DAVIES

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March 1, 2019

BY EMAIL

Ontario Securities Commission
c/o The Secretary
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: OSC Staff Notice 11-784 *Burden Reduction*

We are writing in response to the Ontario Securities Commission ("**OSC**") Staff Notice 11-784 *Burden Reduction* (the "**Staff Notice**"). We strongly support this initiative to reduce undue regulatory burden under Ontario securities regulation. In addition to providing our feedback through our written comments below, our firm would also like to participate in the Burden Reduction Roundtable to be held on March 27, 2019.

Our comments below address some, but not all, of the areas of focus identified in the Staff Notice and are, by necessity, at a high level and incomplete due to the wide-ranging and general nature of this initiative. For further detail, we have also, where applicable, referred to comments we previously provided to the Canadian Securities Administrators ("**CSA**") on July 28, 2017 ("**CSA Comment Letter**")[1] in response to CSA Consultation Paper *51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*. While we have provided several specific examples herein and in our CSA Comment Letter, these examples are not intended to be exhaustive. More specific and comprehensive feedback will be provided as detailed rule proposals are published in connection with this initiative.

We acknowledge that many of these comments will take significant time to implement. In particular, where we have suggested changes to national instruments or national policies or address issues that otherwise require a harmonized approach across Canada, we recognize that these will require the approval of the Canadian Securities Administrators ("**CSA**") as a whole and that the OSC can only advocate for its position within the CSA. However, in our view, the reduction of regulatory burdens

[1] A copy of our CSA Comment Letter is available at http://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20170728_51-404_davies-ward-phillips-and-vineberg-llp.pdf

contemplated by the Staff Notice can only be achieved in a meaningful way if there is buy-in from the CSA as a whole to implement these initiatives.

I. General

We believe this regulatory burden reduction initiative provides an excellent opportunity for Ontario to revisit a number of its rules and procedures to identify those that can be modernized, streamlined or harmonized with other jurisdictions in order to fulfill the OSC's mandate of fostering efficient capital markets. We recognize that any reduction in regulatory burden must not undermine the OSC's other, competing mandates, which include providing protection to investors in Ontario and fostering confidence in Ontario's capital markets. However, as we discuss in greater detail below, there are a variety of rules and filing requirements that can be eliminated or modified without undermining the OSC's mandates.

In many cases, unnecessarily burdensome Canadian securities regulations are the product of an overly-inclusive or prescriptive approach to rulemaking. In this initiative to reduce regulatory burden, generally, we suggest that, where appropriate, the OSC (and the CSA as a whole) narrow the scope of securities regulations to address their specific policy objective, in lieu of a "catch-and-release" approach of overly-broad regulation that is scaled back through numerous carve-outs, and take a more principled approach where a prescriptive, "one size-fits all" regulation cannot work.

That said, we are mindful of the potential for adverse, unintended consequences resulting from changes to a well-established regulatory regime. These changes may, at least in the short term, result in added costs and confusion for capital markets participants as they get up to speed with the new regime. In particular, it could be disruptive to make substantial changes to regulations that were recently amended following extensive consultation with Canadian capital markets participants (such as the early warning reporting and take-over bid regulatory regime) or long-standing regulations that afford unique flexibility to issuers and underwriters and have already struck an appropriate balance for fair and efficient Canadian capital markets (such as the bought deal regime).

II. Operational changes for regulatory branches and offices

1. Are there operational or procedural changes that would make market participants' day-to-day interaction with the OSC easier or less costly?

(a) Improve information sharing between branches

Information provided to the OSC by registrants and issuers should be made accessible to, and relied on, by the all branches of the OSC that require such information. It is unnecessarily burdensome for market participants to be asked to provide information to one branch of the OSC when such information has already been provided to another branch. For example, when an investment fund manager applies for exemptive relief from rules which fall under the purview of the Investment Funds & Structured Products Branch, the manager is typically required to provide detailed information that has already been provided to the Compliance & Registration Regulation Branch in connection with the registration of the firm and its individuals. Similarly, in connection with compliance reviews conducted by the OSC,

registrants are routinely asked to provide information and documents that have already been filed with the OSC.

(b) Modernize SEDI and SEDAR filing systems

We suggest that the CSA modernize the SEDI and SEDAR filing systems, which are out-dated and not user-friendly. With respect to SEDI, we note that as a web-based application it is not currently possible to prepare a draft insider report for review prior to filing. It would be much easier and cost-effective for capital markets participants if a draft filing could be generated and amended on SEDI prior to filing.

With respect to SEDAR, we note that the current system has been in use since 1996 and, while there have been a number of changes with respect to the use of the system, we think the CSA should revisit the SEDAR system to develop a more user-friendly platform. For example, by amending the character limit on file names. Further, we would recommend that an alert mechanism be created to inform SEDAR users when changes have been posted by a regulator on a specific SEDAR project. This would eliminate the need for SEDAR users to frequently access the server to determine whether a change has been posted. Examples of suggested alerts include alerting users when a document has been posted and when there has been a change in the status of a filing. We would further recommend the deletion of certain features which are no longer used, such as the mail features.

