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Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territories
Superintendent of Securities, Nunavut

Your reference

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Dear Sirs/Mesdames:

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

This letter is submitted in response to the Public Consultation being undertaken by the Canadian Securities Administrators ("**CSA**") described in CSA Staff Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions* (the "**Consultation Note**"). We appreciate the opportunity to comment on this important review of the minimum amount prospectus exemption ("**minimum amount exemption**") and the accredited investor prospectus exemption ("**AI exemption**") contained in National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**"). We have the following comments:

The Minimum Amount Exemption

Prior to the introduction of the AI exemption in 2005, the minimum amount exemption acted as the sole proxy for an exemption related to an investor's sophistication and was based upon the assumption that an investor who could afford to invest, and potentially lose, the prescribed amount was sophisticated enough not require the protection of a prospectus. It was retained by the CSA following the introduction of the AI exemption. Given its ease of application we understand it continues to be widely used in certain jurisdictions to raise capital for smaller enterprises and we are of the view it should be retained to support capital raising by such issuers in those jurisdictions. With respect to the prescribed amount of any purchase, the setting of any amount is arbitrary and, in the absence of a demonstrated need for greater investor protection, we are of the view that it should remain at its current threshold.

The AI Exemption

We are of the view that an income and asset test is the appropriate basis for the AI exemption and an adequate proxy for an individual investor's sophistication, education, work or investment experience. The "bright line" income and asset criteria means that it can be easily relied upon with certainty by both issuers and investors. Attempting to base the exemption on an individual's education, work or investment criteria will cause uncertainty and be problematic to apply. In addition, certain of the criteria suggested to supplement or replace the asset and income test do not in our view represent appropriate proxies for sophistication (for example, completion of the Canadian Securities Course). Other proposed criteria, such as work experience in the financial industry, are unduly restrictive and will deny access to the exempt market to persons who do not meet such limited criteria but are otherwise sophisticated. We therefore are of the view that the AI exemption should be retained in its current form and be based on an income or asset test for individual investors. We note that the bright line test based on income and assets and the current thresholds are also internationally comparable.

With respect to the CSA concern that the AI exemption is being relied upon by individuals who are not in fact accredited investors, the onus is on an issuer to collect the necessary representations as to accredited investor status and relying on the exemption with knowledge that it has not been complied with should be a matter of enforcement against such issuer. The use of a third party such as an accountant or lawyer to verify assets and income in our view, would increase the costs associated with offering securities and given such verification would only be based upon evidence presented by the investor himself would not provide a significantly greater degree of investor protection. Finally, it should be questioned whether investors who represent themselves as accredited investors and who are not in fact accredited investors, should be a matter of investor protection concern for securities regulators.

You have further requested comment on whether the involvement in the distribution of a registrant who has an obligation to recommend only suitable investments addresses any concerns with respect to the appropriate basis for the exemptions. It is not uncommon for registrants to be involved in private placements, especially in the offering of more complex products. The involvement of a registrant who properly discharges its know-your-client and know-your-product duties and the suitability obligations prescribed in National Instrument 31-103 *Registration Requirements* and IIROC regulations will provide additional protection to purchasers in the exempt market. If there is a concern that dealers and individual representatives are not appropriately discharging these duties, then this is an appropriate matter for regulatory enforcement. While we are of the view that the current exemptions are sufficient to protect investors, we note that registrant involvement may provide additional protection. We do not, however, think it is appropriate to condition a prospectus exemption on registrant involvement.

General Comment

In connection with this consultation, we would urge the CSA to consider whether it is possible to achieve greater harmonization in NI 45-106 and prospectus exemptions across Canada. When NI 45-106 was introduced, the CSA stated that it was a "first-step toward further harmonization". Having a consistent set of rules in NI 45-106 would, in our view, simplify compliance. Given that a considerable period of time has passed since the introduction of NI 45-106, the CSA should examine the use of exemptions which exist in some jurisdictions and not in others and in different forms in different jurisdictions and determine whether further harmonization can be achieved at this time.

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This letter has been prepared by certain members of the Toronto Securities Law Group of Norton Rose Canada LLP but may not reflect the views of each of its members. If you have any questions concerning these

comments, please contact Tracey Kernahan (416) 216-2045 (direct line) or by e-mail at Tracey.Kernahan@nortonrose.com.

Yours very truly,

"*Norton Rose Canada LLP*"

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