Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Latham & Watkins LLP
555 11th Street, NW
Washington, DC 20004

January 31, 2017

Ms. Michele Anderson
Associate Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Use of Form F-7 for Canadian Rights Offerings under National Instrument 45-106

Dear Ms. Anderson:

We are writing to request that the staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission" or the "SEC") not object to the use of Form F-7 to register under the Securities Act of 1933 (the "Securities Act") an offering of rights conducted in Canada by a Canadian reporting issuer pursuant to Section 2.1 of National Instrument 45-106 – *Prospectus Exemptions* ("NI 45-106"), as recently amended by the Canadian Securities Administrators (the "CSA").

I. Background

On December 8, 2015, the CSA announced the coming into force of an amended regime for prospectus-exempt rights offerings in Canada. Since that date, over 25 Canadian issuers have conducted rights offerings in Canada using the new prospectus-exempt rights offering regime but none of them have extended these rights offerings to U.S. shareholders on a registered basis. Effectively, these rights offerings have "stopped at the border" and have prevented U.S. shareholders from participating in these rights offerings at a discount to market to the same extent as their Canadian shareholder counterparts. We believe that this is due, to a large extent, over widespread uncertainty over whether Form F-7 remains available for use by Canadian foreign private issuers who conduct a rights offering pursuant to the new prospectus-exempt rights offering regime under Section 2.1 of NI 45-106. This uncertainty is, in our view, significantly detrimental to U.S. shareholders who are not currently receiving the benefit of participating in Canadian exempt rights offerings utilizing a Form F-7.

II. Form F-7

Form F-7 was originally adopted by the Commission in 1991 as part of the Multijurisdictional Disclosure System (the "MJDS") under which eligible Canadian companies could register securities offerings under the Securities Act and file periodic reports under the Securities Exchange Act of 1934 (the "Exchange Act") using disclosure documents largely prepared in accordance with disclosure standards under Canadian securities laws and regulations.

Form F-7 was adopted at least partly in response to the Commission's recognition that "with the increase in U.S. ownership of foreign securities, the unwillingness of foreign issuers to extend rights offers… to U.S. shareholders has become increasingly significant… [and that] rather than comply with the requirements of regulators in more than one country, foreign issuers choose at times to exclude jurisdictions such as the United States from their offerings."[1] The Commission addressed this challenge by permitting Canadian issuers to rely on home-country disclosure documents, supplemented only as necessary for U.S. shareholder protection by additional requirements in the MJDS forms. Representative of the Commission's deference to Canadian standards is the fact that whether financial statements are required turns in a rights offer disclosure document entirely on Canadian laws and regulations (the legend required by Item 2 of Form F-7 references "financial statements included or incorporated herein, *if any*…") (emphasis added). This approach is also evidenced by the fact that use of Form F-7 does not give rise to a reporting obligation under Exchange Act Section 15(d) (subject to certain conditions) and that Form F-7 does not require the issuer to file a Form F-X Consent to Service of Process.[2]

Form F-7 may be used to register under the Securities Act offers and sales of securities of an eligible corporation for cash upon the exercise of rights to purchase or subscribe for such securities that are granted to the corporation's existing shareholders in proportion to the number of securities held by them, referred to generally as a rights offering. As the Staff clarified in Securities Act Forms Compliance & Disclosure Interpretations Question 106.01 ("CDI 106.01"), Form F-7 is available both for the registration of rights offers qualified in Canada by way of prospectus and for the registration of rights offers exempt from prospectus requirements. Under Securities Act Rule 467(a), a registration statement on Form F-7 is effective upon filing with the Commission.

In order to be eligible to use Form F-7, the registrant must (1) be incorporated or organized under the laws of Canada or any Canadian province or territory, (2) be a foreign private issuer (as defined under Securities Act Rule 405), (3) have had a class of its securities listed on specified Canadian stock exchanges for the 12 months preceding

---

[1] "Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers," SEC Release No. 33-6902 (July 1, 1991).

[2] See General Instruction II.J to Form F-7.

the filing of the Form F-7, (4) have been subject to the continuous disclosure requirements of a Canadian securities commission for the 36 months preceding the filing, and (5) be currently in compliance with obligations arising from its listing and reporting.

