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DELIVERED BY E-MAIL

Ontario Securities Commission
20 Queen St. West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8
Canada

Attention: The Secretary (comments@osc.gov.on.ca)

Dear Sirs/Mesdames:

Re: Proposed Amendments to Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions* and Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* (the "Proposed Amendments") – Notice and Request for Comment (the "Notice and Request for Comment")

This submission is made in response to the Notice and Request for Comment published by the Ontario Securities Commission (the "**Commission**") on April 25, 2013, in connection with certain proposed amendments to Ontario Securities Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions* ("**OSC Rule 45-501**") and National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**").

This submission represents the general comments of certain members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

Overall, we are supportive of efforts to streamline and make more efficient the "Canadian wrapper" process, including the limited changes contained in the Proposed Amendments. However, we are concerned that there are a number of Canadian requirements that are not addressed in the Proposed Amendments that are typically dealt with during the Canadian wrapper preparation process, including disclosure of underwriter conflicts. The preparation and use of a Canadian Wrapper has been a well-established and effective process for many years and it is our view from both a legal and practical perspective that any significant changes to the rules should have been made in an open, transparent and public process rather than by way of private exemptive relief.

A. Background

The Proposed Amendments follow the initial issuance in April 2013 by the Commission, in conjunction with the Canadian Securities Administrators (the "**CSA**"), of exemptive relief from certain mandatory disclosure requirements applicable to an offering memorandum to a select group of applicants comprised primarily of foreign dealers and their affiliates relying on the "international dealer exemption" and/or registered in the category of "investment dealer",

"exempt market dealer" or "restricted dealer", and the subsequent issuance in June 2013 of similar relief to additional dealer applicants (collectively, the "**Exemptive Relief**"). In our view it is important to review the Proposed Amendments in the context of the Exemptive Relief. In particular, it should be noted that the Proposed Amendments do not address the issue of the disclosure of underwriting conflicts and thus do not deal with a very important element of the Exemptive Relief and this, in our view, is a major shortcoming of the Proposed Amendments. We understand from the Notice and Request for Comment that the Commission, in conjunction with the other members of the CSA, are in the process of considering amendments to National Instrument 33-105 *Underwriting Conflicts* ("**NI 33-105**") to provide relief from "connected issuer" and "related issuer" disclosure requirements where offerings by foreign issuers provide comparable alternative disclosure to investors (prospectively, the "**Proposed Conflicts Disclosure Amendments**").

The Commission states in the Notice and Request for Comment that the object of the Proposed Amendments is to amend certain requirements applicable to disclosure currently required to be included in an offering memorandum used to distribute securities of a foreign issuer into Ontario under certain prospectus exemptions. Specifically, the Proposed Amendments contemplate amendments to (i) Part 5 of OSC Rule 45-501 pertaining to the requirement that an offering memorandum delivered to investors pursuant to certain prospectus exemptions, including the "accredited investors" exemption, include disclosure of statutory rights of action under section 130.1 of the *Securities Act* (Ontario) (the "**Act**"); (ii) subsection 38(3) of the Act pertaining to the prohibition of making listing representations; and (iii) the "Authorization of Indirect Collection of Personal Information for Distribution in Ontario" contained in the Form 45-106F1 *Report of Exempt Distribution* (the **"Personal Information Authorization Notice"**) pertaining to the notification and authorization of the indirect collection of personal information in connection with distributions made within Ontario in reliance on certain prospectus exemptions. As a general matter, we support the Proposed Amendments on the limited items that the Proposed Amendments address.

