PROSPECTORS & DEVELOPERS ASSOCIATION OF CANADA

March 1, 2019

Sent via email: comments@osc.gov.on.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
Toronto, ON
M5H 3S8
22nd Floor

Re: OSC Staff Notice 11-784 Burden Reduction project

Dear Sir/Madam,

As the leading voice of Canada's mineral exploration and development community, the Prospectors & Developers Association of Canada (PDAC) works on behalf of its over 8,000 members to ensure Canada remains the top global jurisdiction for conducting mineral exploration and development activities. PDAC's strategic goals include advocating for regulatory and policy frameworks that support the competitiveness of the mineral sector, and for regulatory reforms that reduce the cost of capital raising in Canada.

Access to new capital investment is becoming increasingly difficult for the mineral industry, particularly for junior exploration companies. From 2011-2018, mineral sector financings on Canadian stock exchanges nearly halved, and funding specifically for exploration mirrored this decline. As a result, the amount of dollars committed to early-stage exploration in Canada has declined by over 65% during the same period. Given that exploration companies typically generate no revenues and require new investment to remain a viable business, the current state of investor engagement with the industry is deeply concerning to PDAC and its members.

Internal industry pressures, such as increasing remoteness of activities and expanded stakeholder engagement and longer permitting timelines, have not only made exploration processes more complex but also added significant costs. External factors have magnified industry cost inflation, not the least of which are expanded public disclosure and regulatory compliance obligations.

The compound effect of consistent cost inflation and growing constraints in accessing capital has led to less efficient exploration and declining discovery rates in Canada. As a result of this dynamic, the reserve base and overall mineral wealth of Ontario and Canada is in decline.

PDAC is very encouraged by *OSC Staff Notice 11-784 Burden Reduction* as it presents the opportunity to streamline a number of regulatory processes, harmonize regulations and reporting mechanisms across all relevant jurisdictions in Canada, and modernize reporting and disclosure infrastructure. If successful, these efforts could provide some relief from cost inflation, improve capital access for the mineral sector and help reverse the decline of Canada`s mineral reserves.

The competitiveness and attractiveness of Ontario has dropped precipitously in recent years as reflected in the recent *Fraser Institute Annual Survey of Mining Companies 2018* where Ontario`s global ranking dropped from 7th to 20th in terms of investment attractiveness and from 20th to 30th with respect to policy perception. With this in mind, the importance of efforts being made by the OSC to reduce regulatory burdens for the mineral industry cannot be overstated, and PDAC applauds the OSC for initiating the project.

PDAC greatly values and looks forward to the opportunity to participate in the upcoming March 27, 2019 roundtable, and very much appreciates any OSC considerations made on PDAC's behalf with respect to the contents of this letter.

The attached appendix outlines PDAC recommendations for a selection of pertinent issues identified by members and the PDAC Securities Committee that directly relate to the questions posed by *OSC Staff Notice 11-784*, including rule harmonization, streamlining of filing infrastructure and simplification of fee processes.

Sincerely,

Lisa McDonald
Executive Director
Prospectors & Developers Association of Canada (PDAC)

This submission was prepared by Jeff Killeen (Director, Policy & Program, PDAC) and Ran Maoz (Policy Analyst, PDAC), with the help of Adam Allouba, Michael Fowler (Chair, PDAC Securities committee) Denis Frawley, Sandy Hershaw and Al Weins. For correspondence, please contact jkilleen@pdac.ca or rmaoz@pdac.ca

APPENDIX

Rule Harmonization

PDAC submits that, as a general matter, the OSC's default approach should be to harmonize all rules and requirements with those of other Canadian jurisdictions (or, where multiple approaches exist, the majority of jurisdictions). Deviations should occur only if there is a specific, overriding policy imperative unique to Ontario that compels a departure from a harmonized approach. This approach would be particularly beneficial to reporting issuers with limited resources, in particular junior mining exploration companies that are reporting issuers. For example, in ***National Instrument 45-106*** alone:

a) Paragraphs (a) to (i) (except (e) and (e.1)) of the definition of "accredited investor" do not apply in Ontario.
b) Section 1.8 applies only in Ontario.
c) Subsection 2.3(1) does not apply in Ontario.
d) Subsection 2.4(2) does not apply in Ontario.
e) Section 2.6.1 applies only in Ontario.
f) Section 2.9 contains numerous rules that apply in Ontario but not in most other provinces.
g) Paragraphs 2.34(2) (a), (c) and (d) do not apply in Ontario.
h) Part 5 does not apply in Ontario.
i) The reports required to be filed in Ontario under Part 6 are generally either different in Ontario than in other Canadian jurisdictions, or filed using a different portal (*e.g.* the Report of Exempt Distribution is filed through an Ontario-specific portal in Ontario, through a different portal in BC and through SEDAR in other jurisdictions).