For the purposes of a registration statement on Form F-7, the "prospectus" consists of "the entire disclosure document or documents used to offer the rights and underlying securities to holders in any Canadian jurisdiction."[3] Form F-7 contains other requirements relating to the registrant and the terms of the rights offering. For purposes of this letter, the registrant and the rights offering would satisfy the eligibility requirements for use of Form F-7 as provided under Section I of the General Instructions to Form F-7. Furthermore, as required by Item 2 of Form F-7, an offering circular and notice filed with a registration statement on Form F-7 would include legends alerting U.S. investors to the fact that the disclosure requirements of the issuer's home country differ from U.S. requirements, that there may be tax consequences to acquiring the offered securities, that investors may have more difficulty enforcing civil liabilities against an issuer incorporated or organized under the laws of a foreign country and that the SEC has not approved or disapproved of the offered securities or passed upon the accuracy or adequacy of the disclosure in the offering documents.

III. Recent Changes to the Rights Offering Regulatory Regime in Canada

Until December 8, 2015, prospectus-exempt rights offerings by Canadian public companies were conducted under National Instrument 45-101 – *Rights Offerings* ("NI 45-101"), an exemptive regime under which a company could offer up to 25% of its outstanding equity in value through a rights offering circular (as opposed to via the filing and distribution of a full prospectus) based on Form 45-101F that would be filed with the appropriate Canadian securities commission and delivered to shareholders. Under NI 45-101, the circular was required to contain disclosure relating to the terms and mechanics of the rights offering (including the various specific procedures as to how to subscribe for shares and pay funds), any stand-by commitments, insider participation, the use of proceeds, a brief business description and other matters. The circular was subject to review and comment by staff of the relevant Canadian securities commission(s).

For issuers listed on the Toronto Stock Exchange or TSX Venture Exchange, pre-clearance by the exchange was also required. After any staff comments were resolved and pre-clearance, if required, was received, the circular was cleared for filing and delivery to shareholders and the offering could proceed. If the offering was to be extended to U.S. shareholders under the MJDS, Form F-7 was available to register the NI 45-101 rights offering in the United States. Under NI 45-101, the rights and underlying securities acquired under a rights offering were not subject to Canadian statutory secondary market liability and issuers were not required to disclose previously undisclosed material facts or changes.

[3] *See* Part I, "Item 1. Home Jurisdiction Document" in Form F-7.

In response to concerns that rights offers made under NI 45-101 were seldom used because issuers viewed the review process as too burdensome, time-consuming and costly, on September 24, 2015, the CSA repealed NI 45-101 and adopted amendments to NI 45-106 and related national instruments, which were intended to remove significant costs and timing barriers to the use of the NI 45-101 prospectus-exempt regime while maintaining investor protection. The repeal of NI 45-101 and the amendments to NI 45-106 became effective on December 8, 2015.

Under Section 2.1 of NI 45-106, an issuer is eligible to use the exempt regime if the issuer has filed all periodic and timely disclosure documents required to be filed under Canadian securities law, meaning that the issuer has filed all its annual and quarterly financial statements and management's discussion and analysis of results of operations and financial condition ("MD&A"), and latest information circular, in addition to all required reports of a material change and other applicable continuous disclosure filings, which are subject to discretionary review by the staff of the applicable Canadian securities commission. Any Canadian issuer that is not current in its reporting obligations is not eligible to use the exemption offered by Section 2.1 of NI 45-106 and could only make a rights offering in Canada by means of a full prospectus. The general approach of the new exempt regime reflects the Canadian securities regulators' focus on enhanced continuous disclosure and associated statutory secondary market liability that has been in place since 2005.

Under Section 2.1 of NI 45-106, an issuer may now offer up to 100% of the number of outstanding shares of a class, measured as of a date immediately prior to the date of an offering circular and assuming exercise and conversion of all rights, in a rights offering by filing a notice and offering circular with the appropriate Canadian securities commission, and delivering the notice (but not the circular) to all shareholders residing in Canada. The notice filing is intended to be one page in length and contains disclosure designed to alert holders to the pendency of the rights offer and direct them to the offering circular, in a manner similar to how a notice of internet availability directs shareholders of domestic SEC registrants to proxy materials.

