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Ms. Grace Knakowski, Secretary
Ontario Securities Commission
20 Queen Street West
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Toronto, Ontario M5H 3R3

Via e-mail: comments@osc.gov.on.ca

Ontario Securities Commission (the "Commission") Staff Notice 11-784
Burden Reduction - Comments

Dear Ms. Knakowski,

The Commission, in coordination with the Ministry of Finance (the "**Ministry**"), has established a Burden Reduction Task Force (the "**Task Force**") to identify steps that can be taken to reduce the burden on businesses and other market participants by eliminating unnecessary rules and processes under Ontario securities laws while also safeguarding the integrity of the capital markets.

Xplornet Communications Inc. ("**Xplornet**") is writing in respect of Commission Staff Notice 11-784 *Burden Reduction* to submit comments concerning the time-consuming and costly process of protecting confidential and intimate information contained in certain materials that are "filed" with the Commission by privately-held companies.

The disclosure of confidential information of private issuers through OSC filings

Ontario securities law requires all issuers who distribute securities in Ontario pursuant to most of the capital-raising and other key exemptions to the prospectus requirement (an "**Exempt Distribution**") under the *Securities Act*, RSO 1990, c. S.5 (the "**Act**") to file with the Commission confidential and intimate information that is revealing of the issuer's financial position and capitalization structure.

Reporting requirements in respect of Exempt Distributions are set out in National Instrument 45-106 ("**NI 45-106**"). Among other things, for an Exempt Distribution, NI 45-106 requires both public and private issuers to "file" a Report of Exempt Distribution (Form

45-106F1) ("**Form 45-106**") in order to distribute securities in Ontario's exempt market. Subsection 6.1(1) of NI 45-106 reads, in part:

> "**6.1 (1)** Subject to subsection (2) and section 6.2 [*When report not required*], issuers that distribute their own securities and underwriters that distribute securities they acquired under section 2.33 must file a completed report if they make the distribution under one or more of the following exemptions:
>
> (a) section 2.3 [Accredited investor] or, in Ontario, section 73.3 of the Securities Act (Ontario) [Accredited investor];
>
> (b) section 2.5 [Family, friends and business associates]"

Form 45-106 requires the issuer to disclose sensitive and confidential information in respect of the Exempt Distribution that is revealing of the issuer's financial position and capitalization structure (the "**Financial Information**"). This information includes: (1) total number of shares distributed; (2) exercise price; (3) subscription price; and (4) commissions and finder's fees paid to underwriters. As described below, the requirement to file this sensitive, confidential information with the Commission places significant burden on private issuers in order to protect this confidential information from public disclosure.

<u>Recommendation 1</u>: The requirement to file Form 45-106 should be eliminated

Ultimately, Xplornet submits that the requirement to file Form 45-106 set out in NI 45-106 should be eliminated, as this would fully address concerns related to the potential disclosure of sensitive, confidential information, and further reduce the burden associated with filing requirements. Indeed, the filing of Form 45-106 does not serve the objectives of the Act. It is not necessary to protect investors nor to advance any of the policy objectives of Canadian securities legislation, such as promoting market integrity, stability and risk reduction. Accordingly, the elimination of this requirement would be appropriate and would best address the burden placed on private issuers. However, we recognize this is not entirely within the control of the Commission as such an action would require coordination from the Canadian Securities Administrators ("**CSA**"). We recommend that the Commission work with the CSA to achieve this goal.

<u>Recommendation 2</u>: Alternatively, the Commission should take steps to remove the requirement for Form 45-106 of private issuers to be publicly made available

Should the requirement to file Form 45-106 not be eliminated entirely, we recommend further steps that the Commission can take to reduce the burden placed on private issuers to protect confidential information contained in Form 45-106.

As explained in OSC Policy 13-601 *Public Availability of Material Filed Under the Securities Act*, the word "filed" has a precise meaning under the Act and any materials that are "filed" with the Commission are presumed to be made available for public inspection. Section 140 of the Act reads as follows:

> "**Filing and inspection of material**
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> **140 (1)** Where Ontario securities law requires that material be filed, the filing shall be effected by depositing the material, or causing it to be deposited, with the Commission and all material so filed shall, subject to subsection (2), be made available by the Commission for public inspection during the normal business hours of the Commission.
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> **(2)** Despite subsection (1), the Commission may hold material or any class of material required to be filed by Ontario securities law in confidence so long as the Commission is of the opinion that the material so held discloses intimate financial, personal or other information and that the desirability of avoiding disclosure thereof in the interests of any person or company affected outweighs the desirability of adhering to the principle that material filed with the Commission be available to the public for inspection."

By reading subsection 140(1) alongside subsection 140(2), the Act provides that any materials that are filed with the Commission will be made available for public inspection, unless the Commission is of the opinion that the material discloses "intimate financial, personal or other information and the desirability of avoiding disclosure thereof…outweighs the desirability of adhering to the principle that material filed with the Commission be made available for public inspection." In contrast, materials that are "delivered" to the Commission are presumed to be confidential.[1]

The Act does not define either the term "filed" or "delivered". Rather, the Commission, in coordination with the CSA, determines whether or not a particular document is "filed" (rather than "delivered") under the applicable National Instrument. As mentioned above, the requirement that Form 45-106 be "filed" with the Commission is set out under section 6.1 of NI 45-106.

If the requirement to file Form 45-106 is not eliminated in accordance with our first recommendation, we recommend that the Commissioner coordinate with the CSA to amend NI 45-106 to clarify that Form 45-106 submitted by a private issuers is to be "delivered" instead of "filed". This would address the requirement that this form be made

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[1] See: Order PO-2436 (IPC Appeal PA-0402580-1).

publicly available, effectively reducing the burden placed on private issuers to protect this information from disclosure.