We are concerned about piecemeal changes to the applicable rules and fragmentation in market practice. It is our experience that there has been considerable confusion about the scope, extent and requirements relating to the Exemptive Relief. Furthermore, it should be noted that the typical Canadian wrapper preparation process serves a "gatekeeper" or compliance function that addresses a number of Canadian specific requirements that are often included in the Canadian wrapper or dealt with during the Canadian wrapper process in addition to the requirements addressed in the Proposed Amendments. These additional requirements include: confirmation of dealer registration and/or exemption status; confirmation of the status of potential investors (i.e., as "permitted clients" and/or "accredited investors"); disclosure pertaining to technical reports of mining issuers under National Instrument 43-101 *Standards of Disclosure for Mineral Projects*; specific resale restrictions (e.g., of particular importance when Canadian resident shareholders hold more than 10% of the securities) and certain legending requirements under National Instrument 45-102 *Resale of Securities*; investment fund manager registration/exemption requirements under Multilateral Instrument 32-102 *Registration Exemptions for Non-Resident Investment Fund Managers*; disclosure relating to limitations on the "enforcement of rights" in Canada; and, French language disclosure requirements for distributions in the province of Quebec.

The process by which the Exemptive Relief was granted gives rise to concerns regarding the fundamental fairness to the broader community of market participants as that process was not subject to public notice or public commentary. We recognize that the Commission attempted to address this issue by making the initial Exemptive Relief effective sixty days after the date of the decision to give other market participants an opportunity to apply for similar relief. We also note that one of the stated objectives of the Proposed Amendments is to "…[make] rule amendments that will place all market participants in a similar position." We are of the view that the Exemptive Relief process should have followed the usual rule-making procedures of the Commission.

Furthermore, the headnotes for the Exemptive Relief refer to a separate permission from the Director and a separate letter from the Director. The permission granted the applicants permission under subsection 38(3) of the Act and similar provisions in other provinces to represent that an application to list securities offered in an exempted offering under the Exemptive Relief has been made to an exchange. The letter confirmed that an applicant and its affiliates need not disclose in a report filed with the Commission (Form 45-106F1) for a sale to an institutional purchaser under the Exemptive Relief that it has complied with notification requirements with respect to the collection and use of personal information. As of the date of this letter, neither such letter nor such permission of the Director has been, as far as we are aware, published by the Commission.

Section 143.11 of the Ontario *Securities Act* (the "**Act**") prohibits the Commission from making any order or ruling "of general application". We have concerns as to the Commission's authority to grant the Exemptive Relief in light of the general prohibition against the granting of orders of general application under section 143.11 of the Act. The Commission has effectively acknowledged many of these concerns in its published request for comment in respect of Proposed OSC Policy 11-602 *Guidelines on the Application of the Prohibition Against Orders of General Application to Applications to the OSC for Exemptive Relief* ("**Proposed Policy 11-602**"). In the notice attending Proposed Policy 11-602, the Commission confirms that exemptive relief is not a substitute for formal rule making under section 143(1) of the Act, which is subject to formal notice, public commentary and ministerial approval, where the scope of the requested relief does not apply to a specific class of market participants or transactions that are identified, known or ascertainable at the time the order is made and where the impact has significant policy implications for the broader market. The Exemptive Relief applies to a class of unidentified transactions in respect of unidentified future issuers and selling security holders and raises significant policy implications for the broader market. We share many of the concerns expressed by Philip Anisman, in his "*Comments on Proposed OSC Policy 11-602: Guidelines on the Application of the Prohibition against Orders of General Application to Exemption Applications*" dated July 15, 2013.

B. Comments on the Proposed Amendments

1. Objective of the Proposed Amendments

The Commission states in the Notice and Request for Comment that the purpose of the Proposed Amendments is to eliminate the need for a Canadian supplement, or "wrapper", to be prepared in connection with the distribution of a "designated foreign security" by means of a foreign offering document delivered to a sophisticated investor resident in Ontario. Based on the

Notice and Request for Comment, we understand that the Proposed Amendments are motivated by the Commission's understanding that "many institutional investors as well as dealers involved in foreign offerings have expressed frustration at the current requirements, which they believe restrict investor access to foreign investment opportunities". In response to these concerns, the Commission proposes to (i) permit registered dealers and international dealers to deliver to "permitted clients" a one-time generic notice of potential rights of action investors may have against issuers and selling securities holders in lieu of delivering summary disclosure of such rights contained within an offering memorandum or "wrapper" supplement prepared in connection with the specific offering, (ii) exempt each such offering memorandum from the listing representation requirements under subsection 38(3) of the Act and (iii) limit the Personal Information Authorization Notice delivery requirement to individual investors only.

