

February 28, 2012

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

c/o the Addressees set forth in Schedule "A" hereto

Dear Sirs/Mesdames:

Re: CSA Staff Consultation Note 45-401 – Review of Minimum Amount and Accredited Investor Exemptions (the "Consultation Note")

We are writing in response to the Consultation Note and your invitation to provide comments in connection with your review of the \$150,000 minimum amount prospectus exemption and the accredited investor prospectus exemption (collectively, the "**Exemptions**") contained in National Instrument 45-106 – Prospectus and Registration Exemptions ("**NI 45-106**"). Capitalized words and phrases used herein but not defined have the same meanings herein as in the Consultation Note.

Please note that the comments provided herein are those of certain members of the securities group of our firm and should not be taken to represent the position of the firm generally nor of any of our clients, who have not been consulted in connection herewith.

General

Reasons for Review

The Consultation Note states that the reason for review is that the global financial crisis and recent international regulatory developments have raised questions about the use of the Exemptions. While these issues may have triggered a review of various regulatory matters we would question whether the global financial crisis specifically is the reason for the review or whether there are other underlying issues that need to be discussed in order to obtain an understanding as to the rationale for the review. While retail investors may have been involved in and suffered losses in the global financial crisis through their investment of certain

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types of securities, such as asset backed securities, we note that the losses suffered by institutional and highly sophisticated investors illustrate that the root cause of the problem may not have been the use of the exemption and we note that the securities regulatory authorities in Canada have taken steps in this regard, including new regulations applicable effecting rating agencies.

Secondary Market Liability For Private Placements

As a general matter, we note that the acquisition of securities pursuant to a private placement is specifically exempt from the secondary market liability provisions of the *Securities Act* (Ontario) (the "Act") pursuant to section 138.2 of the Act and similar provisions of the legislation of other jurisdictions. We have not researched the rationale and background to this exemption for private placements and would raise for your consideration whether this should be reviewed in the context of your review of the Exemptions. This may address certain of your considerations as to whether the provision of additional information should be required, at least in the case of reporting issuers who have a public record available to all potential private placees.

Principles Underlying Exemptions

We note the principles underlying the Exemptions are set forth in Section 2 of the Consultation Note. As noted, certain of the rationale for the Exemptions is the apparent sophistication of the investor which either results in the investor being able to evaluate the investment for him or herself or having the ability to determine whether they are in need of, and to obtain, expert advice in such evaluation. Financial resources may be a proxy for this "apparent sophistication" and also evidence of the ability to withstand a loss. We would submit that the other possible criteria suggested, as set forth in the Consultation Note, such as educational background, work experience, investment experience and the like should not detract from the availability of the existing Exemptions based on financial wherewithal but may, if determined appropriate, be considered as an independent basis for availability of an exemption. For example, those with appropriate educational background, work experience or investment experience might actually have the level of sophistication to justify exemption in and of themselves. On the other hand, it may be that regulatory authorities do not want to get into the business of having to judge the nature of experience and whether it is sufficient for this purpose and to set a "bright line" test for such experience. Irrespective of this, we would submit that it would not be appropriate to add this to the existing financial tests given the rationale for the Exemptions.

We would submit that the costs and benefits of having a registrant involved in every investment utilizing the Exemptions should be considered. We are not aware of the exact statistics on the use of the Exemptions in non-brokered situations but would anticipate that it would not be insignificant and thus the involvement of a registrant in all distributions would increase the transaction costs to the issuers. Further, if the Exemptions are premised on the basis of the investor being able to "fend" for himself or herself given his or her level of apparent sophistication, then the involvement of a registrant should arguably not be required.

Accredited Investor Exemption (the "AI Exemption")

Issues Involving the AI Exemption

The dollar thresholds set forth in the AI Exemption are "lines in the sand" that need to be drawn having regard to the underlying rationale to the exemption. If felt necessary, raising the dollar thresholds would not appear to be offensive provided it is done on a reasonable basis. In determining what is reasonable in this regard, we believe that the thresholds were originally established not on the basis that individuals meeting the test had

"significant wealth", but they are at a level where the investor could presumably withstand financial loss and could obtain expert advice if required and are sophisticated enough to seek it if necessary.

While our experience is as legal counsel to issuers and underwriters, it would appear to us, at least anecdotally from our experience, that the AI Exemption has been a very valuable tool in the capital raising exercise by oil and gas and other resource issuers. We do note that it has also provided access to private placements by retail and other individual investors that might not otherwise have been offered participation in private placements, including of non-listed issuers, which otherwise would have been available only to institutional investors. Further, in the case of issuers that are either not large enough or for other reasons cannot raise money from institutional investors, we would, based again on our anecdotal experience, suggest that the AI Exemption has been utilized as a valuable tool for raising capital.