(c) Enhancement of national registration database filing system

Registrant firms are currently required to file firm applications and updates in paper format and deliver such documents electronically by email or through a web-portal. Conversely, the national registration database ("**NRD**") is currently used primarily for individual filings. We would recommend that the CSA enhance NRD to allow firm filings to be submitted on NRD. This would reduce costs and enhance efficiency for firms, as they would be able to submit applications and updates electronically.

(d) Improve mechanisms for issuing prospectus receipts and comment letters

The OSC currently issues receipts and comment letters for prospectus filings via SEDAR. While we understand that these must be posted on SEDAR to comply with regulatory requirements, there can be a significant delay between the time that a comment letter or receipt is ready (and has been sent for posting on SEDAR) and the time at which the comment letter is actually posted and available to the issuer and the underwriters. We suggest streamlining this posting procedure such that comment letters and receipts are posted on SEDAR as soon as they are ready. In addition, in the case of comment letters, we suggest that, in the interim, the OSC examiner email a copy to the OSC's point of contact with the issuer's counsel concurrently with sending the letter for posting on SEDAR.

2. Are there ways in which we can provide greater certainty regarding regulatory requirements or outcomes to market participants?

(a) Automatic shelf procedure (Securities Act (Ontario) - Sections 55 and 61/NI 44-101/MI 11-202)

The CSA should consider adopting procedures similar to the "automatic" shelf registration procedure available under U.S. securities legislation to allow specified issuers to qualify (without prior review by the OSC or any other Canadian securities regulator or any other delay) unspecified amounts[2] of different types of securities by way of an "automatic" shelf. While eligible Canadian issuers can (and often do) take advantage of the current Canadian shelf procedure in order to de-risk the potential for a delay at the time of an offering, an "automatic" shelf procedure should be more attractive as, among other things, it mitigates adverse pricing pressure from the market overhang associated with a traditional, unallocated shelf. The "well-known" and "seasoned" nature of eligible issuers and their reporting record should provide comfort that the Canadian "automatic" shelf option will not meaningfully diminish the investor protection that would otherwise be afforded by a traditional shelf as there should be a sufficient level of confidence in their continuous reporting resulting from their track record and the wide following (and associated scrutiny) of their reporting by the financial community.

(b) Automatic receipt on filing of a preliminary short form prospectus (Securities Act (Ontario) – Section 53(1)/NI 44-101/MI 11-202)

The CSA should have systems that allow for the automatic issuance of a preliminary receipt on the filing of a preliminary short form prospectus, or remove the requirement for a preliminary receipt altogether, in order to allow underwriters to immediately proceed with soliciting offers for a marketed public offering. The manual review of filing documents prior to the issuance of a preliminary receipt, and the potential for further delay due to an administrative or other technical fault in those filings, results in unnecessary regulatory uncertainty that can have significant economic consequences to a marketed offering and provides no additional protection to investors. This risk may also be mitigated by reducing the number of associated filings required with a preliminary short form prospectus as suggested in Item 4(a) below.

(c) Issue no action letters or codify relief given in exemptive relief applications

Obtaining exemptive relief is a time consuming and costly process for issuers. This is the case even in circumstances where the obtaining of exemptive relief is (or is expected to become) routine, or where the requested relief is otherwise uncontroversial. We suggest that the OSC should explore opportunities (together with the CSA or, if legislative amendments would be necessary, the

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[2] While an unspecified amount of securities is a feature unique to an "automatic" shelf prospectus in the U.S., the CSA should consider whether to take this same approach generally with respect to any shelf prospectus. This approach could streamline the Canadian prospectus offering process for Canadian issuers who are reluctant to avail themselves of the efficiencies afforded by conducting offerings pursuant to a traditional shelf prospectus due to concerns regarding the associated market overhang.

Government of Ontario) to decrease the necessity of applications for exemptive relief in such circumstances. More specifically, where exemptive relief is (or expected to become) routine, or is otherwise uncontroversial, the OSC should consider whether is it appropriate (and within its authority) to issue blanket orders or no action letters to provide such relief to the broader market. Issuing blanket orders or no action letters could be used as an interim measure prior to codifying the relief in the relevant rules or the *Securities Act* (Ontario) and either of these instruments could have sunset provisions to underscore and ensure their interim nature.

Examples of these kind of circumstances include the relief required to conduct "at-the-market" offerings (which we understand is currently the subject of a CSA initiative to codify) as well as relief required for an issuer to undertake a modified Dutch auction substantial issuer bid. In addition, the OSC could address the relief routinely given to exempt SEC issuers from filing, or being required to incorporate by reference into a short form prospectus, the exhibits to their annual report on Form 20-F or Form 10-K (to the extent an equivalent filing of those exhibits would not be required were the issuer to have instead complied with Ontario continuous disclosure obligations). A further example is the standard relief granted from section 13.5 of NI 31-103. Where an investment fund managed by a registrant transfers assets to a newly created investment fund as part of a restructuring and where there is no change in the beneficial ownership of the investment assets, registrants should not be required to incur legal fees and regulatory filing fees to obtain exemptive relief. The relief in such situation is only required because the transaction is technically offside the rule, but does not raise any of the concerns that gave rise to the rule. Another example for Staff to consider is codifying the standard relief granted from section 111 of the Act for pooled funds from the fund-on-fund investment restrictions. Exemptions granted to investment managers to act as trustee of their investment funds should also be codified.

