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Our File: 35692

August 30, 2011

Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario M5H 3S8

Attention: John Stevenson, Secretary

Dear Mr. Stevenson:

Re: Notice and Request for Comments

Proposed National Instrument 41-103
Supplementary Prospectus Disclosure Requirements for Securitized Products

Proposed National Instrument 51-106
Continuous Disclosure Requirements for Securitized Products
and Proposed Amendments to
National Instrument 52-109
Certification of Disclosure in Issuers' Annual and Interim Filings

Proposed Amendments to National Instrument 45-106
Prospectus and Registration Exemptions **and**
National Instrument 45-102 *Resale of Securities*

Proposed Consequential Amendments

This letter is a submission pursuant to the Notice and Request for Comments issued by the Canadian Securities Administrators dated April 1, 2011 (the 01Apr11 CSA Notice) in respect of the above cited matter.

This letter will be restricted in its scope to comment only on Question #7 and then, only as it relates to "mortgage investment entities" (MIEs) in the Province of Alberta. Question #7 asks:

Is the proposed carve-out for non-debt securities of MIEs from the Proposed Securitized Products Rules appropriate? Should there be additional conditions imposed in order for the carve-out to be available and if so, what should these be?

EXECUTIVE SUMMARY

Our firm has a large client base of mortgage investment corporations (MICs) and entities involved in syndicated mortgages (SMs).

Regulation of MICs and SMs by the securities regulators in Canada is relatively recent and the regulations are evolving. It is our and our clients' view that given the recent and evolving nature of the regulation of MICs and SMs, it is very important for the regulators to be knowledgeable of the nature and character of these entities and the industry that they operate in and be very clear and consistent in the regulations that they develop and apply.

With respect to the 01Apr11 CSA Notice, we offer the following general comments in the context of MICs and SMs:

1. We would advocate for a consistent and clear set of securities regulations applicable to MICs and SMs and we are concerned that the various securities regulators in Canada are becoming increasingly fractured in their respective differing regulation of MICs and SMs, contributing to significant confusion to industry players as well as to legal counsel. We are concerned that if any of the proposals contained in 01Apr11 CSA Notice are applied to MICs and SMs, the confusion will increase.

2. We are fully supportive of a carve-out from all of the Proposed Securitized Products Rules as contained in the 01Apr11 CSA Notice for MICs and SMs for both non-debt and debt securities.

3. We do not understand the rationale for the proposal that there be a "*carve-out for non-debt securities*" and not for "debt securities". We do not see a meaningful distinction between the two.

4. We believe that the use of the term "MIE" by the regulators is confusing and not helpful in the context of MICs and SMs. A MIC is already clearly defined in the *Income Tax Act* (Canada) and a SM is clearly defined in section 8.12 of *National Instrument 31-103* (NI 31-103) and in Section 2.36 of *National Instrument 45-106* (NI 45-106). We submit that these are clear and previously existing definitions that the MIC and SM entities and legal counsel are already familiar with and understand. We submit that these terms should be used by all securities regulators in all regulations and that the term "MIE" should be abandoned.

BACKGROUND

What is a MIE?

Item 4(a) of the 01Apr11 CSA Notice states:

*We are also proposing to exclude non-debt securities issued by a "mortgage investment entity" (**MIE**) from these additional requirements for a variety of reasons. The CSA is currently considering the regulatory analysis of MIEs as part of a separate initiative.*

The CSA issued a CSA Staff Notice 31-323 on February 25, 2011 (the 25Feb11 CSA Notice) which set forth a definition of a MIE as follows:

In this guidance, the term MIE refers to a person or company whose purpose is to directly or indirectly invest substantially all of its assets in debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property (collectively, mortgages for purposes of this guidance), and whose other assets are limited to:

- *deposits with a bank or other financial institution;*
- *cash;*
- *debt securities referenced in section 8.21 [Specified debt] of NI 31-103;*
- *real property which is directly or indirectly held on a temporary basis as a result of action taken to enforce its rights as a secured lender; or*
- *instruments intended solely to hedge specific risks relating to the debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property.*

The 25Feb11 CSA Notice goes on to state:

Mortgage syndications
A MIE holding an interest in a single mortgage will not typically be subject to the investment fund manager registration requirement where that MIE or a related entity had a role in the creation or syndication of that mortgage (such MIEs are commonly referred to as mortgage syndications).

What is a MIC and is it a MIE?
and
Does an investor in a MIC hold a "non-debt security" in the MIC?