While we are supportive of efforts to streamline and simplify the wrapper process, as discussed above, there are many legal and practical reasons for preparing a wrapper beyond the requirements addressed in the Proposed Amendments and eventually in the Proposed Conflicts Disclosure Amendments. We note that in our experience the offering of foreign securities to sophisticated investors resident in Ontario, and in Canada generally, using a wrapper in reliance on certain common exemptions from the prospectus requirements under NI 45-106 (e.g., the "accredited investor" exemption) is for many offerings and many participants a well-established and efficient process.

2. The Proposed Amendments, the Exempt Market Review and Related Initiatives

In our view, the Proposed Amendments should not be evaluated in isolation from the exempt market review and other initiatives concurrently being undertaken by the Commission. Specifically, we note that the OSC Exempt Market Review - OSC Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions* (the "**Exempt Market Review**"), published December 14, 2012, acknowledges that the capital markets have experienced significant recent changes and provides a framework for reviewing the exempt market. It is stated in the review that: "…we identified a continued lack of disclosure to investors on conflicts of interest, particularly with EMDs [note: "exempt market dealers" registered with the Commission] who trade in securities of 'related issuers' and 'connected issuers'" (page 25). Consistent with the findings presented in the Exempt Market Review, the Commission has in recent years endeavored to broaden, rather than reduce, its regulatory oversight of exempt market participants. To this end, the Commission has imposed registration requirements on foreign investment fund managers who have no direct dealings with investors resident in the province. In conjunction with the CSA, the Commission has sought to restrict the scope of dealing activities conducted by foreign exempt market dealers ("**EMDs**") by registering new foreign exempt market applicants only as "restricted dealers" and publishing CSA Staff Notice 31-333 *Follow-up to Broker Dealer Registration in the Exempt Market Dealer Category* to inform foreign firms that the Investment Industry Regulatory Organization of Canada ("**IIROC**") would not be proceeding with its "Restricted Dealer Member Proposal" dated July 12, 2012.

3. Requirement to Describe Rights in Offering Memoranda and Application to "Sellers"

While we are generally supportive of providing market participants with a range of disclosure options with respect to statutory rights, we do have some technical concerns that we submit should be addressed. Pursuant to section 5.3 of OSC Rule 45-501, "if a *seller* (emphasis added) delivers an offering memorandum to a prospective purchaser in connection with a distribution to which the rights referred to in section 130.1 of the Act apply, the rights must be described in the offering memorandum". Similarly, section 5.6 under the Proposed Amendments applies where a "seller delivers an offering memorandum to a prospective investor…". The securities laws do not define "seller" for the purposes of section 5.3 of OSC Rule 45-501 or, by extension, for the purposes of section 5.6 under the Proposed Amendments. Notwithstanding the absence of a definition of seller, rights of action applicable to an offering memorandum under section 130.1 of the Act apply against issuers and selling security holders on whose behalf a distribution is made. The rights of action disclosure requirement under section 5.3 of OSC Rule 45-501 and under section 5.6 under the Proposed Amendments cannot be read in isolation from section 130.1 of the Act. Accordingly, it is reasonable to ascribe application of the term "seller" to issuers and selling security holders, rather than to dealers who, where not selling securities as principal, act in an agency capacity as underwriters, selling group members and placement agents.