If the OSC concludes that the issuance of blanket orders or no action letters in this manner is not within its ambit, we encourage the OSC to lobby the Government of Ontario to legislatively authorize the use of these measures to reduce the regulatory burden.

(d) Pre-review continuous disclosure/technical reports in advance of filing preliminary prospectus

The CSA should consider streamlining the short form prospectus review process such that it is focused on disclosure specific to the particular offering and not on the issuer's existing continuous disclosure record (absent manifest error). From a timing, efficiency and policy perspective, any review of an issuer's continuous disclosure should, as necessary, be performed over the course of the year, or as suggested below, confidentially on the request of an issuer. For the reasons noted in Item 2(a) above and as further detailed in Item 13 of our CSA Comment Letter, we submit that there is no longer a strong policy rationale for triggering this review merely by virtue of a short form prospectus offering, particularly in the case of seasoned issuers that are well-known in the financial community.

The broad scope of the short form prospectus review can also pose a significant problem for issuers that became reporting issuers under a reverse take-over or similar transaction that does not involve the full securities commission review associated with an IPO (an "**RTO Issuer**"). When filing a prospectus for the first time after completion of a going-public transaction, RTO Issuers are ultimately faced with a long form review, in the public, of their continuous disclosure record. The OSC could provide greater

certainty to RTO Issuers by permitting a confidential review of the RTO Issuer's disclosure record on request of the RTO Issuer in advance of filing a prospectus for the first time following completion of its going-public transaction.

Similarly, the OSC should consider adopting the BC Securities Commission's confidential pre-filing review of mining technical reports for issuers that anticipate filing a prospectus. Concurrent review of mining technical reports often causes delays in the approval of a deal for both long- and short-form issuers, which increases uncertainty and, frequently, imposes additional costs. A further benefit of a pre-review process is that it may also reduce the need for clarifying disclosure where initial disclosure is premised on approaches to the formulation of scientific and technical information that the OSC does not endorse. We suggest that any such pre-filing review process be available to both long- and short-form prospectus issuers.

(e) Compliance reviews of registrants

The expectations of the OSC communicated to Staff who conduct compliance reviews of registrants should be consistent and clear and should address areas of securities laws that are well established. For example, deficiency letters should not be used as an opportunity for OSC Staff to explore establishing new standards, guidance or rules and compliance Staff should rely on rules and policies, rather than Staff Notices, to assess compliance. Further, legal compliance should be led by counsel at the OSC rather than the accounting group, as is often the case. Certain of our clients have been cited for major deficiencies and have spent tens of thousands of dollars on legal fees for counsel to explain to OSC Staff that the client is in compliance with applicable laws. Where a registrant is unwilling to challenge a finding that it is deficient and where Staff conducting compliance reviews interpret applicable laws differently, it creates differing standards for certain registrants that can be unfairly burdensome.

3. Are there forms and filings that issuers, registrants or other market participants are required to submit that should be streamlined or required less frequently?

(a) Quarterly filing of excess working capital (Form 31-103F1)

The quarterly filing of Form 31-103F1 under NI 31-103 seems unnecessary given that registrants have ongoing obligations to assess, among other things, the status of their excess working capital. Part of a registrant's effective compliance program within the context of a principles-based regulatory regime is ensuring they are maintaining adequate working capital at all times. As such, we recommend that the quarterly Form 31-103F1 filings required under section 12.14 of NI 31-103 be reduced in frequency to semi-annual filings, to match the production of semi-annual financial statements.

(b) Registration of individuals and review of permitted individuals (Form 33-109F4) and change in registration information (Form 33-109F5)

Subject to certain exceptions, the information provided to the OSC in a Form 33-109F4 should only be required to be updated annually. Some of the information about registered and permitted individuals, such as proficiency and certain employment and outside business activities ("**OBA**"), are not critical

information that OSC needs to regularly rely on and do not raise investor protection issues. For example, changes in proficiency after a registered individual has already met the standard required to register does not require contemporaneous updating. A further example is the requirement to report all changes to OBAs contemporaneously with the change in activity. The fundamental issue with OBAs is that potential conflicts of interest can arise when a registered or permitted individual engages in activities other than with their sponsoring firm. In circumstances where a registered or permitted individual is engaged in an affiliate entity, a personal holding company or another entity or organization where no conflict of interest arises, an annual update is sufficient. We recommend that the OSC coordinate with the other CSA members and self-regulatory organizations to develop a principles-based approach to the reporting of OBAs and certain other information filed under a Form 33-109F4 and that all other information be required to be updated annually.

(c) Monthly suppression of terrorism and Canadian sanctions reporting

Registrants are typically considered to be securities dealers under the Proceeds of Crime, Money Laundering and Terrorist Financing Act (the "**PCMLTFA**"). The PCMLTFA and other Canadian federal legislation impose a myriad of regulatory obligations on registered firms, including a requirement to implement ongoing monitoring procedures for high-risk clients and to report suspicious transactions, large transactions and terrorist property reports. The Monthly Suppression of Terrorism and Canadian Sanctions Reporting reports required to be submitted to a firm's principal regulator are redundant in light of a registrant's obligations under the PCMLTFA and other anti-terrorism legislation.