MICs were a creation of the Government of Canada in 1973 pursuant to the *Residential Mortgage Financing Act* (Canada) which was a precursor statute to the enabling income tax provisions found in Section 130.1 of the *Income Tax Act* (Canada). The stated purpose of the *Residential Mortgage Financing Act* (Canada) was *"to enhance the marketability of mortgages*

issued on residential properties in Canada and improve the effectiveness of the contribution of the private sector to the financing of housing in Canada.";

Subsection 130.1(6) of the *Income Tax Act* (Canada) sets forth a list of criteria that must be met in order for a corporation to qualify to be a MIC. For the purposes of this letter, we will highlight only some of, what we consider to be, the relevant criteria as follows:

130.1(6) For the purposes of this section, a corporation is a "mortgage investment corporation" throughout a taxation year, if throughout the year,

(a) it was a Canadian corporation;

(b) its only undertaking was the investing of funds of the corporation and it did not manage or develop any real property;

(c) none of the property of the corporation consisted of

(i) debts owing to the corporation that were secured on real property situated outside Canada,

(ii) debts owing to the corporation by non-resident persons, except any such debts that were secured on real property situated in Canada,

(iii) shares of the capital stock of corporations not resident in Canada, or

(iv) real property situated outside Canada, or any leasehold interest in such property;...

(e) any holders of preferred shares of the corporation had a right, after payment to them of their preferred dividends, and payment of dividends in a like amount per share to the holders of the common shares of the corporation, to participate pari passu with the holders of the common shares in any further payment of dividends;

(f) the cost amount to the corporation of such of its property as consisted of

(i) debts owing to the corporation that were secured, whether by mortgages, hypothecs or in any other manner, on houses (as defined in section 2 of the National Housing Act) or on property included within a housing project (as defined in that section), and

(ii) amounts of any deposits standing to the corporation's credit in the records of

(A) a bank or other corporation any of whose deposits are insured by the Canada Deposit Insurance Corporation or the Regie de l'assurance-depots du Quebec, or

(B) a credit union,

plus the amount of any money of the corporation was at least 50% of the cost amount to it of all its property;...".

The combined effect of subsections 130.1(6)(b) and 130.1(6)(f) of the *Income Tax Act*, is that a MIC's undertaking must be restricted to the investing of its funds at least 50% of which must be invested in mortgages or other security on "housing" plus deposits at banks, credit unions and the like. It is important to note that the *Income Tax Act* does not restrict a MIC's investments to mortgages, other than as described above. The balance of a MIC's investments could be virtually any investment not prohibited under section 130.1(6)(c) of the *Income Tax Act*.

The definition of a MIE in the 25Feb11 CSA Notice says its purpose is to "*...directly or indirectly invest substantially all of its assets in debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property...*".

Based on the above analysis, our view is that not all MICs would necessarily be MIEs, as defined in the 25Feb11 CSA Notice, because not all MICs may have "substantially all of its assets" invested in mortgages, etc. They are not required to do so under the *Income Tax Act*.

An investor in a MIC is typically issued some form of preferred share. Obviously, as a preferred shareholder, the investor's legal relationship with the MIC is in the form of an equity interest in the corporation, which we assume is a "non-debt security", as contemplated in the 01Apr11 CSA Notice.

Although we have not seen this in our firm's experience, conceivably, a MIC could issue some form of "debt" instrument to an investor and this type of instrument may or may not be a security and, in any event, would not likely be a "non-debt security", as contemplated in the 01Apr11 CSA Notice.

Our conclusions are:

(a) not all MICs are MIEs; and

(b) all equity type investors in MICs hold "non-debt securities", as contemplated in the 01Apr11 CSA Notice, but non-equity type investors would likely not.

What is a SM and is it a MIE?
and
Does an investor in a SM hold a "non-debt security" in the SM?

Section 2.36 of NI 45-106 defines a SM as follows:

*"**syndicated mortgage**" means a mortgage in which 2 or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage.*

Our firm acts as legal counsel to many mortgage syndicators and, in the hope that it is helpful to the CSA, we will attempt to provide a summary of several other important elements of a SM as we understand them.

Some of these additional elements are as follows:

1. A SM is almost always initiated and organized by one person. That person could be an individual, a corporation, or some other entity, but it acts as the initiator and organizer of the SM. We will refer to this person the "SM Organizer". Certainly, it is possible for a group of persons to sort of spontaneously form a syndicate but in the real world of commercial activity, there is almost always a single SM Organizer who leads the process.

2. Often the SM Organizer is a licensed mortgage brokerage firm, or a licensed mortgage associate (as they're called in Alberta).

3. Often the investors who are invited into the syndicate (or you could say, the investors to whom the mortgage is marketed) are frequent and repeat investors in SMs organized by the SM Organizer.

