuing securities) and item 15(1) of Form 32 (which effectively requires prospectus-level disclosure for the issuer of securities in a securities exchange take-over bid, even if it is not the offeror). Finally, we note that Companion Policy 45-102CP acknowledges the distinction between the concepts of "offeror" and "issuer" in these circumstances: proposed section 1.11 of the Companion Policy states that the basis for the exemption in section 2.11 of the proposed rule is that the securities exchange take-over bid or securities exchange issuer bid circulars:

> "…..contain prospectus disclosure <u>for the offeror or other issuer</u> whose securities are being offered in exchange for the securities of the offeree issuer."

Therefore, we suggest the term "offeror" be replaced with "issuer" in the following locations: (i) the lead-in sentence to section 2.11; (ii) section 2.11(c); and (iii) section 2.12(c).

We appreciate the opportunity to comment on the Proposed Revisions and would be pleased to discuss any aspect of this submission with you.

Yours very truly,

Philip de L. Panet

PdeLP/eg

c: Robert Karp – *Torys LLP*
Donald MacInnis – *Torys LLP*