(d) Reduce frequency for filing technical reports (NI 43-101 – 4.2(2))

The CSA should consider changing the triggers for filing technical reports for issuers with more than one producing mine. Currently, many of the requirements for filing a technical report are premised on circumstances where there is new material scientific or technical information that is not supported by the then-current technical report. For a multi-mine producing issuer, this can often result in a new technical report being required where the scientific and technical information that is not supported by the then-current technical report is not material to the issuer as a whole. Accordingly, we question why issuers should be required to dedicate the significant resources necessary and potentially delay transactions in order to prepare a technical report that supports non-material changes to the issuer's disclosure. This regulatory burden is compounded by the fact that one of the underlying triggers is the (annual) filing of an annual information form ("**AIF**"). We suggest that the CSA consider including a materiality requirement in respect of the AIF trigger (and possibly other triggering events) for filing a technical report, whether premised on the current carve-backs for a preliminary short form prospectus or other written disclosure currently in the instrument or on some other basis.

4. Are there particular filings with the OSC that are unnecessary or unduly burdensome?

(a) Reduce the number of burdensome filings and deliveries required in connection with short form prospectus offerings (NI 44-101 – Part 4)

The CSA should consider removing a number of burdensome filing and delivery obligations that are prescribed by Part 4 of NI 44-101. Key among these is the personal information form ("**PIF**") filing. To the extent PIFs are required for new executive officers and directors appointed after an issuer's IPO, it should be adequate for those new PIFs to be cleared in the ordinary course by the stock exchange on which the issuer's securities are listed, without further clearance by the issuer's principal regulator. Obtaining and clearing the necessary PIFs and/or obtaining PIF confirmations concurrently with a short form prospectus filing is an unnecessary burden that can delay the filing of a preliminary prospectus and, as applicable, the launch, pricing or settlement of an offering. In the case of a bought deal, it may be impractical to obtain all the necessary PIFs in the intervening four business days between announcement and filing because the necessary individuals may be inaccessible for any number of reasons. To the extent the CSA feels it necessary to continue to clear new PIFs, issuers should be entitled to clear PIFs in advance and outside of the context of a short form prospectus filing. Further, if the CSA maintains the requirement for PIF confirmations, this could be satisfied on an annual basis (rather than within 30 days of filing) as the issuer must in any event confirm the same information for its AIF.

The CSA should also consider limiting the requirement to file consents ("**QP consents**") of authors of technical reports ("**Author QPs**") in connection with the filing of short form prospectuses and prospectus supplements. The technical report for each material property of an issuer and the names of the QPs who prepared the technical report must be set out in an issuer's AIF which makes the Author QPs "experts" when an AIF is incorporated into a prospectus. As a result, consents must be obtained from each Author QP in connection with each filing of a short form prospectus or prospectus supplement,[3] even where the prospectus disclosure supported by the portion of the technical report written by an Author QP is not material in the context of the issuer. Obtaining QP consents can be a major impediment to the timely execution of a bought deal or a shelf prospectus take-down, particularly in the context of a multi-mine issuer, where internally prepared technical reports with many contributors may result in a significant number of Author QPs. Further, in these circumstances, there is no alternative form of consent permitted if the Author QP is no longer employed by the issuer. Accordingly, an issuer must seek relief from the requirement to file a QP consent where the Author QP cannot be located or no longer cooperates with issuer. In lieu of requiring a QP consent in connection with the filing of a short form prospectus of a producing issuer, the CSA should consider whether it is sufficient that one or more qualified persons has approved the disclosure in that prospectus as required by Section 3.1(b) of NI 43-101. For further discussion on this issue, please refer to Item 2.2(c)(i) of our CSA Comment Letter.

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[3] Other than a prospectus supplement filed in the period between filing the base shelf prospectus and the first subsequent AIF.

Consideration should also be given to removing other filing obligations that simply add to the prospectus-related paperwork. For example, we suggest removing the requirement for manually signed certificate pages (and corresponding SEDAR Form 6s). Generally speaking, requiring any manually signed documents imposes an unnecessary burden.

(b) Reduce and simplify insider reporting filing requirements (NI 55-104)

The CSA should reduce the circumstances in which insider reporting is required, and simplify the prescribed content of insider reporting filings made, under NI 55-104, as the time and money spent on their preparation is not proportionate to their benefit.

In some circumstances, required reporting should be eliminated as it does not provide any insight into an insider's view of the issuer's securities or otherwise advance any policy rationale served by the insider reporting requirements. For example, under the current insider reporting framework, insiders are required to report securities acquired, or in some cases disposed of, where there is no separate investment decision by the insider. Although exceptions are afforded if certain conditions are met to allow this reporting to be completed on an annual basis, in our view, these exceptions should instead provide that no reporting is required.