4. Often the SM Organizer is the party that:

   (a) contracts with the borrower (i.e. via an Offer Letter or similar document);

   (b) conducts the due diligence on the borrower and the property constituting the subject matter of the mortgage and/or other security, etc.;

   (c) approves the loan by some sort of credit committee process (since the implementation of NI 31-103, such process would presumably involve a portfolio or restricted portfolio manager); and

   (d) summarizes the terms of the SM in some kind of document and circulates that summary to its investors (since the implementation of NI 31-103, such circulation would presumably be done by an exempt market dealer).

5. Once the investors are in place, the SM Organizer will often then also act as the administrator of the SM. Since this, in our view, is a different role than the role of the SM Organizer, we'll call this person the "SM Administrator", but is often the same person as the SM Organizer.

6. The SM Administrator will then enter into one or more agreements with the investors setting forth the terms and conditions of the relationship between the SM Administrator and the investor and the role (i.e. the powers and duties) of the SM Administrator in the course of administering the mortgage loan. The SM Administrator will usually charge an administration fee to the investors for the service provided.

7. In our firm's experience, the SM Administrator's legal relationship with the investors in the SM is either one of the 2 following, depending on the nature of the agreement entered into:

   (a) the SM Administrator acts as a trustee for the investors (usually registering the mortgage solely in the name of the SM Administrator) and the investors are beneficiaries of the trustee. In this case the investors do not have a debtor-creditor relationship with the borrower, only the SM Administrator does; or

   (b) the SM Administrator acts as an agent for the investors and may or may not register the mortgage in the name of the SM Administrator and the investors are principals. In this case the investors have a direct debtor-creditor relationship with the borrower via their agent, the SM Administrator;

8. In some cases where there is either: (a) no SM Organizer or SM Administrator; or (b) the investors simply engage a third party to administer the SM on their behalf; the investors may enter into a joint venture agreement to set forth the terms and conditions of their relationship with each other. In such cases, the investors would have a direct debtor-creditor relationship with the borrower; and

9. In all cases, however, a SM is a single debt instrument secured by a mortgage on real estate, with a single debtor, namely the borrower/mortgagor. The only feature distinguishing it from an ordinary mortgage is that there is more than one participant in the creditor group.

The definition of a MIE in the 25Feb11 CSA Notice says its purpose is to "*...directly or indirectly invest substantially all of its assets in debts owing to it that are secured by mortgages, hypothecs or in any other manner on real property...*".

Based on the above analysis, our view is that no SM is a MIE because there is no person whose purpose it is to invest "substantially all of its assets" in mortgages, etc. Typically neither the SM Organizer nor the SM Administrator invests any of its assets in a SM, so those entities are not MIEs.

Even though an investor in a SM is investing in that particular SM, it is very unlikely that any such investor would be investing "substantially all of its assets" in mortgages, etc.

Also, based on the above analysis, certain investors in a SM could be said to hold a "non-debt security" in the SM, as contemplated in the 01Apr11 CSA Notice, however certain other investors in a SM could be said to hold a "debt security" in the SM. The nature of the investor's interest is entirely dependent on the legal relationship created between the investor and the SM Organizer or SM Administrator. As described above, in some cases the legal relationship between the SM Administrator and the investor is a trustee/beneficiary relationship, which would be a "non-debt security". However in other cases the legal relationship between the investor and the SM Administrator is an agent/principal relationship, which would create a direct or, at least an indirect, debtor-creditor relationship between the borrower and the investor. This would be the case also, where the investors form a joint venture amongst themselves.

Our conclusions are:

(a) no SM is a MIE, as defined in the 25Feb11 CSA Notice, and

(b) not all investors in a SM hold "non-debt securities", as contemplated in the 01Apr11 CSA Notice.

What is the current regulatory scheme applicable to MICs and SMs?

Item 4(a) of the 01Apr11 CSA Notice states:

*We are also proposing to exclude non-debt securities issued by a "mortgage investment entity" (**MIE**) from these additional requirements for a variety of reasons. The CSA is currently considering the regulatory analysis of MIEs as part of a separate initiative.*

Since the introduction of the amended NI 45-106 and the new NI 31-103 in September, 2010, the CSA has set in place a number of new regulations applicable to MICs and SMs. These include, but are not limited to, such things as:

(a) SMs are now classified as securities, which they weren't before, thus now subject to the exemption scheme as set forth in NI 45-106;

(b) MICs and SMs are now subject to exempt market dealer and portfolio or restricted portfolio manager registration requirements under NI 31-103; and

(c) MICs are subject to investment fund manager registration requirements under NI 31-103.