These are only some examples contained in a single national instrument. In some cases, the substantive law is harmonized, but the relevant provision is in Ontario's *Securities Act* or elsewhere. In others, the substantive law is different. The lack of harmonization often forces small public or private exploration companies to seek experienced legal counsel to ensure compliance in situations where it should not be necessary to do so, which increases transactional and operational costs higher and be a drain on human resources.

Standardize & Simplify Fee Process

PDAC submits the OSC consider repealing the forms required to be filed under OSC **Rule 13-502**. The approach of requiring a complex form to calculate annual fees does not exist in any other Canadian jurisdiction besides Alberta, and our members submit that a simpler mechanism should be implemented for determining the annual fees required to be paid by reporting issuers (and that this new mechanism should not require its own distinct form). PDAC also submits that the OSC should consider either implementing a flat annual fee structure, provided it does not result in fees generally moving higher, or deploying more user-friendly tools to automate annual fee calculations for reporting issuers, and that this new mechanism should not require its own distinct form.

Streamline Filing Infrastructure

PDAC has received notable negative feedback from our members regarding **SEDAR**; it is an extremely user-unfriendly system that requires specialized software and training. As a result, mineral exploration companies typically must rely on external service providers to complete filings. Again, a

lack of automated fee calculation also results in engagement with external parties, increasing costs and time to the filing process for all issuers.

SEDAR's user interface has not changed in over 10 years while digital user interfaces continue to improve daily and numerous low-cost cloud-based systems are readily available. A web interface similar to those operated by press release dissemination services that allow the user to submit files via "drag-and-drop" while calculating all applicable fees automatically would be more cost effective and would not reduce investor protections. At a minimum, filings through SEDAR should only be required where the associated documents are required to be made publicly available. There is no compelling reason why the OSC should require that non-public applications, correspondence and other materials can only be sent through SEDAR, as doing so imposes filing costs and generally requires issuers to engaged legal counsel or service providers where they might not otherwise have required that assistance.

Existing SEDAR filing fees and procedures are significant, and more value and visionary planning for the SEDAR database should be available to capital markets participants without added costs.

Streamline NI 43-101 Triggers

Under **National Instrument 43-101**, when a preliminary prospectus, a rights offering or an annual information form (AIF) is filed, if **new material information** about a project is disclosed, companies must file an updated technical report in order to complete the financing. With a short form prospectus, the trigger for a new technical report is higher and limited to a first time disclosure or material change to reserves/resources and/or the result of a Preliminary Economic Assessment (PEA). However, completing a short form prospectus requires a current AIF to be filed, which often triggers the lower NI 43-101 threshold.

Updating a technical report adds both cost and time to the financing process, which could result in missed opportunities to raise funds when market appetite permits. Given the threshold for materiality is unclear, uncertainty exists around when an update is required. Therefore, PDAC submits that items (a), (e) and (f) from subsection 4.2(1) of NI 43-101 be altered so that:

1) a requirement for updated technical report would be materiality at the issuer level only (as opposed to the project level), and
2) only for first time disclosure of, or material change to, reserves, resources and PEA results will trigger the requirement to update a technical report, as is the trigger in items (b) and (j).

This would reduce the time and costs associated with a short-form prospectus, and may therefore allow our members greater access to capital and flexibility in structuring financings.

Publish Rules & Policies

National Policy 12-203 states that in rare situations regulators may consider management cease trade order (MCTO) applications submitted within 2 weeks of the filing deadline. However, PDAC members' experience indicates that the OSC has an internal policy of systematically rejecting all MTCO applications that are submitted less than 2 weeks prior to the filling deadline. If the OSC has

adopted an internal policy of never exercising available discretion under this National Policy, it should be communicated, as it will save reporting issuers from devoting time and resources to filings that will not be considered.

As a further example for the lack of disclosure regarding OSC's internal policies, our members understand that in considering whether to issue a receipt for a prospectus, the OSC considers a number of factors in determining whether a receipt is in the public interest. Those factors should be clearly communicated to the public.

