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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorite des marches financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Financial Services Regulation Division, Consumer and Commercial Affairs Branch, Department
Government Services, Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

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Dear Sirs/Mesdames

**Re: BLG Comments on Proposed National Instrument 11-102 Passport System and related Forms, Companion Policy and Amendments (the Passport System)
BLG Comments on OSC Notice 11-904 Request for Comment Regarding the Proposed Passport System (the OSC Notice)**

We are pleased to provide the members of the Canadian Securities Administrators with our comments on the above-noted proposed instruments, in response to the CSA's (other than the OSC) Notice and Request for Comments on the Passport System and also in response to the OSC Notice. These comments are those of lawyers in BLG's Toronto Securities and Capital Markets practice group and do not necessarily represent the views of others in the firm.

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1. *We support the Passport System in the absence of the better solution—that is, a single securities regulator*

In the absence of a political solution to Canada’s fragmented securities regulatory regime, we completely support the CSA’s “key foundation” for the Passport System - “a set of nationally harmonized regulatory requirements that will be consistently interpreted and applied throughout Canada”. We also support the stated aims of the CSA “to implement, in the main areas of securities regulation, a system that gives a market participant access to the capital markets in multiple jurisdictions by dealing only with its principal regulator and meeting the requirements of one set of harmonized laws.” These are very laudable aims, given the realities of our provincial/federal governmental system. However, in a perfect world, reporting issuers and securities market participants would not be regulated by 13 separate provincial and territorial securities regulators, each with their own body of securities regulation. Most reporting issuers in Canada no longer issue “local” securities and securities industry participants are not “local” market participants, given that for the most part, securities are sold to all Canadians in every province and territory and industry participants often participate in the markets in each of those jurisdictions. To the extent industry participants today distribute securities in a limited number of provinces or territories, they generally do so to avoid having to deal with all regulators in all provinces and territories. We see no need for *any* local rules or regulation and see little to no benefit to investors in having 13 regulators, each with growing numbers of staff necessitating fees being levied, overseeing reporting issuers and industry market participants.

2. *The Passport System cannot work without the participation of the OSC or an accommodation by the other CSA in the absence of the OSC*

Notwithstanding our support for the Passport System in the absence of a better long-term solution, we remain most concerned that the CSA, despite its optimism, will be unable to achieve its ambitious objectives due to the inherent and acknowledged difficulties in achieving consensus among 13 different securities regulators and 13 separate provincial and territorial governments. Without the involvement of the OSC, the Passport System will not get off the ground, since it will be of limited use to the majority of issuers and market participants in Canada and indeed will create a more difficult regime than the one at present. We urge the CSA to draft a realistic, simple and practical “interface” solution, as suggested in the OSC Notice, that will provide issuers and market participants with simple and efficient access to *all* the benefits of the Passport System, **even if the OSC chooses not to join the Passport System. If the CSA cannot draft such a solution, we recommend that the current MRRS and NRS systems be maintained as known and relatively workable systems until a full and complete consensus solution can be reached.**

We note that the OSC has asked for comment on an appropriate “interface” which would allow Ontario-based market participants to use the Passport System. We recommend, at a minimum, that the Passport System contemplate that a market participant can use the Passport System in those jurisdictions where the Passport System has been adopted, but otherwise the MRRS and the NRS system will remain as currently drafted. Ideally a better interface would be drafted so that Ontario-based market participants can take full advantage of the additional benefits of the Passport System.

We submit that the Canadian securities market-place is too important to the overall Canadian economy (including the economies of each province) to be held hostage by any member or members of the CSA simply in the hopes of forcing a resolution to philosophical disagreements between provincial governments or CSA members.

3. *CSA and the provincial governments must agree on an amending mechanism and common rule-making approaches*

Because of the inherent difficulties experienced in coming to an initial agreement on the Passport System and our experience in working within the Canadian securities regulatory system for many years, we and many of our clients are quite concerned about whether the Passport System objectives ever can or will be achieved. We submit that essential to the success of the Passport System is the development of amending mechanics of the nature we discuss below which are agreed to both at the CSA and a provincial/territorial government level. Without agreement on a simple mechanism to govern amendments to both securities legislation and regulation made pursuant to the legislation, we believe there is a risk that the Passport System and the future “harmonized” regulatory model will bog down due to its sheer size and overall complexity.