The CSA should also clarify and simplify the prescribed content of insider reports and issuer grant reports. In particular, the requirements to disclose information regarding price or exercise price, and guidance provided with respect to filings for compensation securities, are irrelevant when dealing with certain types of non-equity securities granted to insiders as part of their compensation arrangements (*e.g.*, deferred share units and performance share units). In many cases, the price or exercise price for these securities is not known at the time of grant, and only may be determined at a later date based on a formula. The insider reporting forms are not flexible enough to accommodate this.

(c) Eliminate or limit post-trade reports under 45-106 (NI 45-106, Part 6; Form 45-106F1)

The CSA should consider removing the requirement for issuers and underwriters to file a report of exempt distribution. If not eliminated entirely, the required content for such a report should be narrowed. We understand that a key objective of the report of exempt distribution is to obtain information regarding the Canadian exempt market; however, it is unclear how the prescribed reporting of the type currently required is necessary to meet the investor protection, market integrity and stability and risk reduction policy objectives of Canadian securities legislation. In particular, we submit that requiring issuers and underwriters to gather information regarding the identity of specific purchasers is not necessary to achieve this objective. Where exempt trading data is required to serve the policy objectives of Canadian securities legislation, that information could be obtained instead on an aggregated (as opposed individual) basis through periodic reporting by institutional investors. If not eliminated entirely, the OSC (in consultation with the other CSA members) should also reconsider the current requirement for issuers to file Form 45-106F1 through three separate filing systems: the OSC portal in Ontario, BCSC e-services in British Columbia and SEDAR in the remaining provinces and territories. For smaller firms and issuers that rely heavily on external legal counsel or other service providers to make such filings, having to file through three different systems significantly increases costs. One filing portal for all jurisdictions should be created.

(d) Registration of individuals

The OSC should streamline the process for registering individuals. It is currently very time consuming for a firm to register an employee with the OSC, particularly as an advising representative. Staff should have a set of clear criteria and timelines for registering individuals as advising or dealing representatives. There is significant variation in the supporting information required to register an individual, particularly as an advising representative, and in some cases, the registration process takes significantly more time than in others.

5. Is there information that the OSC provides to market participants that could be provided more efficiently?

(a) Publish all of Staff's interpretative guidance in one place and enable push notifications as to updates

Staff of the OSC should regularly publish and update guidance that it has provided, whether in response to specific inquiries it has received from issuers or their counsel (over the phone or by email), as part of prepared remarks made at conferences, or otherwise outside of formal Staff notices. While these positions may be those of Staff, and not a binding position of the OSC, for transparency and efficiency we think it is important that these positions be publicly available to all capital markets participants and be as current as practical. These should be easily accessible on a single page on the OSC's website and, to the extent practical, organized by topic or searchable, similar to the way in which the SEC provides its compliance and disclosure interpretations. Capital markets participants should be able to opt in to receive notifications where new Staff guidance is added or any existing guidance is changed.

(b) Clarify the marketing rules

The rules governing marketing and pre-marketing in the context of a prospectus offering would benefit from a number of clarifications to alleviate common confusion in their application. In particular we suggest the CSA consider the following clarifications:

Expressly exempt bona fide offshore marketing activities (sections 13.11 and 13.12 of NI 41-101) - The CSA should clarify that written communications made outside of Canada, and not directed at Canadian residents, are not subject to the prospectus requirement or Canadian marketing rules simply because they are accessible by Canadian residents (over the internet, as a press release, or otherwise). This issue could be addressed through 41-101CP. However, it would be clearer to instead carve-out all such *bona fide*, "offshore" marketing communications from the application of the marketing rules.

Clarify when a blackline of marketing materials is not required (NI 44-101 - 7.6(7); 44-102 9A.3; 13.8(7) – 41-101) - The CSA should also clarify that the requirement to file a blackline comparing the indicative and final marketing materials (and the corresponding required prospectus disclosure) is not applicable where the only change between the indicative and final marketing materials is the inclusion of pricing or other bulleted/blank information in the final prospectus or prospectus supplement. It is not necessary for investor protection to highlight through a blackline the inclusion of pricing information, or the completion

of other previously bulleted/blank information, as this should be expected and obvious and does not in fact modify a prior statement of a material fact. These blacklines merely serve to clutter an issuer's SEDAR profile.

(c) Consolidate amendments to rules and policies on a timely basis

Copies of OSC rules and policies, as well as multi-lateral and national instruments and policies, are available to the public on the OSC's website. Unfortunately, this information is not presented in a user-friendly way. Amendments are posted on the website but there is often a significant lag before a consolidated, amended version is made available. Capital markets participants are often forced to track through amendments on their own or, where dealing with a national instrument or policy, review the website of another securities commission to find a consolidated copy. We suggest the OSC make consolidated versions of rules, policies and instruments available on its website on a timely basis.

III. Rule Changes

6. Are there requirements under OSC rules that are inconsistent with the rules of other jurisdictions and that could be harmonized?

(a) Align Canadian prospectus disclosure requirements and processes for cross-border offerings to facilitate MJDS offerings

Public U.S. offerings by Canadian issuers are most commonly effected by way of the Canada-U.S. multi-jurisdictional disclosure system ("**MJDS**"). MJDS is by far the most efficient way for eligible Canadian issuers to access the public U.S. capital markets. However, since the adoption of MJDS, there have been intervening developments (in regulation, technology and the capital markets in general) that have led to some misalignment in the respective offering processes and practices in the United States and Canada. In addition, because the rules establishing MJDS are not exhaustive, there are (and have always been) certain ambiguities that would benefit from clarification. We urge the OSC to consider an initiative specific to streamlining prospectus disclosure requirements and processes that may conflict with corresponding U.S. requirements or otherwise be burdensome in the context of "southbound" MJDS offerings.