We are encouraged that the Commission has proposed alternative methods of delivery that may be used by issuers and selling security holders to comply with the right of action disclosure requirements where an offering memorandum is delivered to prospective investors under certain prospectus exemptions, particularly in respect of proposed subsection 5.6(a) and (b). Nevertheless, the Commission should consider whether subsection 5.6(d) is an appropriate proxy method of delivery where the rights of action and delivery requirements apply to issuers and selling security holders as the "seller" of the securities and not to dealers, who may or may not be acting in the context of an actual offering or for a known and identifiable issuer and/or selling security holder. In addition, the approach in proposed section 5.6(d) may cause investor confusion as to against whom such rights may apply (i.e., against the dealer or the issuer and selling security holder). Liability for material misstatements and omissions contained within the offering memorandum largely, if not wholly, applies against the issuer and/or selling security holder. We question what is actually achieved when a third-party dealer delivers a generic notice in advance of the issuer and/or selling security holder being identified to the investor and where there is no known or identifiable transaction. We would submit that the Commission should consider removing section 5.6(d) or perhaps eliminating entirely the disclosure requirement in section 5.3 of OSC Rule 45-501.

Section 5.6(c) under the Proposed Amendments would permit a "seller" to comply with the rights of action disclosure delivery requirements by including a summary of rights of action in a representation letter, subscription agreement or other form or written notice delivered to a "permitted client" in connection with a distribution for which no offering memorandum is being used. As rights of action under section 130.1 of the Act apply only to an offering memorandum, the Commission should clarify the purpose and practical application of section 5.6(c) under the Proposed Amendments.

In addition to the above concerns, we note that sections 5.5 and 5.6 of the Proposed Amendments are conditioned on the investor qualifying as a "permitted client", notwithstanding that the distribution itself may otherwise qualify under the "accredited investor" prospectus exemption. Whereas the rights of action disclosure delivery requirement under the existing formulation of OSC Rule 45-501 universally applies to the delivery of an offering memorandum pursuant to the prospectus exemptions expressly enumerated under section 5.1 thereunder, including in respect of the "accredited investor" exemption, conditioning reliance on 5.5 and 5.6

of the Proposed Amendments on the investor qualifying as a "permitted client" introduces additional fragmentation into the private placement process. Private placements offered to "accredited investors" will not qualify under proposed sections 5.5 and 5.6. Furthermore, the implementation of the Proposed Amendments can reasonably be expected to give rise to the prospect that Canadian investors will receive dissimilar disclosure based solely on their status as either an "accredited investor" or "permitted client", notwithstanding that both classes of investor are qualified for the purposes of reliance on the "accredited investor" exemption. Given the interjection of this additional fragmentation into the private placement process, an unintended consequence of the Proposed Amendments may be that foreign issuers and dealers may elect to not offer investment opportunities to "accredited investors".

4. Amendments to NI 33-105 - Conflicts Disclosure Requirements

We understand from the Notice and Request for Comment that the Commission, in conjunction with the CSA, is in the process of considering amendments to the conflicts disclosure requirements relating to "connected issuer" and "related issuer" relationships under NI 33-105. We presume that any proposed amendments to NI 33-105 presently under consideration will substantially mirror the conflicts disclosure exemption and conditions for reliance thereon granted under the Exemptive Relief. Under the Exemptive Relief, the Commission and CSA provided select dealers upon application with an exemption from the "connected issuer" and "related issuer" disclosure requirements under NI 33-105 for offering documents prepared in compliance with section 229.508 of Regulation S-K under the U.S. Securities Act of 1933, as amended, and FINRA Rule 5121. The Exemptive Relief was premised on the assumption that section 229.508 of Regulation S-K and FINRA Rule 5121 impose substantially similar disclosure requirements to those mandated under the "connected issuer" and "related issuer" standard contained in NI 33-105.

It is our understanding that there are material and substantive differences between the disclosure standards under section 229.508 of Regulation S-K and FINRA Rule 5121 and those contained within NI 33-105, with the effect that the Canadian disclosure requirements are more robust and provide investors with additional disclosure in respect of a broader range of potential conflicts than those under the applicable U.S. disclosure rules. We assume that the Commission and CSA will be examining this issue in depth during their review of the Proposed Conflicts Disclosure Amendments.

Please do not hesitate to contact the undersigned if you have any questions or would like to discuss this letter.

Yours truly,

"Kenneth G. Ottenbreit"
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