



CANADIAN BANKERS ASSOCIATION

Box 348, Commerce Court West
199 Bay Street, 30th Floor
Toronto, Ontario, Canada M5L 1G2
www.cba.ca

Daniel Iggers
Legal Counsel
Tel: (416) 362-6093 Ext. 291
Fax: (416) 362-7708
diggers@cba.ca

April 16, 2007

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission

c/o Ms. Heidi Franken
Co-Chair of the CSA's Prospectus Systems Committee
Ontario Securities Commission
20 Queen Street West
Suite 1903, Box 55
Toronto, Ontario
M5H 3S8

Dear Sirs/Mesdames,

**Re: Proposed Amendments to National Instrument 41-101,
CSA Notice and Request for Comments dated December 21, 2006**

The Canadian Bankers Association ("CBA") appreciates this opportunity to provide comments on the proposed amendments National Instrument 41-101 - Prospectus Requirements and related amendments. Our comments focus on three provisions: (1) section 5.13, which introduces a certificate requirement for "substantial beneficiaries of the offering"; (2) Material Contracts, and (3) the definition of "novel" in section 1.1 of NI 44-102 - Shelf Distributions

"Substantial Beneficiaries Of The Offering"

The amendments would appear to require persons and companies that are "substantial beneficiaries of the offering", as defined in section 5.13, to certify that the prospectus (and all material incorporated by reference in the prospectus) "constitutes full, true and plain disclosure of all material facts relating to the securities offered."

We are particularly concerned that the definition of "substantial beneficiaries of the offering" could unfairly subject banks to the certificate requirement in circumstances where issuers use the proceeds of an offering to repay a bank loan. It is conceivable that 20% of the voting shares of an issuer could be held by a subsidiary of a bank, and that the bank could receive 20% or more of the proceeds of an offering from an issuer as repayment for a debt held by such bank. It is also conceivable that, due to deemed beneficial ownership of securities owned by affiliates, the threshold level of holdings may represent aggregated holdings of a number of separate entities within the financial institution's group and reflect a variety of diverse activities and purposes, including among others, merchant banking, passive investment, and hedging activity. It appears that in these circumstances, the bank or affiliate (it is not clear which entity from section 5.13) would be required to sign a prospectus certificate as a "significant beneficiary of the offering" even though this was not contemplated when the bank initially provided the loan to the issuer.

If the rule is intended to require the bank or its subsidiaries to sign the prospectus certificate in such circumstances, we respectfully submit that neither party would be in a position to certify that the prospectus contained "full, true and plain disclosure". As a lender, in the case of the bank, or as a securities holder or lender, in the case of the subsidiary, such party would not be in possession of the requisite knowledge of operations and affairs to enable it to sign such a certificate. Such parties would be required to undertake significant due diligence on the issuer in order to be in a position to sign such a certificate. Consequently, such a provision would necessarily have a significant negative impact on the cost and availability of financing.

We submit that the definition of "substantial beneficiary of the offering" is overly broad and potentially places unfair burdens on banks, particularly in the circumstances that we have outlined. As well, the inclusion of past holdings of up to a year prior, which are no longer held, is overly broad.

We believe that securities legislation correctly places the principal burdens of prospectus disclosure on issuers and selling security-holders, and it would not be appropriate to extend the same burdens on banks through the proposed "substantial beneficiary of the offering" certificate requirement. While banks do have access to a certain level of information with respect to their borrower clients, the amount of information provided by a borrower and the manner in which it is reviewed is principally driven by the bank's credit and legal analysis, and is often not as comprehensive as a due diligence investigation that would be conducted in connection with a prospectus offering.

The proposed certification would make the substantial beneficiary responsible for the entire content of the prospectus and would not be subject to any knowledge qualifier. This would mean that a bank that is deemed to be a "substantial beneficiary of the offering" would need to conduct a costly and comprehensive due diligence investigation. Such a requirement would significantly increase the cost of bank financing and would place Canadian banks at a substantial competitive disadvantage with their international competitors. In our view, the significant extra costs that this requirement would impose on bank financing outweigh any unproven potential for enhanced disclosure.

We would ask the CSA to review the certificate requirement in light of these concerns, and clarify the language so that neither the bank nor its subsidiary is required to sign a prospectus certificate in the circumstances described above.

Material Contracts

We do not think it is clear in the wording of subsections 9.1(1) of Proposed NI 41-101 and 3.6 of Proposed 41-101 CP that contracts that are not material to the issuer do not have to be filed, even if they fall within the exclusions from the exemption to file material contracts entered into the ordinary course of business. While we believe this is the CSA's intention that only material contracts be filed even if they are of the type listed in subsection 9.1(1), we suggest it is important to clarify this in order to avoid a large volume of non-material filings that might obscure the truly significant information for the marketplace.

