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August 30, 2011

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

**Attention: John Stevenson**

Dear All CSA Member Commissions:

**Re: CSA Notice/Request for Comments (the "CSA Notice") - Proposed National Instrument 41-103 (NI 41-103)  
Comment Letter - File No.: 64425.001**

We act for exempt market dealers, exempt issuers and groups that finance exempt issuers and, as such, have developed a strong understanding of the operation of the exempt market. We have reviewed the CSA Notice and submit that, in its current form, NI 41-103 will negatively impact current and future participants in the exempt market.

In this context, we have provided specific comments relating to the "Proposed Exempt Distribution Rules" questions. Our responses are below and numbered in accordance with the questions posed in the CSA Notice regarding NI 41-103.

*General approach*

**Question #27**

- To create an exemption tied to a specific product-type is to fundamentally change the policy basis of the exemption categories; potentially leading to patch-work legislation. If the intent is to

prescribe exemptions by product-type then overall reform of the legislation is likely required. However, we do not think this is a necessary or practical solution. Rather, the introduction of greater disclosure and reporting requirements for specific products (ie. more complex product = greater disclosure and reporting requirements), as suggested, and the requirement for distribution of such identified specific products through registrants, with the obligation to conduct suitability assessments, is a more appropriate approach.

- Further, it is to be noted that exempt market dealers and dealing representatives are already required to conduct appropriate due diligence as it relates to all securities sold to their clients; an additional safeguard for investors and a point of regulatory oversight.
- The proposed NI 41-103 and consequential amendments to existing legislation would effectively eliminate most of the investors of securitized products in the exempt market (as most would not qualify as “permitted clients”). This would be extremely prejudicial to issuers currently operating in the securitized products market. Also, securitized product issuers looking to distribute their products in the future, as well as, exempt investors (not qualified as “permitted clients”) would be limited to the distribution of and access to these types of investments through prospectus offerings solely.

#### **Question #28**

- With the proposed additional (more rigorous) disclosure and reporting requirements, and assessment of suitability by a registrant, securitized products can be properly distributed in the exempt market. There are participants in the exempt market that are sophisticated persons, other than “permitted clients”, with the ability to understand potentially complex securities products. These persons should not be prejudiced by the limitation of the distribution of securitized products by prospectus only.

*Who can buy*

#### **Question #29**

- The removal of sections 2.3, 2.4, 2.9 and 2.10 of NI 45-106, in their entirety, will severely limit the ability of current and future issuers of securitized products to raise capital in the exempt market. Typically, issuers in the exempt market do not access a prospectus-type offering as they seek to raise smaller amounts of capital over a longer period of time, which factors are not attractive to brokers/dealers generally involved with prospectus offerings.
- We acknowledge, however, that some restriction on the exemption categories may be appropriate. We suggest that notwithstanding the proposed additional disclosure and reporting requirements for securitized products, that due to the nature of these and other complex securities products, restricted access to these products by specific investor qualified groups such as the exemptions under section 2.9(1) and section 2.9(2)(b) – “relating to purchases not greater than \$10,000”, as these groups arguably are largely (not exclusively) composed of relatively unsophisticated investors (ie. Minimal investment knowledge & experience, and modest financial circumstances) and thus are potentially the most vulnerable type of investor.

### Question #30

- We do not agree with the proposed approach. We believe that distribution of securitized products should be allowed in the exempt market. However, we agree with the suggestion to limit the sale of these products through registered dealers and registered exempt market dealers. With this limitation in mind, we believe there are sufficient protections in place to protect investors (product due diligence, suitability & risk assessments, etc). See our comments under Questions 27, 28, & 29, above).

### Question #31

- We do not agree with the overall proposed approach. However, as stated above we do believe that some limited restriction on the sale of securitized products in respect of the exemptions provided for in section 2.9(1) and 2.9(2)(b) of NI 45-106 may be appropriate. Also, we propose that, at a minimum, the list of eligible securitized product investors should be expanded to include those persons/individuals that qualify as ‘accredited investors’ and ‘eligible investors’ (pursuant to an offering memorandum) under NI 45-106. Generally, without substantial adjustment to the investor qualification categories for securitized products, there will very limited need for ‘Exempt Distribution Rules’ for securitized products, as there will be limited activity in the exempt market for such products.