MICs and SMs operate within what we will refer to as the "private mortgage" market in Alberta. Investments made by these entities are usually loans secured by mortgages on real property. The private mortgage industry is a thin profit margin business, partly because there is generally no "up-side".

Given the current economic conditions in the real estate market in the Province of Alberta and the additional cost burdens imposed upon the private mortgage industry resulting from the new regulatory framework under NI 45-106 and NI 31-103, MICs and SMs are operating under an even thinner profit margin than ever before.

In our view, there is a very real threat to the economic viability of MICs, in particular, thus thwarting the very purpose for the creation of MICs as stated by the Government of Canada in 1973, which, as referred to above was: *"to enhance the marketability of mortgages issued on residential properties in Canada and improve the effectiveness of the contribution of the private sector to the financing of housing in Canada."*.

QUESTION #7

Question #7 01Apr11 CSA Notice asks:

Is the proposed carve-out for non-debt securities of MIEs from the Proposed Securitized Products Rules appropriate? Should there be additional conditions imposed in order for the carve-out to be available and if so, what should these be?

OUR ANSWERS TO QUESTION #7

Based on our analysis above, we submit as follows:

(a) even though, by our analysis, not all MICs are MIEs, as defined in the 25Feb11 CSA Notice, we submit that for the purposes of the proposals set forth in the 01Apr11 CSA Notice, all MICs should clearly be deemed to be within the definition of MIEs and enjoy the benefit of the proposed carve-out for MIEs. We do not see any public policy purpose in distinguishing between MICs who have less than "substantially all of its assets" invested in mortgages, etc. and those MICs that do. Due to our concern about the definition of MIE in the 25Feb11 CSA Notice (see our comment in item (g) below), we submit that, for the purpose of the proposals in the 01Apr11 CSA Notice, and future implementation thereof, the CSA simply use "mortgage investment corporation" in the carve-out for greater clarity;

(b) while it is our view that all shareholder type investors of MICs hold "non-debt securities", we submit that a definition of "non-debt securities" be developed and that it clearly includes all equity type investors of MICs;

(c) because it is conceivable that a MIC could issue some form of "debt" type instrument to an investor, the CSA may wish to consider whether such instrument is a "security" for purposes of the proposals under the 01Apr11 CSA Notice, or not. For what its worth, from a public policy point of view, we can't envision any meaningful distinction between a holder of a "non-debt security" of a MIC and a "debt" security of a MIC and we submit that all securities and instruments issued by a MIC to investors should enjoy the benefit of the proposed carve-out for MIEs;

(d) based on our view that no SM is a MIE, as defined in the 25Feb11 CSA Notice, we submit that for the purposes of the proposals set forth in the 01Apr11 CSA Notice, all SMs should clearly be deemed to be within the definition of MIEs and enjoy the benefit of the proposed carve-out for MIEs;

(e) from a public policy point of view, we can not envision and meaningful distinction between an investor's position as beneficiary (i.e. a non-debt security) and as principal (i.e. a "debt" security) in the context of a SM. It is our view that for the purposes of the proposals contained in the 01Apr11 CSA Notice, there is no practical difference between these 2 types of legal relationships between the SM Administrator and the investor. Accordingly, we submit that a definition of "non-debt securities" be

developed and that it clearly includes all investors of SMs regardless of the legal relationship, if any, between the SM Organizer and/or SM Administrator, or if the investors form a joint venture relationship amongst themselves;

(f) it is our view that the current regulatory scheme applicable to MICs and SMs in the Province of Alberta pursuant to NI 45-106 and NI 31-103 is fully adequate to protect the interests of investors and to continue to serve the purpose stated by the Government of Canada in 1973 and that MICs and SMs should be entirely carved-out of the scope and application of the proposals described in the 01Apr11 CSA Notice; and

(g) while not a direct response to Question #7, we would are of the view that the definitions of MIE and of "Pooled MIEs" , in the 25Feb11 CSA Notice are confusing and not helpful in interpreting the application of NI 45-106, NI 31-103 or the proposals in the 01Apr11 CSA Notice. Accordingly, we would encourage the CSA to simply refer to MICs and SMs in future legislation, instruments, notices, etc. If the CSA is attempting to catch entities in addition to MICs and SMs in the application of the legislation then perhaps there could be a specific definition for those entities, but as per our analysis above, we feel there is a significant disconnect between what a MICs and SMs really are, and what a MIE is, as currently defined.

Yours truly,

FLEMING LLP

PER: BARRY A. BERNHARDT
Counsel

BB/TZ

cc. Alberta Securities Commission, Attention: David Linder, Executive Director