(b) Streamline reporting for reporting issuers that choose to satisfy Canadian reporting obligations with U.S. filings

Consideration should be given to whether there are avenues to further streamline the reporting of Canadian reporting issuers that choose to satisfy their Canadian reporting obligations using their U.S. reporting. While Ontario securities legislation largely accommodates cross-border issuer's use of U.S. compliant reporting to satisfy Canadian reporting obligations, there is room for further improvement. This is principally an issue for issuers that do not qualify as a "foreign issuer" or a "foreign reporting issuer" and so are not afforded the exemptions under NI 71-101 or NI 71-102. These issuers may also not qualify as a "foreign private issuer" under applicable U.S. securities legislation and, as a result, are subject to both U.S. and Canadian requirements in respect of certain reporting (*e.g.*, proxy circulars and material change reporting) absent exemptive relief from Canadian securities regulators. The CSA

should also codify the relief that is routinely given to exempt SEC issuers from filing the exhibits to their annual report on Form 10-K.

(c) Accommodate wall-crossed offerings for shelf prospectus offerings to permit soft sounding (NI 44-102, Part 9A)

Requirements within the marketing material rules can pose practical issues for conducting "wall-crossed" shelf offerings in Ontario. In particular, the requirement that "marketing materials" must be filed not later than the first day they are provided to a potential investor is problematic. This requirement would defeat the purpose of the wall-crossing if it required a public filing, prior to a determination to proceed with a shelf offering, of written communications that were confidentially provided to wall-crossed investors. NI 44-102 should be amended to clearly accommodate wall-crossed offerings by allowing investment dealers to provide written communications to wall-crossed investors in a confidential manner after a receipt for a final base shelf prospectus has been received such that those communications could remain confidential until after the announcement of the offering, if any, despite ultimately being marketing materials for purposes of the announced offering.

(d) Permit sophisticated institutional investors to purchase securities on a basis exempt from prospectus requirements and other securities laws

Canadian securities regulators have made significant progress in streamlining Canadian securities laws to permit Canadian institutional investors to access foreign securities through the so-called "wrapper exemption". However, we suggest that the OSC (whether or not together with the CSA) should consider establishing a more straightforward prospectus "super exemption" for all purchases by large, sophisticated institutional investors (*i.e.*, banks, investment funds and money managers). Such purchasers have the knowledge and experience to assess potential investments and the ability and leverage to negotiate the additional protections that they believe they need. We understand that Canada is an outlier among countries with developed capital markets as it does not have such an exemption (for example, Rule 144A for Qualified Institutional Buyers in the United States). Ideally, such an exemption should cover all securities laws so that, for example, a foreign issuer that is an investment fund for the purposes of Ontario securities laws is not required to comply with the domestic regime applicable to investment funds. A large, sophisticated Canadian institutional investor participating in an offering does not require the protections afforded by the mutual fund regime. Further, the wrapper exemption did not eliminate all of the existing barriers to Canadian institutional investors accessing foreign securities. For example, exchange offers (which are frequently used in the U.S. debt markets) do not qualify for the exemption as the exchange securities are distributed by the issuer directly, and it is a condition of the wrapper exemption that the securities be distributed through a registered dealer or an exempt international dealer.

(e) Modify the "all-information disclosure requirement" for marketing materials (NI 41-101 – 13.8(1)(b))

The requirement that all information in a standard term sheet or marketing materials be disclosed in, or derived from information disclosed in, the applicable prospectus (the "**all-information disclosure requirement**"), other than contact information for the investment dealer or any comparables (in the

case of marketing materials), is too narrow. Notably, under applicable U.S. rules, a "free writing prospectus" may contain information that is additional to the registration statement in respect of the securities offering; it simply must not conflict with the information in that registration statement or the issuer's continuous disclosure record. The CSA should give further consideration to additional information that might properly be carved-out from the all-information disclosure requirement as well as a more general carve-out to allow for immaterial information that is not derived from the prospectus.[4] For further details, see Item 2.2(d) of our CSA Comment Letter.

(f) Address the exemption for roadshows for cross-border offerings.

The exceptions for U.S. cross-border offerings in sections 13.11 and 13.12 of NI 41-101 are difficult to apply in practice. Among other things, clause 13.12(2)(a) of NI 41-101 should be amended to provide a threshold that is clear and practical. The threshold of a “reasonable expectation” that an offering will be sold “primarily” in the United States is too vague to be useful and may be too high a threshold given the purpose to be served by this condition. For further details, see Item 2.2(d) of our CSA Comment Letter.