### Question #32

- The proposed enhanced accredited investor and minimum amount exemptions should be available for qualifying investors for the purchase of securitized products, and should be in lieu of, rather than in addition to the proposed Securitized Product Exemption. As indicated under Question 27, the proposed change to the drafting of the legislation is a shift from qualifications based on investor-type to qualifications based on product-type, which is a fundamental change to the current legislative policy. The exemption categories as currently drafted can be amended, as proposed, to reference specific disclosure and suitability requirements in relation to specific products.
- The "minimum amount" exemption should remain at \$150,000 for all products offered in the exempt market. With the proposed additional disclosure, reporting and suitability requirements, the proper protections are in place. In fact, with the additional requirements, this exemption category becomes much more reliable. (ie. the investor has to be assessed for suitability for the specific product versus being allowed to purchase the product simply because he/she has \$150,000 in cash, which single factor may not be representative of the investor’s investment knowledge & experience, and/or overall financial circumstances).
- We do not agree with a proposed ‘Specified ABCP Prospectus Exemption’ category. This would be furthering the proposed policy to develop exemptions based on specific product-type versus investor-type. As stated above, if this initiative is to be pursued, then NI 45-106 should be reformed, such that several specific types of products should be defined and excluded or included for purchase by specific investors. In our view, the analysis of ‘certain risk mitigating conditions’, although a reasonable due diligence requirement for the registered dealer, presents potential problems at the dealing representative or advisor level

when assessing suitability of the securitized product for the retail investor. By way of example, we see the potential for blind reliance on positive credit ratings as establishing a one-size-fits-all product. [Note, we believe that should this type of exemption category be carried forward into the legislation, in all instances, the securitized product should only be sold to a retail investor through a registered dealer.]

- As it relates to continuous disclosure obligations, we accept that a higher level of ongoing financial disclosure is likely warranted, along with an obligation to disclose any material non-performance of ABCP/Securitized Products, and the specifics of such non-performance. In many cases CUSIP numbers are associated with the Securitized Products and perhaps this information should be shared with investors and the regulators on a periodic basis. Annual Audited financial statements would also be fair, and the notes to such financials should comment on the portfolio of ABCP acquired and its performance.

### **Question #33**

- No. See comments under Questions 27 to 32, above.

### *Disclosure*

### **Question #34**

- We acknowledge that additional disclosure will further your proposed objectives. On the same topic, we submit that the lack of a specific regulator designed information memorandum for non short-term securitized products may detract from the goals of "quality and consistency", as well as, potentially the level of due diligence by sponsors and underwriters.

### **Question #35**

- No, we agree with the approach that a specified level of disclosure is warranted for the distribution of securitized products. Further, we see merit in uniformity of disclosure to all investors, in accordance with the basic principle of transparency; thereby benefiting not only investors, but the reputation and integrity of the capital markets as well.

### **Question #36**

- No. We question any initiative to differentiate disclosure requirements for specific securitized products, if, transparency, investor suitability, and avoidance of mis-understanding of these products, are the primary goals. We agree with the enhanced disclosure requirements as outlined in the proposed legislation, and suggest consideration be given to the development of a specific form of information memorandum for non-short term securitized products.

**Question #37**

- See comments under Question 34, above.

**Question #38**

- Agree, this is a good approach, and will assist in meeting the goals of "quality and consistency" of disclosure, etc. However, as stated, we believe there should also be a specific regulator designed information memorandum for non short-term securitized products.

**Question #39**

- See answer #38.

**Question #40**

- Agree, it is a reasonable requirement to have ongoing disclosure available to investors and, upon request and with confidentiality protection, to prospective investors. We do not see any added utility to providing such disclosure through SEDAR.

**Question #41**

- We agree with the proposed approach.

*Statutory civil liability*

**Question #42**

- The proposed liability is appropriate and identifies the proper groups/persons.

**Question #43**

- There are many complicated and/or risky products in the market (prospectus products and exempt products). To design special rules regarding civil liability as it relates to ongoing disclosure for specific products is to create an uneven playing field for market participants. If the regulators are considering such regulations, a much broader discussion on such rules must be considered as it should be discussed in the context of all ongoing disclosure for all products.

**Question #44**

- Yes, given the potential complexity of the product and thus the need for an information memorandum, the investor should be afforded the same rights as an investor who is given an OM, as the document to be taken away and used to contemplate the investment. Also, it creates fairness in the application of exemptions to allow for this right

of withdrawal to investors of securitized products.

*Resale*

**Question #45**

- There should be consistent application of the exemption rules, and the resale rules, to investors in the exempt market; not tied to the type of investment product. We suggest that it would be prejudicial to limit the first trade of a securitized product to only investors that qualify pursuant to proposed section 2.44. As with other exempt products, a first trade in a securitized product should be permitted in reliance on any of the exemption categories utilized in the first instance.

*Registration*

**Question #46/#47**

- We believe that a fair consideration might be to require enhanced proficiency for the sale of securitized products; translating into a type of 'Restricted Exempt Market Dealer' (ie. prohibited from selling certain types of products), similar to the "Restricted Portfolio Manager" category, pursuant to NI 31-103.

Please feel free to contact the undersigned should you require anything further.

Yours truly,

SCOTT VENTURO LLP

**Per: "Signed" CHARLENE L. MCLAUGHLIN**

**Per: "Signed" DANIEL R. HORNER**