The offering circular in Form 45-106F15 is now in a streamlined, accessible question-and-answer format, but the substantive disclosure requirements are largely similar to the disclosure requirements under the previous exemptive regime. The one significant difference between new Form 45-106F15 and the old form is that Form 45-106F15 requires the inclusion in the circular of an affirmative statement that there is no material fact or material change about the issuer that has not been generally disclosed whereas the earlier form included no such requirement. If an issuer is unable to make such a statement, it must disclose in the circular such additional material facts or material changes that allow it to make such a statement. Furthermore, and notably, in contrast to the NI 45-101 exemptive regime, under NI 45-106, the acquisition of rights and underlying securities under the rights offering is now subject to Canadian statutory secondary market liability.

Under NI 45-106, neither the notice nor the circular are subject to prior review and comment by Canadian securities commission staff. Rather, the rights offering may commence immediately following the filing of the notice and offering circular with the relevant Canadian securities commission and mailing of the notice to shareholders resident in Canada. However, rights offerings conducted pursuant to Section 2.1 of NI 45-106 remain subject to pre-clearance with the Toronto Stock Exchange and the TSX Venture Exchange, as applicable.

IV. Use of Form F-7 to Register a Rights Offering Conducted Pursuant to NI 45-106

We are not aware of any express prohibition in Form F-7 or in the Commission's releases proposing and adopting the MJDS of the use of Form F-7 in a rights offering conducted under Section 2.1 of NI 45-106.

In adopting Form F-7 and the eligibility standards for its use, the Commission's rulemaking focused on the eligibility of an issuer to use the form (e.g., the issuer's jurisdiction of incorporation, the exchange on which its securities are listed and the length of its reporting history), but purposely refrained from imposing substantive requirements for rights offerings that could be registered on Form F-7, effectively deferring to Canadian substantive regulation of such offerings. For example, as proposed, Form F-7 contained a limitation that an eligible offer could not increase the capital of the class of securities offered by more than 25%. The Commission noted that this 25% test was derived from Canadian requirements, which used the 25% threshold to identify rights offers that would not be exempt from the Canadian prospectus requirements. On adoption, this limitation was not included as part of Form F-7. The Commission noted that such a limitation was judged unnecessary for, and in some cases was inconsistent with, the interests of U.S. investors.

Similarly, the fact that the notice and offering circular are no longer subject to review by a Canadian securities commission should not prevent registration on Form F-7 of rights offerings under NI 45-106. As with respect to the substantive requirements for a rights offer, the Commission effectively defers to the relevant Canadian securities commission with respect to the review process, if any, for documents filed in connection with a rights offering. As proposed, the effective date for registration of securities on Form F-7 would have been the date of notification to the Commission that the securities may be lawfully sold in Canada. As adopted, however, a registration statement on Form F-7 (and any amendment thereto) is always effective upon filing, recognizing that in the context of a rights offering, a filing may not be reviewed.

Significantly, while NI 45-106 is referred to in Canada as an "exemptive" regime, a Canadian prospectus-exempt rights offering is not "exempt" in the same way that a private placement would be exempt from registration under the Securities Act. Rather, an issuer undertaking an exempt Canadian rights offer is exempt from providing "prospectus-level disclosure," on the basis that the rights are offered to existing shareholders who are presumed to be already familiar with and have access to all material information about the issuer. An issuer relying on Section 2.1 of NI 45-106, however, is

nevertheless required to prepare and file with the applicable Canadian securities commission a comprehensive offering circular satisfying the disclosure requirements of the form adopted by Canadian securities regulators to supplement the disclosure record of the issuer accessible by the recipient of the rights.

We note that the Commission took the same approach with respect to rights offerings under the MJDS. In the initial release proposing the MJDS (the "Initial Proposing Release"), the Commission noted: "Rights offerings to U.S. investors that already own the securities of the issuer are particularly appropriate for multijurisdictional registration. Investors already holding the securities can be expected reasonably to make a further investment based on the same type of information on which they relied when they bought the securities in the secondary market."[4]

Furthermore, we submit that the prohibition on the use of MJDS forms available to "substantial" issuers for offerings not made by prospectus or an equivalent prospectus-level offering document does not apply to offerings registered on Form F-7. As explained in the release adopting the MJDS (the "Adopting Release"), certain Canadian offerings may not be made on MJDS forms: "…if no Canadian takeover bid circular or issuer bid circular (in the case of an exchange offer) or information circular (in the case of a business combination) or prospectus (in all other cases) is prepared with respect to an offering because an exemption from such requirements is being relied on by the issuer, the offering is not eligible to be made using MJDS forms regardless of whether the eligibility tests are satisfied."[5] The Commission included this language as guidance with respect to all MJDS Securities Act forms available to "substantial" issuers that were adopted in the Adopting Release,[6] including Form F-10, which was the only MJDS Securities Act form other than Form F-7 on which a rights offering could be registered.