<u>Recommendation 3</u>: The Commission should reduce the burden placed on private issuers to protect confidential information contained in Form 45-106

Should the current regime continue to exist, and the determination that Form 45-106 be "filed" with the Commission remain, the Commission should assist private issuers in protecting their confidential information.

The current regime imposes a significant administrative and financial burden on privately-held companies to protect their information. To prevent disclosure of confidential information, an issuer must obtain a confidentiality order from the Commission under subsection 140(2) by commencing a formal application before the Commission that demonstrates the confidential nature of the information at issue. Commencing such an application includes paying a fee of over $7,000.00 for each ground of relief requested on the application. Issuers must also file a separate confidentially application in respect of each Exempt Distribution.

Private issuers should not be required to commence a formal application before the Commission in order to maintain confidentiality over the Financial Information. Financial Information for private issuers qualifies as "intimate financial, personal or other information" on a plain reading and meaning of those terms. Indeed, unlike publicly-traded companies who are subject to significant disclosure obligations under the Act's prospectus requirements and otherwise, privately-held companies are not required to publicly disclose information in respect of their financial position and capitalization structure under applicable securities laws.

Publicly disclosing the Financial Information of private companies can result in financial harm to a private issuer and thereby prejudice its competitive position. If disclosed, the Financial Information would allow a competitor to determine: (1) the exact share price at issue in the Exempt Distribution; and (2) the total amount of capital raised in the Exempt Distribution. This information would ultimately allow the competitor to better assess the financial position of the issuer, both in terms of the issuer's overall liquidity and ability to raise capital. It could also allow a competitor to assess the funds available for competitive bidding processes such as for public projects and radio spectrum.

Moreover, unlike public issuers, the securities of privately-held companies do not publicly trade in Ontario's capital markets (other than as provided under applicable securities law), and therefore, the Financial Information of private issuers is not material to investors. In *Re Dusa Pharmaceuticals, Inc.*, the Commission issued a confidentiality order under subsection 140(2) in respect of the information of a public issuer based in part

on the fact that the information at issue was not of material value to investors.[2] As in the *Dusa* case, the Financial Information of private issuers also does not engage the Commission's mandate of protecting investors and the integrity of the capital markets. Further, the information can relate to individuals who are the investors, thereby making the information subject to privacy legislation, such as the *Personal Information Protection and Electronic Documents Act*. The present process does not provide for bringing to the Commission's notice that personal information is being filed and should not be made public.

In short, the need to commence a formal application to obtain a confidentiality order in respect of the Financial Information imposes a disproportionate burden on private issuers in relation to the regulatory objective sought to be achieved. This information contained in Form 45-106 is clearly confidential in nature.

Accordingly, to the extent that the current regime is not modified as we recommend above, and Form 45-106 remains subject to a presumption of disclosure, we recommend that the Commission determine that Form 45-106 from private issuers be treated as confidential in nature. This would relieve private issuers of the high degree of burden associated with filing an application to obtain a confidentiality order from the Commission in conjunction with each Exempt Distribution.

Recommendation 4: The Commission should provide clarity to private issuers concerning processes related to confidentiality

The Commission should also take steps to ensure issuers are aware of the OSC's processes related to confidentiality. For example, under the regime that exists today, Form 45-106 does not indicate that: (1) it will be "filed" with the Commission within the meaning of subsection 140(1); or that (2) the issuer must bring an application under subsection 140(2) of the Act in order to maintain confidentiality over the information contained in Form 45-106.

Moreover, OSC Policy 13-601 *Public Availability of Material Filed Under the Securities Act*, which purports to identify the materials that are "filed" with the Commission and made available for public inspection, states that "reports filed under sections 71(3) [72(3)], 71(4)(c) [72(4)(c)], 71(5)(b) [72(5)(b)], 71(7)(b)(i) [72(7)(b)(i)] or 71(7)(b)(ii) [72(7)(b)(i)] with respect to transactions exempt from the prospectus requirements" are considered to be "filed" with the OSC for the purpose of section 140 of the Act. None of these provisions relates to Form 45-106, which is submitted to the Commission in accordance with section 73.3 of the Act. Furthermore, OSC Policy 13-601 *Public Availability of Material Filed Under the Securities Act* is not referenced in Form 45-106.

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[2] See, for example: *Re Dusa Pharmaceuticals, Inc.* (Decision dated: November 22, 2011) [*Re Dusa*].

Issuers are entitled to reasonable notice in respect of the Commission's policy on disclosure of Financial Information. Further, there should be a process for addressing the protection of personal information where the investor is an individual. We thus recommend that further clarity be provided to private issuers.

<u>Recommendation 5</u>: The Commission should assist private issuers in protecting confidential information from disclosure pursuant to *Freedom of Information Act* requests

Finally, while the Commission is not tasked with adjudicating requests made pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the **"FOI Act"**), Xplornet notes that the concerns raised in this submission are also engaged by requests for disclosure under FOI Act.

FOI Act requests are managed by the Ministry. However, Commission staff play an active role in advising the Ministry on the application of the FOI Act's exemptions, including the third-party information exemption under section 17 of the FOI Act. In light of the financial harm and prejudice that can arise from the disclosure of the Financial Information, Xplornet encourages the Commission to carefully evaluate requests for such information, and in particular, to ensure that the exemptions under the FOI Act are correctly applied.

Thank you for the opportunity to provide these representations. If you have any questions or require additional information, please do not hesitate to contact us.

Yours truly,

Christine J. Prudham