We urge the CSA to agree on a mechanism, other than reliance on the traditional CSA methods of reaching consensus among all 13 jurisdictions, to govern how the CSA will make changes to, or add to, national regulations and the Passport System *before* the Passport System is finalized. This mechanism should govern how the CSA will ensure that the harmonized regulation and the Passport System *remains* uniform (or harmonized) once the Passport System is in place in the various provinces and territories. In our view, we see a serious danger in the CSA being so conscious of consensus-building that regulatory paralysis results (i.e. no decisions are capable of being made). We see no reason why all thirteen provinces and territories need to make decisions on national securities regulation given the national scope of the securities industry in Canada.

We also see a real danger of one or more provinces (or regulators) breaking off from the Passport System. The mere fact that the OSC is not part of the Passport System as it is proposed today is a good example. There is nothing written anywhere, no agreement, no binding MOU that would bind the BCSC (for example) to be a part of the Passport System for any length of time. To this extent, the Passport System is a voluntary, non-binding initiative.

We also urge the CSA to publish national and proposed national rules and policies on one Web site. There is no need for each single regulator to maintain separate Web sites containing identical regulation. Simply publishing a national rule or proposed national rule or policy on the CSA Web site will assist in simplifying regulation in Canada.

4. *The CSA must agree to limit “local regulation” to truly local matters*

As part of any CSA amending formula and mechanics, we believe that the CSA and the provincial governments should also formally agree to minimize local “opt outs” and local regulations and agree on the specific (and very limited) circumstances when local regulations would be considered necessary and important. As a minimum, we believe any local regulations should expressly apply to local market participants, i.e. those market participants carrying on business **ONLY** in that local jurisdiction. If a market participant is carrying on business in more than one province and territory, then that market participant only need comply with the uniform legislation and rules. In this regard, we applaud the CSA for determining that reporting issuers and market participants need only comply with nationally harmonized regulation and are exempt from all non-harmonized regulation, although we have not analysed the various exceptions to this provision and urge the CSA to pull back from any exceptions to this provision.

5. *We believe additional work is necessary to achieve the CSA’s ideal objectives*

The Passport System deals with prospectus filings, registration requirements and discretionary exemptions. We urge the CSA, including the OSC, to continue to push for uniform securities *administration* in each province and territory. The difficulties inherent in having separate rule-

making procedures in each province and territory, along with different enforcement powers and compliance procedures have been catalogued many times over the last few years. We urge the CSA to work with their provincial governments and their CSA counterparts to make these procedures uniform. We also urge the CSA to continue their efforts in ensuring that staff of each applicable regulator defers to the principal regulator (including the OSC, even if the OSC is not part of the Passport System) and applies the principles behind the Passport System in a uniform and consistent manner.

We also note that much of securities regulation is outside the scope of the Passport System: for example, prospectus and registration exemption regime contained in NI 45-106, take-over bid regulation, insider reporting, early warning reporting, civil remedies, trading rules etc. It also is not clear to us how the registrant conduct rules will apply once a firm or individual is registered in multiple jurisdictions. Whose rules will apply to that firm or individual?

The Passport System must address *all* regulatory instruments to achieve a truly realistic alternative to the more desirable outcome of a single securities regulator.

6. ***Lack of Consistent CSA Interpretation of the Harmonized Rules***

We urge the CSA to work closely with staff of all regulators to ensure consistent interpretation of the harmonized rules. One of the more frustrating (and costly) results of our 13-regulator system, is that although the rules may be harmonized (and even identical), different staff and different Commission members continue to have different views on how to administer that regulation. This significant issue must be dealt with on a priority basis, even if the Passport System is not adopted, if the CSA is to continue as a realistic, viable alternative to a single regulator. We note that the CSA (other than the OSC) indicate that a “filer does not have to concern itself with differences among jurisdictions in requirements or interpretation”. It is not clear to us how this objective will be achieved, although we support the aim of the CSA in this regard.

7. ***We are concerned about the inherent complexities of the Passport System***

We note that while the Instrument itself is relatively simple, the Companion Policy contains 44 pages of details with five detailed appendices, including how to pay fees (participants pay PRs, who then will forward the cash to the non-PRs), how to file forms (including email addresses of regulators), how to file exemption applications (including different email addresses for the regulators), how to pick a PR, how to file prospectuses, etc. The sheer complexities of the Passport System highlight the ideal necessity for a single securities regulator – the danger of the Passport System collapsing under its own weight of myriad details is great and realistic, in our view.

