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Delivered by Email

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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Government of Yukon
Superintendent of Securities, Department of Justice, Government of the Northwest Territories
Superintendent of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

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

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montreal, QC H4Z 1G3

Dear Sirs/Mesdames:

Re: Proposed Securitized Product Rules

We appreciate the opportunity to comment on the Proposed Securitized Products Rules published for comment on April 1, 2011.

By way of introduction, our firm is one of the leading plaintiff securities class action firms in Canada. While we act in a broad range of shareholder rights litigation, the focus of our practice is representing institutional and retail shareholders in securities class actions arising out of disclosure violations by issuers, their directors and officers, and other market participants. In particular, we are counsel to the plaintiffs in the two Ontario class actions in

which leave has been granted under the secondary market misrepresentation liability provisions contained in Part XXIII.1 of the Ontario *Securities Act* (the "*OSA*").

We are encouraged by the Canadian Securities Administrators' (the "CSA") proposal to impose heightened disclosure requirements in respect of securitized products. However, our experience practising in the area has shown us that a robust civil liability regime for disclosure violations is an integral feature of an *effective* disclosure regime. With ever-increasing demands placed on the finite resources of Canada's securities regulators, it makes sense to permit private litigants and their counsel to play a role in enforcing the disclosure requirements through class action or individual litigation. But the private enforcement mechanism will be effective only if the statutory civil liability regime targets the appropriate class of defendants and imposes liability in the right circumstances.

While the apparent intention is to extend the existing statutory civil liability provisions (Parts XXIII and XXIII.1 of the *OSA* and the equivalent provisions of the Securities Acts of the other Canadian provinces and territories), with necessary modifications, to disclosure violations in connection with securitized products, there is limited detail in the request for comments about what specific modifications are anticipated. In light of our particular expertise, we offer our views in this letter on how the statutory civil liability regime should be adapted to the market for securitized products.

Prospectus Disclosure Reforms

There is no problem in principle in imposing the existing civil liability provisions for prospectus misrepresentation (section 130 of the *OSA* and the equivalent provisions of the Securities Acts of the other Canadian provinces and territories) to prospectuses used to qualify the distribution of securitized products. However, consideration must be given to the key question of *who* should be liable for misrepresentations contained in a prospectus in respect of securitized products.

The parties to whom potential liability already attaches under section 130 of the *OSA* should also be liable in respect of prospectuses for securitized products. That would extend to the issuer, the underwriters, directors of the issuer at the time of the prospectus, parties which filed a consent to the disclosure of information in the prospectus, and other persons who signed the prospectus. In respect of information memoranda issued in connection with exempt distributions of securitized products, the CSA proposes to extend civil liability to the sponsor (in addition to the issuer and the underwriters). In our view, a statutory right of action for prospectus misrepresentation should also be available against the sponsor. In addition, in our view both the arranger (to the extent that such party is not an underwriter, to which liability would already attach) and the depositor (to the extent that such party is not a sponsor, to which

liability would already attach) should be subject to liability for prospectus misrepresentations. Both parties are closely involved in the process of structuring the securitized product and, therefore, have available to them the information necessary to attest to the material accuracy of a prospectus issued in respect of the securitized product.

We encourage the CSA members to make the appropriate amendments to the statutory civil liability provisions of the respective Securities Acts in accordance with our recommendations above.

Continuous Disclosure Reforms

With respect to question 18 of the CSA's request for comments, we see no basis for exempting reporting issuers that issue securitized products from the requirements of National Instrument 51-102 – *Continuous Disclosure Obligations* ("NI 51-102"). The disclosure requirements prescribed in NI 51-102 represent the *minimum* standards of disclosure expected of reporting issuers and the additional requirements that are to be imposed on the issuers of securitized products are necessary because of the specialized nature of those products. All reporting issuers are accustomed to complying with the minimum requirements of NI 51-102 and there is no compelling basis to exempt some issuers from these requirements.

Although it is not explicitly stated in the request for comments, we assume that Part XXIII.1 of the *OSA* (and the equivalent provisions of the other Securities Acts) will apply to reporting issuers in respect of their continuous disclosure under the Proposed CD Rule (in addition to their disclosure under other securities instruments).

With respect to question 23 of the CSA's request for comments, a Payment and Performance Report for Securitized Products under Form 51-106F1 should be prescribed as a "core document" for all potential defendants. This document provides fundamental disclosure about the securitized product and, as a periodic disclosure document, directors of the reporting issuer should be held to a due diligence standard. The Report of Significant Events Relating to Securitized Products under Form 51-106F2 operates in a similar manner to a material change report and should be prescribed as a "core document" on the same basis as material change reports are under Part XXIII.1 of the *OSA*. With respect to the documents to be prepared by the servicer and the participating audit firm and to be filed by the reporting issuer, it may be appropriate to treat these documents as "non-core documents" for the purposes of the statutory civil liability provisions given that the documents are prepared by these other entities. However, the servicer and the participating audit firm should be liable for material misstatements in the documents prepared by them essentially on the same basis on which experts are liable under Part XXIII.1 of the *OSA*.

Exempt Distribution Reforms

With respect to question 42 of the CSA's request for comments, we agree that rights of action should be available against the issuer, the sponsor and each underwriter for misrepresentations in an information memorandum. However, for the reasons stated above, we believe that an arranger (to the extent that such party is not an underwriter, to which liability would already attach) and a depositor (to the extent that such party is not a sponsor, to which liability would already attach) should also be liable for misrepresentations in an information memorandum.

Question 43 of the CSA's request for comments is posed under the heading "The Proposed Exempt Distribution Rules", so we assume that this question is directed at providing a right of action to purchasers of securitized products in the exempt market following the initial prospectus-exempt distribution. This would extend Part XXIII.1 of the *OSA*, which currently does not apply to the acquisition of securities pursuant to a prospectus-exempt distribution. To the extent that exempt market purchasers in the initial distribution are granted a right of action, we believe that it is appropriate to extend that right of action to subsequent exempt market purchasers.

With respect to question 44, we would encourage the CSA to provide exempt market purchasers of securitized products with a right of withdrawal from the transaction. The complexity of securitized products justifies the extension of this right of withdrawal to the more sophisticated exempt market purchasers of these products.

Thank you again for the opportunity to comment on the Proposed Securitized Products Rules. We look forward to reviewing the final versions of the rules.

Yours truly,

Siskinds LLP

Per:
A. Dimitri Lascaris and Anthony O'Brien