From: Gordon Smith
Sent: Wednesday, February 29, 2012 11:21 AM
To: George Hungerford; Leslie Rose
Cc: Maria Seifert
Subject: FW: 45-401 Comment Letter
Attachments: ACCP Final 45-401 Comment Letter 2 29 12.pdf

Comment letter

From: skegie@rogers.com [mailto:skegie@rogers.com]
Sent: Wednesday, February 29, 2012 11:16 AM
To: Gordon Smith; Consultation-en-cours@lautorite.qc.ca
Subject: 45-401 Comment Letter

Please find attached the comment letter from the Association of Canadian Compliance Professionals.

Sandra

Sandra Kegie, Executive Director
phone: 416-621-8857 cell: 647-409-8369 www.complianceprofessionals.ca
sustainable thinking...please don't print this email unless you really need to.

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité de marches financières
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

Gordon Smith
British Columbia Securities Commission
gsmith@bcsc.bc.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorité de marches financières
Consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

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

Founded in 2000 the Association of Canadian Compliance Professionals ("ACCP") is an organization representing individuals who have chosen financial services industry compliance as their career and who are dedicated to improving compliance operations within the mutual fund dealer community and beyond.

We appreciate being provided with the opportunity to submit our comments on this important issue.

General Comments

The explanation for undertaking a review of the minimum amount exemption and the accredited investor exemption at this time lacks sufficient detail as the aspects or features of the "global financial crisis" and "recent international regulatory developments" that raise concerns with reference to these two exemptions are not identified and are not self apparent. As National

Instrument 45-106 has been in force for just over two years, it is somewhat surprising that the CSA has turned its attention and resources so quickly to two prospectus exemptions which are heavily relied upon by issuers and distributors. While international developments may be of interest, absent some direct relevance to the Canadian capital markets, we believe that the resources of CSA Staff could perhaps be better directed to more immediate and pressing issues of concern to investors, distributors and issuers.

In addition, we wish to express our view that the determination of the appropriate framework for prospectus exempt offerings is a matter of broad public policy since the raising of capital is of importance to the economy as a whole. It is the role of government to balance competing and conflicting interests to ensure that funding is available at a reasonable cost to small and medium enterprises which, in many cases, cannot afford to offer securities by way of a prospectus offering. Any steps that would limit the number of potential investors or increase the costs of raising capital in the prospectus exempt market would undoubtedly do considerable harm to these enterprises which are often seen as key drivers of growth and prosperity. This harm would limit the long term ability of such enterprises to tap into the prospectus qualified markets, as the absence of available funding would limit growth, development and innovation, all of which are needed to some extent to "go public".

Consultation Questions

For purposes of our responses to the questions posed we have adopted the numbering of the questions as found in CSA Staff Consultation Note 45-401.

1. While we appreciate the need to establish "reasonable" minimum criteria for investors who wish to acquire prospectus exempt securities, it is important to accept the proposition that adults as potential investors ultimately should be responsible for their decisions, absent their reliance on a third party that has a statutory or common law duty of care to provide appropriate advice. We note with the adoption of National Instrument 31-103 (NI 31-103), all registered dealers and their representatives have statutory "suitability" obligations. We believe individuals should be free to acquire all types of assets, whether securities, real estate or anything else either after undertaking sufficient due diligence themselves, or in reliance on the advice or recommendations of others who have a duty of care.

The investor characteristics listed in bullets will be appropriate in many circumstances, but are also likely inappropriate in an equal number of other circumstances. Further, while conceptually the characteristics make sense and may be supportable in some circumstances, we are uncertain as to how they could be applied in a practical manner on a day to day basis. For example, what level of education would be sufficient, what courses would suffice, and what types of educational institutions would be acceptable? The same comments apply with respect to work experience and investment experience. It must be accepted that any criterion is, in its own way, arbitrary and likely will exclude potential investors who should not be excluded.

The notion that having a certain level of financial resources is indicative of an "ability to withstand financial loss" strikes us as simplistic, as the ability to withstand a loss is also function of the investor's financial obligations, cash flow needs, and emotional tolerance.

2. Given the obligations, as of late, that apply to all dealer registrants under securities legislation including NI 31-103 obligations relating to know your client, know your product and acting in good faith and fairly, the answer to this question appears to us to be self-evident save for the lack of consistent and helpful guidance with respect to the meaning of "suitable" as

many of the tools used by dealers and their representatives to determine suitability of investments and what would be suitable for a particular investor are subjective in nature. For example, when an investor indicates they have a high risk tolerance, the obvious question is how high is high? Is suitability to be determined with respect to a single investment, or on a portfolio basis? In the latter case, what due diligence obligations does a dealer or rep have to undertake to confirm that the assets the client says he or she owns actually exist and have the value as stated? We are hopeful that the CSA will agree with our position that a client's signature on a document can and should be relied upon by a dealer and its advisors, absent any actual knowledge of or reason to believe the contrary. If an individual certifies in writing a clear and understandable statement with regard to the individual's income, assets, position, risk tolerance, level of income, etc., it is unreasonable and unwarranted to require anything more be done.