Potential Options Regarding the AI Exemptions

We would submit that it would be appropriate to either retain the AI exemption in its current form or to adjust the thresholds if determined necessary to justify their continuation based on their underlying rationale, as discussed above.

We also note, as discussed in the Consultation Note, that in the case of certain instruments, including, for example, securitized products, the CSA has proposed separate amendments to deal with those products. We would suggest that if a security is novel or complex that this approach be followed and that it be dealt with separately as a carve out from the availability of the Exemptions generally.

As discussed above under "Principles Underlying Exemptions", we would submit that the addition of new criteria to the existing criteria to use of the AI Exemption may be considered but should not be added to the dollar threshold criteria. We also would not favour limiting the use of the AI exemption to other than individuals. Firstly, we do believe the AI exemption has been valuable in allowing individual and retail investors to participate in offerings that would otherwise have been available only to institutional investors. Again, while not knowing the exact problems with the use of the Exemptions, we do not believe the rationale on which the Exemptions were originally based, have been eroded or no longer apply and therefore should continue to be available to individuals. If the problem is ensuring that individual investors are in fact meeting the eligibility criteria for accredited investors then that should be the issue that is addressed. If the concern is that unscrupulous promoters are causing people to utilize the Exemptions when they do not qualify, then the issue is how to deal with unscrupulous promoters rather than changing the availability of the Exemptions. Using an independent third party to certify the accredited investor status still requires that the independent third party rely on the investor to provide them with information on which to base such certification. If the investor is going to make a misrepresentation in the certificate to the issuer as to its status he or she may make the same to the third party certifier. If it is determined that a third party certifier is required we do not believe that a lawyer has any qualification to make this determination. An accountant may have some information in respect of the financial assets of an investor but certain information, for example, as to liabilities and other assets, still will have to come from the investor. While requiring review or certification by a third party may provide a level of due diligence in the process, the costs to the investor of obtaining such certification must also be considered. If the concern is to ensure that the investor is aware of the qualification criteria prior to certification then perhaps an additional certificate to be signed by the investor that they are aware of and understand the criteria may suffice.

Given the underlying rationale for the AI Exemption we do not believe that a requirement to provide additional disclosure in connection with its use should be necessary. We would suggest, as above, that consideration be given as to whether secondary market liability should be extended to acquisition of securities

pursuant to a private placement and this may largely deal with any information-based issues in connection with private placements by reporting issuers. We do note that, in certain provinces, if an "offering memorandum" (as defined for purposes of the Act) is provided that statutory rights of action will apply. One clarification you may wish to consider is that if an offering memorandum is provided in such provinces to any investors in that province that it be provided to all investors in that province who will then have the resulting statutory rights of action. This would ensure that all persons have the same information base and have the same rights of action in connection therewith.

Minimum Amount Exemption

We agree with the issues outlined in the Consultation Note regarding the minimum amount exemption. Again, the minimum dollar threshold required for the exemption is somewhat arbitrary. We do think that one of the rationales behind the exemption when it was originally put in place was that, given the level of investment required from the investor, he or she would have the ability to negotiate terms and additional information or protections that he or she may be in need of in making the investment – i.e. he or she has negotiating leverage given the level of investment. Based on that rationale, the amount of \$150,000 may be insufficient.

As with the AI Exemption, we do not believe the provision of additional information should be necessary, given the original rationale for the exemption.

While we do not have any statistical or other information or evidence of this, we would expect that most investors utilizing the exemption would also be accredited investors and thus the minimum amount exemption may be of limited utility. We have, however, encountered a number of situations where for some reason the potential investor did not technically meet one of the enumerated legs of the definition of "accredited investor", but clearly met the level of sophistication in which the Exemption was based, and thus the exemption has been helpful in those instances.

We would like to thank you for the opportunity of commenting on the issues raised by the Consultation Note. If you have any questions or require any further clarification on the comments herein, please feel free to contact Shannon Gangl, Steve Cohen, Alyson Goldman or Bill Maslechko of our office at your convenience.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP

Burnet, Duckworth + Palmer LLP

SCHEDULE "A"
ADDRESSEES

Gordon Smith
British Columbia Securities Commission
Po Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia V7Y 1L2
Fax: (604) 899-6814
e-mail: gsmith@bcsc.bc.ca

M^c Anne-Marie Beaudoin
Corporate Secretary
Autorité des Marchés financiers
800, square Victoria, 22^e étage
C.P. 246, Tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: (514) 864-6381
e-mail: consultation-en-cours@lautorite.qc.ca