PDAC submits that no such unpublished internal policies should exist: it is unreasonable – and contrary to the rule of law – that informal policies that can lead to a discrepancy between the letter of the law and actual practice are not made public. Preparing filings requires time and expense that market participants can and would avoid if those filings were known to be inadmissible due to rules that are knowable in advance.

Publish Amended Regulations & Forms

For many critical regulations, in particular **National Instruments 45-106** and **51-102**, the OSC website does not provide an easily accessible consolidated copy of the regulations and forms, as amended. PDAC submits that copies of important securities regulations as they are currently in force should be readily available by the public on the OSC website. This would eliminate the burden of purchasing publication subscriptions that may contain unreliable content due to frequency of publication.

Improve MD&A Disclosure

PDAC submits that the disclosure elicited by MD&A, and in particular **Form 51-102F1**, is not effective for shareholders and investors of non-revenue generating mineral exploration companies. For such companies, the status of exploration or mining development activities has greater weighting on investment decisions, whereas the focus of MD&A (and *Form 51-102F1*) remains on revenues and expenses. As a result, many junior exploration companies are required to produce disclosure that has little value to shareholders or potential investors. PDAC encourages the OSC to consider producing a subset of regulations tailored to mineral industry companies (for example, a blanket exemption for companies without revenues from requirement irrelevant to their situation) and welcomes opportunities to consult with the OSC in this regard.

Clarify 'Related Party' Compliance Requirements

PDAC encourages the OSC to consider the interaction of ***Multilateral Instrument 61-101****-Protection of Minority Security Holders in Special Transactions* and ***National Instrument 45-106****-Prospectus Exemptions*. As it stands, when a party that is a "related party" under MI 61-101 participates as an investor in a private placement alongside other, arm's length investors, MI 61-101 requires additional analysis, and potentially compliance measures, notwithstanding that the non-"related parties" may comprise the bulk of investors.

For example, in a private placement that is subject to MI 61-101, the regulation might require a lengthy material change report, a formal valuation and minority shareholder approval. MI 61-101 provides exemptions from the formal valuation and minority shareholder approval requirements,

but qualifying for those exemptions requires analysis and careful consideration. The PDAC submits that where a transaction has been conducted with stock exchange requirements, or where non-"related parties" invest alongside "related parties" for a meaningful portion of the private placement, MI 61-101 should not apply (such that reporting issuers would not have to face the need for formal valuations and/or minority shareholder approval in particular.

Simplify Exempt Distribution Reporting

Exempt distribution reporting under ***National Instrument 45-106*** has become unduly complex. Despite the fact that the filing is derived from the same regulation, an issuer completing a private placement in more than one Canadian jurisdiction can no longer file a single report in all jurisdictions but is required to report through multiple portals (Ontario, BC), and through SEDAR (other jurisdictions). This causes layering of multiple fees (SEDAR processing fee, associated bank charges, provincial securities regulator fees) and often requires an issuer to seek advice and assistance of legal counsel and filing service providers.

Disclosure requirements applicable to private placements have become excessively granular and PDAC encourages the OSC to consider simplifying reporting portal options (e.g. drop-downs, etc.) to make it possible for smaller issuers to self-report without having to engage legal counsel or seek other expertise. Notably, the OSC has the authority to request additional information when necessary, providing it the ability to seek out additional information from filers where the responses submitted raise questions or concerns.

For Reports of Exempt Distribution, we encourage the OSC to consider reducing the filing fees outright, or perhaps moving towards a sliding scale of fees similar to what is done in some other provinces, provided it does not generally result in higher fees for reporting issuers.

PDAC encourages the OSC to reconsider the utility of recently adopted risk acknowledgement forms under ***National Instrument 45-106***, namely ***Form 45-106F9*** and ***Form 45-106F12***. In PDAC`s view, individual accredited investors, as well family, friends and business associates participating in private placements understand the inherent risks of such investments and signing separate forms in no way enhances their understanding of the repercussions of their investment. As such, these forms increase investor process burdens, as well as issuer compliance burdens, increases the risk of inadvertent non-compliance, all without providing additional public protection.

Clarify Offering Memorandum Documents

PDAC encourages the OSC to provide greater clarity regarding the kinds of document that would qualify as "offering memorandum" for purposes other than NI 45-106, and to remove the requirement under OSC ***Rule 45-501*** according to which copies of all such documents be filed with the OSC. This requirement is unique to Ontario, and it may lead issuers to refrain from summarizing their business and plans for prospective investors, out of the concern that such summaries will then be scrutinized by the OSC in a manner similar to a prospectus. PDAC is not aware of any meaningful use by the OSC with such filings, and therefore submits that they should no longer be required.