Notably, the only MJDS Securities Act form that was *not* adopted with such an instruction was Form F-7, suggesting that the Commission never intended to limit the use of Form F-7 only to offerings made by means of Canadian prospectus-level disclosure documents.[7] The Initial Proposing Release supports this interpretation: "Either a rights offering circular filed in Ontario pursuant to paragraph 71(1)(h)(i) of the Ontario Act and

---

[4] *See* "Multijurisdictional Disclosure," SEC Release No. 33-6841 (July 21, 1989)(original proposing release for the MJDS).

[5] *See* SEC Release No. 33-6902 (Jul. 1, 1991).

[6] *See* General Instruction I.B to Form F-8, General Instruction I.I to Form F-9, and General Instruction I.J to Form F-10.

[7] We note, however, as described above, that a detailed disclosure document satisfying Canadian form requirements *is* prepared in connection with a NI 45-106 rights offer, and is filed with the Canadian securities regulators and made available to recipients of the rights offer, as a result of which, with the public disclosure record of the issuer being available, the investor has access to all material information in respect of the issuer.

in Quebec pursuant to section 52(1) of the Quebec Act [meaning a prospectus-exempt offering] or a rights offering prospectus may be filed under Form F-7."[8]

A subsequent technical amendment by the Commission further supports this view. Less than a year after adopting the MJDS, the Commission issued a release correcting errors in the final regulations set out in the Adopting Release.[9] Among the regulations and forms that were corrected was Instruction I.J to Form F-10, which was "corrected by adding… 'rights offering circular (in the case of exempt rights offerings)…'" to the list of Canadian offerings using documents other than full prospectuses for which Form F-10 was available.[10] In substance, the Commission was clarifying that a prospectus-exempt offering could be registered on Form F-10. In 1999, the Staff adopted Securities Act Forms Compliance and Disclosure Interpretation 109.05, which clarified further that Form F-10 was available for the registration of an exempt rights offering by means of an offering circular (not a prospectus), when that rights offering did not meet the requirements for registration on Form F-7 (this could occur, for example, if the issuer chose to have the rights freely transferable in the United States).[11] This interpretation was subsequently amended and reaffirmed in 2009.

If a home-country document including prospectus-level disclosure is not required for an exempt rights offering on Form F-10, then we respectfully submit that it would be inconsistent with the policies underlying the MJDS and with the goal of investor protection to require a home-country document with prospectus-level disclosure for an exempt rights offering registered on Form F-7. Form F-7 is only available for rights offerings where the rights granted to U.S. holders are "upon terms and conditions no less favorable than those extended to any other holder of the same class of securities."[12] Form F-10 contains no equivalent requirement.

Similarly, Form F-7 requires that "the securities offered or sold upon exercise of the rights granted to U.S. holders may not be registered on this Form if such rights are transferable other than in accordance with Regulation S under the Securities Act." In contrast, rights offered in transactions registered on Form F-10 may be freely resold in the United States. As a result, if Form F-10 is available for exempt rights offerings but Form F-7 is not, U.S. shareholders will be able to participate in exempt rights offerings

---

[8] *See* "Multijurisdictional Disclosure," SEC Release No. 33-6841 (Jul. 21, 1989).

[9] *See* "Correction to Final Rule," SEC Release No. 33-6902A (Mar. 23, 1992) ("The Commission adopted the multijurisdictional disclosure system for Canadian issuers on July 1, 1991. As published, the final regulations contain errors which may prove to be misleading and are in need of clarification. In this release, authority citations, rules and forms containing such errors are being corrected.")

[10] *Id.*

[11] *See* Securities Act Forms Compliance and Disclosure Interpretation 109.05 ("The Commission revised General Instruction I.J of Form F-10 in Securities Act Release No. 6902A (Mar. 23, 1992) to clarify that a Form F-10 registrant may file a rights offering circular prepared pursuant to Canadian requirements in lieu of a prospectus.").