(g) Harmonize insider reporting across Canada

There is a lack of consistency across CSA members with respect to requirements for insider filings. In particular, we note that the guidance on specific codes to be used for reporting annual dividend equivalents for omnibus plans considered under automatic securities purchase plans and relying on the exemption in Part 5 of NI 55-104 varies across provinces. The OSC guidance indicates to use code 30 – *acquisition or disposition under a purchase plan/ownership* plan and indicate in the remarks section: *dividend equivalents*. The AMF’s guidance indicates to use code 35 – *stock dividend*, no remarks. We suggest that CSA members harmonize their internal policies and interpretation in respect of the insider reporting regime.

7. Are there specific requirements that no longer serve a valid purpose?

(a) Eliminate duplicative disclosure requirements (NI 51-102)

We suggest the CSA remove the duplicative disclosure requirements prescribed by the forms governing AIFs, MD&A and financial statements. Several prescribed MD&A disclosure items are adequately addressed through the equivalent note disclosure in an issuer’s financial statements.[5] Cross-references to the appropriate financial statement note(s) could be used, to the extent relevant, to provide context to discussion in an issuer’s MD&A. There is also considerable overlap in the disclosure items prescribed for an AIF and MD&A, and duplication between the AIF and proxy circular disclosure requirements with respect to directors and governance matters. We also note that TSX-listed issuers are required to make copies of a number of key governance documents (for example, board mandates

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[4] It may also be appropriate to carve-out other market information that is not material information specific to the issuer and is derived and available from other publicly available sources.

[5] For example, disclosure of financial instruments, critical accounting estimates, changes in accounting policies and contractual obligations on Form 51-102F1 has significant overlap with the disclosure requirements in IFRS.

and audit committee charters) available on their websites, making it unnecessary to require inclusion of these materials in a proxy circular or AIF.

(b) Eliminate unnecessary or unhelpful short form prospectus and AIF disclosure requirements (Form 44-101F1; Form 51-102F2)

Several of the disclosure items prescribed by Form 44-101F1 and Form 51-102F2 could be eliminated or modified without adversely affecting investor protection. Taken as a whole, we think these changes would result in a significant reduction in the time and expense of preparing short form prospectuses and AIFs. Specific examples of mandated disclosure that could be eliminated or modified include: (i) price range and trading volume statistics; (ii) credit ratings; (iii) prior sales information; and (iv) earnings coverage ratio disclosure. In general, AIFs may provide more meaningful disclosure to investors if the form required disclosure that was less prescriptive and more focused on disclosure that might be material to an investor (consistent with the approach taken for MD&A).

For further details, see Item 2.2(c)(i) of our CSA Comment Letter.

(c) Eliminate requirement to deliver offering memorandum to the OSC (OSC Rule 45-501 – Section 5.4)

We suggest the OSC eliminate this delivery requirement in its entirety. Ontario is one of the few remaining Canadian jurisdictions which requires an issuer to deliver a copy of an offering memorandum to the securities commission in connection with a prospectus-exempt distribution of securities (other than a distribution relying on the offering memorandum exemption in Section 2.9 of NI 45-106). It seems an unnecessary burden to require delivery to the OSC of an offering memorandum that was delivered voluntarily to prospective purchasers. Moreover, it subjects a private issuer to the risk of potential public disclosure of confidential information in its offering memorandum under freedom of information legislation or other regulatory processes. That risk can have a significant chilling effect on private issuers' participation in Ontario's exempt market. This requirement is also out of step with U.S. federal securities laws.

(d) Eliminate requirement for disclosure of statutory rights (OSC Rule 45-501 – Section 5.3)

Ontario is also one of the few remaining Canadian jurisdictions that requires disclosure of the statutory rights of rescission and damages in an offering memorandum. This disclosure is unnecessary, as these rights are provided in the publicly available *Securities Act*, and is inconsistent with the requirements of the majority of jurisdictions in Canada. The obligation to disclose statutory rights often necessitates the retention of local counsel, which increases the cost associated with prospectus-exempt distributions. We suggest the OSC provide an exception to this disclosure requirement consistent with the exception afforded in Section 5.3.1 in all circumstances, rather than limit this exception to distributions of eligible foreign securities to permitted clients. At a minimum, this exemption also should be available in circumstances where the offering memorandum is provided only to prospective purchasers that are accredited investors.

(e) Expand permitted content of standard term sheet (subsection 13.5(3) of NI 41-101)

The permitted content for a standard term sheet should be expanded to include additional market and other offering-specific information that is typically included in a term sheet. In almost every securities offering (other than straightforward common equity offerings) issuers are forced to file term sheets as "marketing materials" despite their being standard (from a policy perspective). This is due to the overly narrow content limitations in subsection 13.5(3). As a result of these limitations, in most cases, issuers cannot avail themselves of the accommodations that regulators intended for standard term sheets and are forced to file (and translate, where applicable) each and every basic term sheet despite there being no utility in each such filing being made. In addition to causing an unnecessary (albeit minor) administrative burden, these overly narrow limitations can pose a significant problem for soft-sounding in the context of a potential debt offering by a shelf issuer as they may cause a very standard term sheet (without material non-public information) to be "marketing materials" that must be filed not later than the first day they are provided to a potential investor, potentially defeating the purpose of the soft-sounding. For further details, see Item 2.2(d) of our CSA Comment Letter.

