

February 29, 2012

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**BY COURIER AND EMAIL**

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New Brunswick Securities Commission  
Superintendent of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
Securities Commission of Newfoundland and Labrador  
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**SUBJECT: Review of Minimum Amount and Accredited Investor Exemptions,  
Public Consultation**

Dear Sirs/Mesdames:

Further to the CSA Staff Consultation Note 45-401 dated November 10, 2011 regarding your review of the minimum amount prospectus exemption and the accredited investor prospectus exemption contained in National Instrument 45-106 – *Prospectus and Registration Exemptions* (“NI 45-106”), we are pleased to provide the following comments

based upon our experience as counsel to numerous issuers and investors to whom NI 45-106 applies.

### **General Observations**

We believe that both the minimum amount exemption and the accredited investor exemption (the “Exemptions”) should be maintained in order to ensure continued access to capital markets for issuers and access to Canadian investments to investors who may not otherwise have the opportunity to participate in such investments. Other jurisdictions have similar exemptions and we believe that to restrict access to or remove altogether the ability of Canadian issuers and investors to take advantage of the Exemptions would place such parties at a competitive disadvantage to investors and issuers in other jurisdictions. A predictable effect of such restrictions would be the diminution in both investment opportunities available to sophisticated Canadians and the ability of Canadian issuers to access capital markets. While we understand that the size of an investment does not itself ensure that investors are sophisticated enough to determine the appropriateness of such investments on their own, we believe that the Exemptions achieve the goal of ensuring that only those investors that have the financial capability to seek expert advice have access to non-prospectus qualified investments.

We support the CSA's initiative to periodically review exemptions from the prospectus requirements (and other facets of securities regulation), particularly where the underlying premises or standards are subject to change or diminution over time. We know that the CSA is well aware of the trade-offs that must be made between encouraging capital formation and investor protection. However, we submit that capital formation is optimized when the capital raising process is subject to known, stable requirements. Accordingly, absent strong specific evidence that the standards currently set out in these exemptions are not providing the requisite protection to consumers or are not permitting capital to be raised efficiently, we suggest that the thresholds set out in the current regime be maintained. In this regard, we submit that the CSA should collect and publish information regarding circumstances where the current thresholds have failed the CSA member organizations' mandate for investor protection or unduly impeded capital formation. Only when market participants are aware of the nature and magnitude of problems with the current thresholds will they be able to provide meaningful insight on the appropriate levels for these thresholds.

### **Comments on Certain Specific Aspects of the Exemptions**

We would like to take this opportunity to address certain specific aspects of the Exemptions that have arisen in the course of our practice that, while theoretically sound, may have unintended practical consequences which could, in the context of an amendment to NI 45-106, be clarified.

*Trusts as Accredited Investors*

In the context of the establishment of a private equity or investment real estate fund, often structured as limited partnerships, investors are sometimes advised to invest by way of family trusts for the purposes of optimizing tax efficiencies (a “**Family Trust**”). Such Family Trusts are often structured as discretionary trusts for the benefit of the living and future lineal descendants of such individuals. Beneficiaries of such Family Trusts are the beneficial owners thereof. Sub-paragraph (t) of the definition of “accredited investor” provides an exemption for entities in respect of which all of the owners of interest, direct, indirect or beneficial are persons that are accredited investors. Since a young child, or further, an unborn child, both of which would routinely be beneficiaries of the Family Trust, is typically not an accredited investor, the Family Trust is by definition not an accredited investor. Further, since the Family Trust is established as a single purpose entity, it does not have any financial assets which would allow it to qualify under a different sub paragraph of the definition of accredited investor. We are thus left with the anomalous result that a wealthy individual or family which would otherwise easily qualify as an accredited investor but for the structure of its investment, cannot avail itself of the exemption. This, despite the fact that all of the policy concerns surrounding the accredited investor exemption would suggest that the Family Trust be able to rely on such exemption.

In order to rectify the described anomaly, we would suggest that the definition of trusts used in Section 2.4(2)(k) of NI 45-106, be used in the context of the accredited investor exemption, namely, that in order for a trust to qualify as an accredited investor, the requirement should be that a majority of the trustees are accredited investors. Since the trustees are entrusted to make decisions for the benefit of the beneficiaries, it stands to reason that the beneficiaries would be protected if the trustees had the requisite sophistication targeted by the accredited investor exemption. Alternatively, we suggest that a trust with at least one beneficiary that is an accredited investor be eligible to qualify as an accredited investor.

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We would like to thank the members of the Canadian Securities Administrators for giving us the opportunity to comment on this review process, and look forward to your responses to the comments of the various market participants and advisers who have submitted issues for your consideration.

Should you have any questions regarding the foregoing, please do not hesitate to contact me directly.

Best regards,

DAVIES WARD PHILLIPS & VINEBERG LLP



Per: Brian Kujavsky

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