[12] *See* General Instruction I.D to Form F-7.

where their interests lack substantive protections, but will continue to be excluded from the rights offerings that provide them with the greatest substantive safeguards.

Finally, as set out above, a Canadian issuer registering a prospectus-exempt rights offering on Form F-7 is only eligible to use Form F-7 if it is current in its Canadian continuous disclosure filings, to which Canadian shareholders are presumed to have access. To ensure that U.S. shareholders have access to that same information, an issuer undertaking an exempt rights offering could include a brief description of its business, risk factors, discussion of results of operations and capital resources and such other matters as it deemed material or otherwise appropriate in the offering circular itself or file as exhibits to the Form F-7 its most recent annual information form (if applicable), its financial statements, MD&A, its latest information circular, reports of a material change and other applicable continuous disclosure documents, which would provide U.S. investors with comprehensive disclosure about the issuer while also subjecting the issuer to liability under the U.S. securities laws for any material misstatements or omissions in those documents. A Canadian issuer that is already an SEC registrant alternatively could incorporate by reference in the Form F-7 exhibit index to its previously filed reports on Form 40-F and Form 6-K.

The tenets of the regulatory regime in Canada have remained consistent: the prior rights offering regime based on NI 45-101 was an exemptive regime, and the new rights offering regime under NI 45-106 continues as an exemptive regime. Although certain facets of the regime have changed, that should not affect the use of Form F-7 in connection with registration of rights offerings under the Securities Act.

V. Future Rights Offerings in Canada

As noted above, prior to adoption of the amendments to NI 45-106, rights offerings by Canadian issuers could proceed under the earlier exemptive regime if the offer fell within the 25% dilution limitation, or under the full prospectus regime if the offer did not. NI 45-106 was amended to streamline the previous exemptive regime and make it more accessible to Canadian issuers. With NI 45-106, it is anticipated that far more future rights offerings by Canadian issuers would proceed under the new exemptive regime provided by NI 45-106. As a result, if Form F-7 is not available for rights offerings conducted under NI 45-106, no prospectus-exempt rights offerings will be extended widely to U.S. shareholders of Canadian issuers (except pursuant to an applicable exemption from registration) and, we expect, very few rights offerings by prospectus will be extended to U.S. shareholders, given the time and expense associated with registering such offerings on an available registration statement form. We believe that this result would only be to the detriment to U.S. shareholders of such Canadian issuers who will be unable to (i) participate in such rights offerings at a discount to market and (ii) otherwise avoid up to 100% dilution to the same degree as their Canadian shareholder counterparts.

VI. Conclusion

If the Staff does not object, an eligible Canadian issuer could use Form F-7 to register a rights offering conducted under Section 2.1 of NI 45-106. The Form F-7 would include the notice and the rights offering circular. When so registering securities on Form F-7, an issuer would need to assure that the registration statement and the prospectus satisfied the antifraud and liability provisions under the Securities Act, including Rule 408,[13] and the Exchange Act. To do so, for purposes of the offering materials made available to U.S. holders, the issuer could provide a brief description of its business, risk factors, discussion of results of operations and capital resources and such other matters as it deemed material or otherwise in the offering circular. An issuer that is not an SEC registrant could file as exhibits to the Form F-7 its most recent Annual Information Form (if applicable), financial statements, MD&A, information circular, and its Material Change Reports and other applicable continuous disclosure documents, as prepared in accordance with Canadian securities law requirements, and similarly could incorporate those materials by reference, as permitted by Item 3 of Form F-7. In addition, an issuer that is already an SEC registrant could, solely for purposes of the registration statement filed with the Commission, incorporate by reference disclosure documents such as an Annual Report on Form 40-F and Reports on Form 6-K that have been filed with the Commission, as permitted by Item 3 of Form F-7.

In light of the current apparent uncertainty and because Form F-7 is effective on filing, it seems prudent to seek the views of Commission staff prior to making a filing that contains the limited disclosure contemplated under NI 45-106. Please let us know if you would like additional information.

Sincerely,

André Boivin
Cassels Brock & Blackwell LLP

Alexander F. Cohen
of Latham & Watkins LLP

[13] *See* Adopting Release at fn. 97 ("Like other Securities Act registration statements, those filed under cover of MJDS forms are subject to the requirement of Rule 408 under the Securities Act (17 CFR 230.408) to include other material information necessary to make the required statements not misleading in light of the circumstances under which they are made.")