Expand Accredited Investor Criteria

PDAC is aware that the Accredited Investor (AI) exemption is a vital tool in sourcing capital investment for mineral exploration companies and submits that the current AI criteria are overly prescriptive, particularly for investors in the mineral exploration sector. PDAC submits that the AI criteria could be expanded to include individuals with technical proficiencies and experience in either the financial or mineral industries. This change would expand the pool of potential investors for the mineral industry and would not have a negative impact on investor protections as technical proficiency is more critical in understanding investment risks associated with mineral exploration investment than having significant personal wealth. PDAC also submits that such a change would provide a broader group with equal opportunity to reap potential investment rewards, leveling the playing field for retail investors in Canada.

Aside from the AI exemption, PDAC has recognized through exempt market reports furnished by TMX Group that many of the prospectus exemptions available to issuers are not being exploited in any material way by the mineral industry (i.e. offering memorandum, existing shareholder, crowdfunding). PDAC would be keen to engage with OSC to identify how such exemptions could be more frequently used by mineral industry issuers.

Limiting Dual Regulation

PDAC also encourages the OSC to work in tandem with other Canadian securities regulators to consider instances where the rules and policies of certain securities exchanges are sufficient to protect the public, and in those cases to stipulate that compliance with the exchange requirements provides a reporting issuer with exemption from similar legal requirements. For example, the Canadian securities exchanges on which most mineral exploration companies are listed have detailed rules relating to private placements of securities and to acquisitions. In certain regards, those requirements are more onerous than those imposed under Ontario's securities laws and regulations. In those cases, the OSC could significantly lessen the regulatory burden, as well as reduce costs, faced by reporting issuers by exempting the application of the legal requirements that would otherwise apply, without thereby increasing the risk to investors and to the integrity of our capital markets.

At The Market (ATM) Offerings (derived from PDAC response to CSA Consultation paper 51-404)

Public companies that file on SEDAR have considerably greater governance, transparency and continuous disclosure compared to like sized private companies. It is estimated that SEDAR, OSC, and Exchange Fees; combined with Quarterly and Annual Audited Financials; Annual Meeting and Shareholder Proxy Voting procedures; regular Board of Director Meetings; Continuous Disclosure News Releases; and legal counsel oversight cost $200,000 or more annually to maintain the public listing status. In addition, public trading liquidity establishes market valuations that are not available with private companies. All these public company disclosure procedures are in place to provide greater investor protection.

Currently, a number of provisions in existing securities legislation make it impractical to effect an ATM offering in Canada (even under the base shelf procedures) without first incurring the significant costs inherent in filing a prospectus and obtaining exemptive relief. While an exemptive

relief is usually granted on a routine basis, it takes time and money to obtain. The result is that dual-listed issuers tend to do their ATM offerings only in the U.S.

As noted in the view submitted to CSA regarding Consultation paper 51-404, PDAC recommends to codify the following elements of exemptive relief for ATM offerings in securities legislation:

- Exempt the issuer and the selling agent from the Prospectus Delivery Requirement, provided that the issuer publicly discloses that it has engaged a dealer to effect an ATM offering, and sales pursuant to the ATM offering meet the requirements currently specified in NI 44-102 for ATM offerings (including the requirement that the securities sold under the ATM offering do not exceed 10% of the aggregate market value of the issuer's outstanding securities)
- Exempt ATM offerings from the Prospectus Delivery Requirement and the Certification Requirement, and stipulate that a purchaser shall have no right of withdrawal by reason of the non-delivery of the prospectus, provided that the issuer:
    - Files on a timely basis information concerning the number and average price of securities distributed pursuant to the ATM (including information concerning gross proceeds, commissions and net proceeds), and
    - Has revised the wording of the issuer's and underwriter's certificate to state that the prospectus will provide full, true and plain disclosure of all material facts as of the date of each distribution under the ATM offering

PDAC submits that an ATM offering does not differ materially from the ability of investors to purchase publically traded shares on the secondary market. In PDAC's response to CSA consultation paper 51-404 an elaborated explanation was provided regarding the practicality of the ATM regime, and PDAC would be happy to share these insights with OSC at the March 27 round table.