As the effective regulation of all dealers and representatives who rely on the accredited investor and minimum purchase exemptions is relatively fresh and new, we suggest that this review of these exemptions is premature. The quantity of data obtained, analysis performed and resulting knowledge and experience derived since the adoption of NI 31-103 is insufficient to allow one to reasonably conclude that the obligations of every dealer registrant and its representatives are not sufficient in addressing the concerns of the CSA with regard to the reliance on the two exemptions in question.

3. While Appendix A provides background information with regard to a very limited selection of foreign jurisdictions, its usefulness in responding to the questions raise by CSA Staff is limited as there is no discussion or description of any initial or on-going registration requirements and other investor protection provisions applicable to the distribution channels in these jurisdictions. If requirements and provisions in these other jurisdictions are weak or non-existent it would be appropriate to severely limit the pool of potential investors. That is not the case in Canada since the implementation of NI-31-103.

We take issue with the concept that a prospectus in any significant manner protects investors given that it is unlikely that more than a few actually read the prospectus. Some comfort can be gained from the role of the underwriter in a prospectus offering. However, full, plain and true disclosure offers "protection", if protection is defined very broadly, only if the prospectus is actually read.

With regard to the statement that a $150,000 threshold allows "unsophisticated retail investors to participate in the exempt market", there will always be unsophisticated investors participating in the exempt market regardless of what level the threshold is set at because there really is no actual correlation between sophistication and the value of an investment. The only difference will be in the number of potential unsophisticated investors.

5. The existing minimum amount exemption should remain in place until such time as there is clear evidence indicating that dealers and their representatives are using the exemption in an abusive manner that cannot be remedied in a more efficient and effective manner.

6. Refer to above.

7. Yes.

8. If the $150,000 threshold were increased, we firmly believe that it would have a negative impact on capital-raising.

9. The provision of a risk factor disclosure document would lessen the need for any increase in the minimum exemption amount in our view, as it would provide some assurance that potential investors were given a document that they were much more likely to read than an offering memorandum, prospectus or filings on SEDAR. Further, if a copy of the document was signed and retained by the dealer, it would be of assistance in defending any allegation of misconduct or omission by the dealer.

We have concerns regarding the ability of any party to effectively and consistently determine whether an investment is novel or complex, as both these terms are highly subject to interpretation. Even if an investment were novel, that does not mean that it is not easily understood by investors.

As noted above, we are of the view that the adoption of NI 31-103 provides an opportunity for the CSA Staff to determine whether any concerns raised regarding the accredited investor and minimum purchase amount exemptions can or are adequately addressed by regulating all the distribution channels in a satisfactory and effective manner as a opposed to modifying or limiting these exemptions. See our response to no. 2. above.

10. No

11. Yes

12. While there are most certainly alternative qualification criteria, there can be no assurance that they will address any concerns that the CSA Staff may have in a manner which is superior to the current regime.

13. No.

14. Provided that a risk disclosure document is provided to investors by a registrant with appropriate client suitability obligations, there is no apparent need to repeal the exemption.

15. A repeal of the minimum amount exemption would likely have a negative impact on issuers' ability to raise capital as a smaller number of potential investors will have the required minimum amount. With regard to the proposed elimination of the minimum amount exemption, the acceptability of same could only be assessed once the proposed changes to accredited investor exemption were known.

16. If experience proves that the implementation of NI 31-103 has the desired effect, consideration should be give to reducing the applicable minimum amount to aid in the raising of capital, particularly equity capital, by enterprises that cannot access other sources of capital in an efficient and cost effective manner.

17. If an investor signs a clear document or makes a clear and concise statement in which he/she certifies that they meet one or more of the qualifications and the registrant dealing with such investor has no knowledge or reasonable belief to the contrary, that should be sufficient. If an investor overstates their worth or income or any relevant fact, and therefore brings potential harm to themselves, any harm, loss or damages should rest solely with the investor.

18. None other than those mentioned herein.

19. The accredited investor exemption should remain the same provided that steps are taken to assure that individuals attesting to their status as "accredited investors" are made aware that reliance is being place on such attestation and they are responsible for their own acts.

20. Our views with regard to the involvement of a registrant and the need to assess the impact of NI 31-103 are stated above.

Our comments above to question 9 regarding the provision of a risk disclosure statement, and complex and novel investments are equally applicable in this case.

21. Yes

22. We firmly believe that it would have a negative impact on capital raising.

22.(c) Please see our comments above in the second paragraph of the response to question 1.

23. Please see our comments above in response to question 6.

At the same time that the CSA is reviewing the accredited investor and $150,000 minimum investment exemptions, we recommend that the "Northwest Exemption" be reconsidered by the jurisdictions that adopted that exemption. We believe that the Northwest Exemption creates confusion for clients about the circumstances in which they have the protections offered by the exempt market dealer registration requirement, and that it exposes clients to the risks of dealing with unregistered dealers without any corresponding public benefits.

We want to thank the CSA for the opportunity to comment. Should you wish to discuss further or have any questions regarding this submission do not hesitate to contact the undersigned.

Regards,

Association of Canadian Compliance Professionals

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