155 Wellington Street West
Toronto ON M5V 3J7
dwpv.com

February 26, 2014

Anthony Spadaro
T 416 367 7494
F 416 863 0871
aspadaro@dwpv.com

BY E-MAIL

Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 3S8

Attention: The Secretary

Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3

Attention: Anne-Marie Beaudoin

Dear Sirs/Mesdames:

Proposed Amendments to National Instrument 33-105 – *Underwriting Conflicts*

We are writing to you in response to the request of the Canadian Securities Administrators (the "**CSA**") for comments on the proposed amendments to National Instrument 33-105 – *Underwriting Conflicts* (the "**Proposed Amendments**").

We acted as co-counsel to certain U.S. and Canadian registered dealers and exempt international dealers in connection with the applications for exemptive relief granted by the CSA from the requirement to deliver a "wrapper" affixed to a foreign offering document in connection with private placements of certain foreign securities to permitted clients in Canada. This relief was the impetus for the Proposed Amendments.

We are very supportive of the Proposed Amendments and the CSA's continued effort to improve the accessibility of certain designated foreign securities to sophisticated Canadian investors by reducing the administrative burden the current rules impose on applicable market participants. Our comments on the Proposed Amendments are primarily of a technical nature and to ensure consistency with the exemptive relief orders.

Paragraph 3A.2(a)

We submit that the use of the term "specified firm registrant" in this paragraph is unintentionally narrow. A "specified firm registrant" is defined as a person or company registered, or required to be registered, under securities legislation as a registered dealer, registered advisor or registered

investment fund manager. It does not include a person or company relying on the international dealer exemption, for example. This is inconsistent with the exemptive relief orders.

We appreciate that an exempt international dealer would not have to provide the disclosure required by NI 33-105 in respect of itself because it is not a "specified firm registrant" and therefore NI 33-105 does not apply to them. However, there may be other underwriters participating in the offering who may not be selling into Canada on that particular transaction. If the Proposed Amendments are adopted as drafted, it would suggest that an exempt international dealer would have to provide disclosure in a Canadian wrapper in respect of another underwriter in the transaction that is not selling into Canada but is a "specified firm registrant". Yet if that specified firm registrant itself chose to sell into Canada in that offering, it would not have to provide that disclosure because the exemption would be available to it. This is an unusual result.

We therefore propose that the wording of paragraph 3A.2(a) be revised as follows:

> "the distribution is made to a permitted client by a registered dealer or an international dealer."

We note that our proposed revisions are consistent with the wording used in the proposed amendments to OSC Rule 45-501 – *Ontario Prospectus and Registration Exemptions* ("**OSC Rule 45-501**") published for comment by the Ontario Securities Commission on April 25, 2013.

Paragraph 3A.2(c)

The proposed wording of paragraph 3A.2(c) is considerably narrower than the exemptive relief orders in that it requires the exempt offering document to comply with "the requirements" (i.e., *all* requirements) of section 229.508 of SEC Regulation S-K under the 1933 Act and FINRA Rule 5121. The exemptive relief orders were intentionally broader in that the exempt offering document was only required to comply with the disclosure requirements contained in section 229.508 of SEC Regulation S-K and FINRA Rule 5121 with respect to disclosure of underwriter conflicts of interest. There are elements of the foregoing U.S. rules that have nothing to do with underwriter conflict of interest disclosure and, therefore, are outside the scope of NI 33-105. We would also note that this wording is inconsistent with the CSA's commentary to the Proposed Amendments in the first paragraph under the heading "*Summary of the Proposed Amendments*":

> "… provided that an offering document is delivered to purchasers that complies with the U.S. disclosure requirements on conflicts of interest between issuers and underwriters." (Emphasis added.)

We therefore submit that the wording of paragraph 3A.2(c) be revised as follows:

> "(c) the exempt offering document complies with the disclosure requirements of section 229.508 of SEC Regulation S-K under the 1933 Act and FINRA Rule 5121 with respect to disclosure of

underwriter conflicts of interest, whether or not those requirements apply to the distribution."

Section 3A.5

As currently drafted, this section would require the dealer to deliver a notice to the permitted client that "describes the terms and conditions of the exemptions being relied on". While arguably necessary in the context of a novel exemption order, the requirement to describe the terms and conditions of an exemption provided for under applicable securities laws is, in our view, unnecessary. At most, the requirement should be to provide a statement to the effect that the dealer is relying on an exemption from the disclosure requirements of NI 33-105 with a cross-reference to the applicable section number. The dealer should not have to describe the exemption because any permitted client that is interested can read the exemption for themselves if they are provided with the appropriate section reference. In our view, a description of the applicable exemption from the disclosure requirements of NI 33-105 would add no value to the prospective investor and would be an unnecessary compliance burden for dealers.

This submission was prepared by *Anthony Spadaro, Davies Ward Phillips & Vineberg LLP, 416 367 7494 and Patricia Olasker, Davies Ward Phillips & Vineberg LLP, 416 863 5551*. We would be pleased to discuss these comments further at your convenience.

Yours very truly,

(signed) Anthony Spadaro	*(signed) Patricia Olasker*
Davies Ward Phillips & Vineberg LLP	Davies Ward Phillips & Vineberg LLP