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Re: CSA Staff Consultation Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions*

Thank you for the opportunity to comment regarding the above exemptions. Although there are many issues raised by the Consultation Note, we wish to address only a few. Please note that these comments do not necessarily reflect the views of all lawyers of the firm or of our clients.

Harmonization

Our comments relate primarily to the accredited investor exemption. However, as general principle, we strongly suggest that the CSA prioritize the elimination of local rules and carve-outs included in National Instrument 45-106 *Prospectus and Registration Exemptions* ("NI 45-106") and other instruments in connection with any changes that are proposed. These variations increase the costs and complexity of raising capital in the exempt market. We are not aware of any valid policy rationale that would support treating purchasers in the Canadian exempt market differently based on their jurisdiction of residence

Managed Accounts

One of the carve-outs we suggest eliminating is the limitation in paragraph (q) of the definition of "accredited investor" that excludes, only in Ontario, the purchase of securities of an investment fund by a registered advisor for a fully managed account. Given that the advisor is entitled to purchase any other securities for a fully managed account, we question the rationale for excluding securities of investment funds. The distinction appears to be entirely unrelated any inherent attributes of investment fund securities that would require either the financial sophistication or ability to withstand loss that would presumably follow from requiring the account holder to fall within another provision of the accredited investor definition or purchase more than $150,000. If the concern is related to potential conflicts of interest of the advisor, we submit that it would be better dealt with through the advisor's obligations as a registrant (and in any event should not apply where the advisor is not the portfolio manager or investment fund manager of the particular investment fund).

The registered advisor's obligations to the account holder apply regardless of the nature of the security purchased. If the rationale for including managed accounts within the accredited investor definition relates to the advisor's financial sophistication and client obligations, that rationale would apply equally to investment fund securities.

Many registered advisors have created pooled funds in order to manage clients' assets more effectively. They believe that investing their clients' assets in these funds can provide lower costs of investing, better tracking of their model portfolio and fairer treatment among their clients. However, in Ontario currently, the registered advisor cannot manage clients' asset this way unless the client is an accredited investor or the investment in each fund is at least $150,000. This latter requirement can result in the client's assets being inadequately diversified among the applicable pooled funds. We note that the Ontario Securities Commission has granted exemptive relief in several instances to allow advisors to manage their clients' assets in this fashion.

Master Trusts for the Benefit of Pension Funds

We urge the CSA to recognise master trusts established pursuant to income tax legislation to allow registered pension funds to more efficiently manage their assets (in one vehicle rather than many) as an accredited investor. These master trusts are relatively common in the pension industry.

Under the current definition of accredited investor, master trusts technically do not fall within:

- paragraph (i) (because they are not pension funds of registered pension plans),
- paragraph (m) (given the operation of subsection 2.3(5) of the NI 45-106),
- paragraphs (n), (o), or (u), because the master trusts are not investment funds (as defined under securities legislation), or
- paragraph (t), because, although the immediate beneficiaries of the master trusts are the pension plans, the ultimate beneficiaries of the master trust (through the pension plans) are the participants in the pension plan.

In our view, there should be no objection to master trusts being considered to be accredited investors from a policy perspective (given the fact that they are essentially similar vehicles to the other entities set out in the definition).

We recommend, in the interests of clarity, that the following additional type of entity be added to the definition of accredited investors: "a person that has been established by pension funds referred to in paragraph (i) for the benefit of the beneficiaries of such pension funds." We also assume that this entity would be considered to be purchasing as principal even though has many ultimate beneficiaries (but this is not different from an investment fund), but if there is any doubt about this, we urge the CSA to add a reference to this new accredited investor being deemed to be purchasing as principal for the purposes of section 2.3 of NI 45-106.

Consistency with US Regulation

If the CSA concludes that amendments to the accredited investor exemption are required, we suggest that any changes that diverge from the approach in the United States be avoided. Changes that would make it more onerous to extend offerings to Canadian purchasers on a private placement basis will reduce the opportunities available to Canadian investors.

Disclosure of Statutory Rights

One of the difficulties with conducting a private placement across Canada is the requirement to describe the statutory rights available to purchasers under certain prospectus exemptions, including the accredited investor and minimum investment exemptions. Typically these descriptions go on for pages, virtually guaranteeing that they will not be read. We suggest that the CSA adopt a uniform description of the statutory rights available to purchasers in the exempt market that satisfies the legislative requirements of all Canadian jurisdictions, in a similar manner as the statement of rights of withdrawal and rescission in item 30 of Form 41-101F1 *Information Required in a Prospectus*. We acknowledge that such a summary would need to address the differences in statutory rights that exist in different Canadian jurisdictions. We suggest, however, that the purpose of the requirement to describe these rights is to alert the investor that he or she has certain rights and they should consult a lawyer, not necessarily to provide the detail of these rights. By eliminating the several pages of boilerplate disclosure that is generally provided under the current practice, a brief uniform description would result in more meaningful and simpler disclosure for purchasers in the exempt market.

If you have any questions concerning these comments please contact David Surat (dsurat@blg.com / 416.367.6195), Paul Findlay (pfindlay@blg.com / 416.367.6191) or Rebecca Cowdery (rcowdery@blg.com / 416.367.6340).

Sincerely,

"Borden Ladner Gervais LLP"