(f) Include exceptions to the stock exchange listing representation (Securities Act (Ontario) – Section 38(3))

Prohibitions on listing representations should be modified to allow issuers to state that application will be made to list the offered securities, without having previously made such application or obtaining a prior consent, if the issuer already has a listed class of securities on the relevant exchange. As a timing matter, making a prior application can be impractical and obtaining a prior consent may be equally (or more) impractical and is an unnecessary added expense.

(g) Modify the international dealer exemption

Subsection 8.18(2) of NI 31-103 provides that the dealer registration requirement does not apply in respect of certain trades in securities, subject to the requirements under subsection 8.18(3) and (4). One requirement is that the "international dealer" is registered under the securities legislation of its foreign jurisdiction to act as dealer. International dealers that are exempt from registration in their home jurisdiction should also be permitted to rely on this exemption. For example, SEC registered advisers are able to distribute their own products pursuant to an exemption in their local jurisdiction and, as such, should be able to avail themselves of the international dealer exemption. This exemption should operate in parallel to the international adviser exemption which is available to an international firm that is registered *or exempt from registration* in its foreign jurisdiction as an adviser. We note that the investor protection rationale underlying such limitation is probably not relevant given that the international dealer exemption is available only where the Canadian purchaser is a permitted client.

IV. Enhancing investor experience and outcomes

8. Are there ways to enhance and improve how investors experience disclosure provided: (i) before they invest; (ii) as part of ongoing public disclosure; and (iii) by registrants?

(a) Accommodate electronic delivery of prospectuses

As noted below in Item 9(a), and as further detailed in Item 2.5 of our CSA Comment Letter, when assessing an investment, investors invariably access an electronic version of the relevant prospectus. It would be inefficient to wait for a hardcopy to follow by mail, and an electronic version (in contrast with the hardcopy) is searchable. If the CSA were to implement an "access equals delivery" model, dealers may enhance their investment platforms to integrate this electronic access such that an investor has access to all the information relevant to its investments in one place that is easily accessible online.

(b) Provide issuers with option to consolidate periodic reporting requirements into a single report

Allowing issuers the option to consolidate their annual MD&A, AIF and financial statements into a single annual report and interim reporting (MD&A and financials) into a single report for each quarter should improve how investors experience this disclosure (by providing all the necessary disclosure for a period in one place) while reducing the reporting burden on the issuer of producing multiple reports with significant overlap in the required information. However, we think this consolidation should be at the issuer's option. Reporting issuers often choose to file their AIF on a later date than their financial statements and MD&A, as this affords them additional time to prepare and vet the associated disclosures and provide the annual CEO and CFO certifications. Requiring a single annual report would force these issuers to accelerate this work or delay their current timetable for reporting their annual results and filing their annual financial statements and MD&A.

9. Suggestions for improving the investor experience by modernizing the information provided to investors or other interactions that investors have with issuers or registrants because of regulatory requirements

(a) Implement an "access equals delivery" model for short form prospectus delivery requirements

Access to a filed short form prospectus (and its incorporated documents) on SEDAR should be sufficient to be deemed to constitute delivery of the prospectus for purposes of prospectus delivery obligations under applicable securities legislation without actual delivery of the prospectus (in printed or electronic form). Requiring actual delivery of a short form prospectus (despite substantially all of the critical issuer information being contained in documents that are incorporated by reference and not actually delivered) seems an arbitrary requirement and an unnecessary burden given the high level of Internet access in Canada. Insisting on antiquated prospectus delivery requirements that are premised on delivery by mail as opposed to electronic access (and deem receipt "in the ordinary course of the mail") unnecessarily delay the confirmation of sales. It also artificially extends the expiry of the statutory withdrawal right, making it is impossible for those rights to expire on a normal (modern) settlement

cycle. As a result, the time to settlement for most Canadian public offerings is considerably longer than for a U.S. public offering.

Further, with respect to preliminary prospectuses, we propose that any delivery obligation (including a dealer's obligation to "forward" or "provide" a copy in connection with any solicitation or providing marketing materials) should also be satisfied by access to the preliminary prospectus on SEDAR. For further details, including our views regarding the appropriateness of an access equals delivery model and the manner in which this model might be implemented, see Item 2.5 of our CSA Comment Letter.

(b) Modernize guidance as to available outlets to "generally disclose" material information

The CSA should update its guidance in National Policy 51-201 to identify alternative, modern mediums that are available for an issuer to "generally disclose" material facts within the meaning of Canadian securities legislation prohibiting tipping and insider trading. While NP 51-201 does allow that alternative disclosure methods may be appropriate, it does not identify any methods that would satisfy the "generally disclosed" requirement aside from a news release. In 2013, the SEC announced that U.S. reporting issuers could use social media to effectively disseminate information to the marketplace if the issuer has alerted investors about which social media platform will be used. The OSC should consider adopting a similar approach in order to reflect the manner in which many investors now prefer to receive information. In addition, NP 51-201 should be updated to allow for the "generally disclosed" requirement to be satisfied through a brief, broadly disseminated notice (such as a new release) that alerts the marketplace as to nature of further available information and provides a hyperlink to a page (on the issuer's or a third party's website) where that further information is immediately accessible to the public.

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The following partners at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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