We have the following comments about the types of contracts listed in subsection 9.1(1) of Proposed NI 41-101 to be excluded from the exemption to file contracts entered into in the ordinary course of business:

1. Regarding paragraph (a) of subsection 9.1(1), we do not believe it is appropriate to include contracts with substantial beneficiaries of the offering for the reasons above.
2. Also regarding paragraph (a), we do not understand why material contracts with directors, officers and similar parties for the "purchase and sale of current assets at fair value" may still be considered in the ordinary course of business and therefore not filed, but other contracts with the same parties that also provide the issuer with "fair value" cannot be considered in the ordinary course and therefore must be filed. All material contracts with directors, officers and similar parties on market terms and conditions should continue to be part of the exemption from filing if the issuer concludes they are in the ordinary course of business. We believe this change would focus the filing requirement on information that is valuable to investors who wish to understand the impact of related party contracts on the issuer. In particular, banks provide banking services to their directors and officers in the ordinary course of business, and these agreements should not be required to be filed.
3. In addition, we believe it is overly broad to require filing of material contracts with all officers and that paragraph (a) of subsection 9.1(1) should refer only to Named Executive Officers consistent with the definition of "management or administration agreements" in subsection 3.6(2) of 41-101CP.
4. Regarding paragraph (d) of subsection 9.1(1), we do not understand on what basis material "credit agreements" should be excluded from being eligible to be considered in the ordinary course of business. Banks enter into credit agreements in the ordinary course of business. Further, we believe it is an ordinary part of most businesses conducted in Canada to have credit and other financing arrangements, and the relevant information about these arrangements would be described in the financial statements and MD&A of the issuer. We do not see how filing of the actual contracts, even if material to the issuer, would help investors. There may be certain specific negotiated and/or fact-specific terms and margins recited in credit agreements, viewed as confidential and which could reveal competitive information, which lenders would not wish arbitrarily subject to publicly disclosure.

5. Finally, regarding the disclosure of management and administration contracts in paragraph (e) of subsection 9.1(1), we query whether this is necessary given the CSA's current proposal to enhance executive compensation disclosure. We believe proxy disclosure of management contracts and compensatory plans is an effective way of providing the key information to the marketplace about such contracts and plans. In light of the robust executive compensation disclosure, we do not see what also filing the contracts would add. We also note that the definition in subsection 3.6(2) of 41-101CP includes any management contract related to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing in which any director or named executive officer participates. This could lead to the filing of a great number of contracts such as personal agreements between issuers and named executive officers that are typically executed for each grant of options or other equity compensation. We do not believe this should be required, in light of the extensive disclosure that would be provided in the proxy circular on the specifics of individual grants and the Plan descriptions in the Human Resources Committee report (or CD&A).

We are also concerned that the provisions prescribed in subsection 9.1(2) of Proposed 41-101 are vague and overbroad. These provisions are deemed "necessary to understanding the contract" and may not be redacted or omitted from the filed version of the applicable material contract under subsection 3.6(3)(a) of 41-101CP. Terms used in subsection 9.1(2) such as "concession" and "take-or-pay" do not have well understood meanings and could cause confusion. "Contingency" and "financial covenant" could apply to a great number of provisions in any contract. Because the CSA is proposing to prescribe that these provisions cannot be omitted or redacted from a material contract, this could potentially require issuers to make disclosure of provisions that an executive officer of the issuer would have reasonable grounds to believe would be seriously prejudicial to the issuer or breach confidentiality provisions.

We recognize that the CSA has added a "materiality" qualifier to certain paragraphs of subsection 9.1(2). This is a step in the right direction, and we would encourage this for all paragraphs in the subsection as applicable. However, to fully address the concerns stated above, we suggest that the provisions listed in subsection 9.1(2) should be identified as examples of clauses potentially necessary to understanding the contract, but not specifically prescribed. For example, a particular provision (such as "anti-assignability" or "take-or-pay") could be neutral or positive to an issuer from a commercial risk mitigation perspective. Such a provision should not be ineligible for redaction or omission only because it is of the type on the list in subsection 9.1(2) if the issuer has confidentiality or other appropriate concerns about the disclosure. This approach would recognize that issuers are best placed to make the assessment of what is actually necessary to understanding the contract in the broader context of the issuer's business and financial condition, and can make this assessment appropriately with additional guidance from the CSA."

Definition of "novel" in section 1.1 of NI 44-102 - Shelf Distributions

We also are concerned about the effect that the proposed amendments to the definition of "novel" in section 1.1 of National Instrument 44-102 - Shelf Distributions could have on the structured note business. The proposed amendments would require reporting issuers to pre-clear the initial shelf prospectus supplement for each new type of specified derivative or asset-backed security, regardless of whether another reporting issuer has previously distributed a similar specified derivative or asset-backed security under a prospectus receipted by securities regulators. Requiring each issuer to pre-clear will make it more difficult for banks to respond in a timely fashion to market opportunities. Moreover, such a process would not be transparent to other issuers of similar types of securities.

We have appreciated the opportunity to express our views regarding the proposed National Instrument 41-101. We would be pleased to answer any questions that you may have about our comments.

Yours truly,

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by a series of connected loops and a long horizontal flourish extending to the right.

DI/sh