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PRACTICE RESTRICTED TO CORPORATE, TAXATION AND SECURITIES LAW MATTERS

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May 1, 2001

VIA E-MAIL

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1903
Toronto, Ontario
M5H 3H8

Dear Mr. Stevenson:

Re: Request for Comments - Proposed OSC Rule 45-501

We are writing to you in response to the Ontario Securities Commission's request for comments in respect of proposed OSC Rule 45-501 Exempt Distributions (the "Proposed Rule") published in the April 6, 2001 edition of the OSC Bulletin ((2001) 24 OSCB 2183).

While we believe that the Proposed Rule is generally a very positive step in opening up the exempt market to a greater number of participants and in making more capital available to issuers in the exempt market with reduced compliance costs, we would recommend the following refinements to the Proposed Rule which we ask you to consider prior to adoption of the final form of the Proposed Rule.

1. The appropriate income level for purposes of paragraph (n) of section 1.1 of the Proposed Rule should be "total income" as calculated for federal income tax purposes and not "net income" for federal tax purposes.

If an investor's sophistication is to be deemed based on their historic income level and their ability to generate income in future, the deductions available to a particular investor for tax purposes in a given year should not be relevant. In fact, many of the deductions available from total income on the federal tax form are not in the nature of expenses but rather incentives for such things as contributions to RRSP's and investments in tax shelters. For self employed professionals and others, total income as reported for federal tax purposes is already net of related expenses. Further, basing the income test on net income for tax purposes would discriminate against certain investors such as investors who are separated or divorced and permitted to deduct support payments versus those who are not separated or divorced and may not deduct

payments made to support their families. The income definition of "accredited investor" should in no way serve as a disincentive for investors who want to participate in the exempt market from planning their affairs in a manner that minimizes taxes.

We submit that the Commission should change its view on the appropriate net income figure that should be used for purposes of paragraph (n) of section 1.1 of the Proposed Rule to "total income" as reported for federal income tax purposes. We believe that this change would permit a greater number of investors to be eligible to participate in the exempt market and make that market more meaningful and efficient.

2. All investors who have successfully completed the proficiency requirements to become a registered representative, whether or not they have been granted registration, should be "accredited investors" under paragraph (o) of section 1.1 of the Proposed Rule.

In the commentary to the request for comments, the Commission indicates that the basis for the existence of this category of accredited investor is that the individual will have completed the proficiency requirements required to become a registrant. We would therefore submit that all individuals who have successfully completed the proficiency requirements to become a registered representative, whether or not they have ever been granted registration, should be considered to be accredited investors. Many persons employed in the securities industry (ie. employees of securities dealers, the IDA, securities commissions and stock exchanges) are permitted to complete the same proficiency requirements as registered representatives and this change would permit those persons, who would not otherwise qualify as accredited investors, to become accredited investors through education and allow them to participate in the exempt market. Further support for this change is the fact that paragraph (o), as currently drafted, does not require an individual's registration to be currently in effect.

3. A closely-held issuer should be able to engage the services of a registrant in raising capital under the closely-held issuer exemption if it so chooses.

If a closely-held issuer is effectively precluded from engaging a sales agent to assist it in raising money under this exemption (as it cannot pay or incur any selling or promotional expenses), funds will likely be raised only from parties with a prior existing relationship to the issuer (ie. substantially the same parties that the issuer would raise funds from under the current "private issuer" exemption), except that the closely-held issuer exemption will be more restrictive as a result of the cap on proceeds of $3 million (there is not cap under the private issuer exemption) and the limit on the number of security holders of 35 (versus 50 under the present private issuer exemption). As the regulatory risk has been capped under the closely-held issuer exemption at 35 holders and $3 million, it is difficult to see how there would be any additional risk by the inclusion of sales agents who are registered under the Act. One would think that any due diligence that would be performed and advice provided by the registrant would only foster investor protection and lead to more efficient capital formation. The involvement of a registrant in a trade is already recognized under the Act as a significant investor protection mechanism and forms the basis of the most widely used

registration exemption under the Act.

We recommend that the suggested change be made by the addition of the following wording at the end of paragraph 2.1(1)(c) of the Proposed Rule:

", except for services performed by a registered dealer."

4. Paragraph 2.1(1)(b) of the Proposed Rule should be deleted or modified so that it does not preclude a promoter from relying on the closely-held issuer exemption more than once every 12 months for issuers that are not involved in common enterprise.

It would appear that the intention of paragraph 2.1(1)(b) of the Proposed Rule is to prevent promoters from abusing the 35 security holder threshold for the exemption by financing through multiple closely-held issuers. The effect of this provision however is much broader and would preclude a closely-held issuer who has a promoter in common with another closely-held issuer from financing using this exception if the other issuer had relied upon this exemption in the past 12 months. Presently a private issuer can issue securities under the private issuer exemption whenever it wishes to do so and regardless of whether it has a promoter in common with any other private issuer who has raised money in reliance upon the private issuer exemption. Therefore the closely-held issuer exemption, as presently proposed, would be substantially more restrictive than the current private issuer exemption. If a promoter is a promoter of numerous closely-held issuers that are not engaged in common enterprise, the financing of one of these issuers under the closely-held issuer exemption should not prevent the other issuers from being able to access the capital markets and raise money for their enterprises under the same exemption. If it did, this would unduly restrict a closely-held issuer's legitimate ability to raise capital.

We would suggest that this concern be addressed by deleting paragraph 2.1(1)(b) in its entirety and amending the definition of "closely-held issuer" in section 1.1 of the Proposed Rule to count towards the 35 security holder limit the number of security holders of all other closely-held issuers having a common promoter and engaged in a common enterprise.

Should you require anything further, please do not hesitate to contact the undersigned.

Yours truly,
KUTKEVICIUS KIRSH, LLP

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