How will these details be kept up to date by the 13 separate regulators given the requirements for rule and policy-making provided for in the applicable provincial securities regulation?

We also urge the CSA to review the Companion Policy carefully for mandatory provisions that should be more properly contained in the Instrument.

8. ***We are concerned about the prospect of inconsistent application of the Passport System***

We are concerned about the the specter of troubling outcomes where an application is denied by Regulator X and subsequently the requested exemptive relief is granted by Regulator Y in respect of an identical or similar fact pattern with another applicant. Based on our experience with the CSA in dealing with relief applications for our clients, it is quite common for different regulators to take different approaches (at least initially) on any novel application and even on some not so



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novel ones (though this often can affect the representations in the order and not the relief itself). It is not inconceivable that this could be the result if Regulators X and Y are not required to consult each other on exemptive relief applications. If this occurs, we, as lawyers, would be obliged to explain to a client why Regulator X rejected its application, but a competitor was able to obtain the requested relief from Regulator Y.

To the extent that consultations amongst the participating jurisdictions are currently mandated under MRRS, the system exerts some pressure on the participating jurisdictions to achieve some sort of consensus amongst themselves, which then goes on to serve as the precedent for future orders in all of the participating jurisdictions and, in effect, the non-participating jurisdictions as well. We agree with the OSC when they acknowledge this issue and outline the concerns of the OSC concerning the Passport System in light of it. While we appreciate the commentary from the CSA Chairs that staff may consult each other on novel applications or applications where expertise can be found in other jurisdictions, the absence of any framework for this consultation may result in some undesirable results. Merely identifying what is and is not novel can be an exercise in itself. Though one can applaud the initiative of trying to streamline the exemptive relief process by removing the need for consultation and opt-outs, we can foresee some real headaches if applications that involve non-routine relief are not circulated amongst the other passport jurisdictions for consultation.

At a minimum we suggest that there be a mechanism whereby if the PR refuses to grant an exemptive relief order or a receipt for a prospectus, the other jurisdictions must be notified of such refusal. The CP currently contemplates that a copy of every decision on an exemptive relief application will be sent to the non-PRs (Appendix D at D7.3) but there is no equivalent in Part 6 for a denial or refusal to grant an application. Similarly, there is nothing in the Passport System which requires the PR to notify the non-PRs of a receipt refusal. This won't eliminate the possibility of inconsistent orders or refusals (the latter being a rare occurrence in any event, although conditions to receipt issuance are more common), but it would at least diminish the risk that two PR jurisdictions could be taking a completely different approach to the same issue at the same time.

9. *We are concerned that the Passport System could result in regulatory paralysis*

Notwithstanding our comment 8, we see the “flip” side of more entrenched consultation among regulators as potential regulatory paralysis. This would not be a good result and would mean that Canada’s securities regulatory system would be worse off than it is today. Principal regulators must be free to make decisions and must not be second-guessed by non-participating jurisdictions. If the Passport System is to work properly, non-PRs must agree to completely back away from decision-making – apart from providing non-binding views on more novel applications. PRs must give some thought to precedents made by other PRs on other applications, but must be free to make decisions they believe are appropriate. We see a danger in reconciling our contradictory concerns raised in our comments 8 and 9, but we urge the CSA to come to a sensible solution in the absence of the better solution we articulate in our first comment.

In our view, our comments 8 and 9 amplify the difficulties inherent in 13 different regulators trying, through the Passport System, to act like a single regulator, without, in fact being a single regulator.



10. *We urge the CSA to consider all comments carefully and publish another version for comment once all elements have been put into place*

We are very concerned about potentially hasty implementation of the Passport System. We urge the CSA to consider all comments received very carefully and publish a revised version of the Passport System once an approach to including issuers and market participants based in Ontario has been worked out and once the various harmonized rules currently in progress have been put into place. Once the Passport System is closer to reality, we expect that we will have more comments on the details of the System.

In conclusion, we thank you for taking into account our comments on this important CSA initiative. We hope that you will find our comments useful and constructive and will move forward with this initiative in a way that works for all market participants, including those based in Ontario, and for all regulatory initiatives.

Please feel free to contact the undersigned Rebecca Cowdery (416-367-6340 rcowdery@blgcanada.com) or Paul Findlay (416-367-6191 pfindlay@blgcanada.com) if you have any questions or wish further explanation of our comments.

Yours very truly

“Paul G Findlay”

“Rebecca A. Cowdery”

Paul G. Findlay
Rebecca A. Cowdery

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