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The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Registrar of Securities, Nunavut

(the Canadian Securities Administrators, or **CSA**)

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To the Members of the CSA:

Re: Comment on Proposed Amendments to National Instrument 31-103 *"Registration Requirements, Exemptions and Ongoing Registrant Obligations"*

The following is submitted in response to the CSA's Notice and Request for Comment on Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**Proposed Amendments**) dated December 5, 2013.

Miller Thomson LLP is a national law firm with offices across Canada, including in Kitchener-Waterloo and Southwestern Ontario. We serve a broad range business clients from diverse economic sectors, including start-ups and early-stage companies.

In our experience, early-stage companies need various forms of support, and are generally not in a position to obtain sophisticated legal advice on an ongoing basis. We urge policymakers to continue to explore ways to simplify and streamline rules for start-ups. These enterprises and their principals have no desire to run afoul of securities regulation. They wish to be responsible businesses who do not violate laws. However, they find it frustrating, difficult, time-consuming and expensive to comply with all of the securities rules, regulations and policies applicable to them. They find lack of clarity and certainty in the application of the rules particularly challenging.

Section 1.3 [Fundamental concepts] of NI 31-103CP

The Proposed Amendments contemplate clarifying the application of the business trigger to start-up entities. We commend this proposal to provide reassurance to start-ups and their principals that they will not be found to be "registrants" (persons who are registered or required to be registered under securities regulation) simply for conducting capital raising activities. The added commentary explaining what is meant by an "active non-securities business" is very helpful, as is the commentary addressing the frequency with which certain activities may be conducted.

We respectfully suggest that the Proposed Amendments could be made more helpful by allowing for some flexibility for start-ups to compensate employees and others in connection with raising capital. The proposed text is reproduced below for convenience of reference:

> *...we would likely find the issuer and these individuals to be in the business of trading if:*
>
> - *the principal purpose of their employment is raising capital,*
> - *they spend the majority of their time raising capital, or*
> - *any of their remuneration is tied to their capital raising activities*
>
> [Emphasis supplied]

This language suggests that if a start-up pays any compensation which is linked or tied to capital raising, regardless of the amount of compensation and presumably without regard to success or failure, such payment could result in the start-up or the principal thereof being found to be in the business of trading. As the CSA has implicitly recognized, at many start-ups, and at certain stages in their growth and development, there may be one or two individuals who do indeed spend a majority of their time raising capital. The individual in charge of finance, for example. While such a position may evolve into a more traditional treasurer/ chief financial officer role, for a start-up, this person's primary concern will be to find sources of funding. They seek funding wherever available, through government and private grant programmes, angel investors, accelerator funds, bank loans, etc. We believe that it is not the intent of the CSA that such individuals should not be paid a salary or otherwise compensated during this period unless they are registered.

We understand that the CSA wish to ensure that companies and individuals who exist to access capital for enterprises through the capital markets (essentially, stock promoters) should continue to be subject to the registration requirement. These persons are market professionals and should not be able to shelter under a carve-out from the registration requirement intended for *bona fide* start-ups. We suggest that this objective can be met, while providing certainty to start-ups and their founders, simply by making commission-based capital raisers ineligible for the carve-out.

We suggest that the Proposed Amendment would be more helpful if it were phrased as:

> *"...we would likely find the issuer and these individuals to be in the business of trading if:*
>
> - *the principal purpose of their employment is raising capital through distributions of the issuer's securities, with no other business or functional role,*
> - *they spend the majority of their time raising capital in that manner, and*
> - *their compensation or remuneration is based solely or primarily on the amount of capital so raised."*

This would effectively exclude market professionals (who tend to work on a success fee basis) from the carve-out while recognizing that for start-ups, obtaining funding is key to a venture's success, and generally requires a great deal of time and effort.

Suggestion for Additional Clarification re Private Issuers

Start-ups most often rely on the private issuer prospectus exemption to raise capital[1].

We believe that it would be helpful if there were regulatory guidance to the effect that in the normal course, issuers raising capital in reliance on the private issuer exemption will not be considered to be "trading in securities for a business purpose." This would enable us to advise our clients that so long as they maintain their private issuer status, and limit solicitation of purchases of securities to the persons enumerated in the definition of private issuer, they need not worry that they are carrying on activity that requires registration as a dealer. Anecdotally, many start-ups believe this to be the case, and it often comes as a surprise that this is not a precise and complete and accurate statement of the law.

Not for Profit Issuers

Our firm also has a significant practice in charities and not for profit entities.

One further matter we wish to bring to your attention is the situation of not for profit issuers (**NPF Issuers**) entitled to rely on the prospectus exemption set out in Section 2.38 of National Instrument 45-106, *Prospectus and Registration Exemptions*. Such NFP Issuers no longer have an automatic registration exemption, and will be in a similar situation to start-ups insofar

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[1] As an aside, we believe that this exemption is itself needlessly complex, and difficult to apply, but the Proposed Amendments deal with registration matters and not the prospectus requirements, so we will limit our comments to NI 31-103.

as they also from time to time have a need to raise capital. In addition to donations, NFP issuers may wish to issue securities to fund projects or ongoing operations.

Staff of the members of the CSA have stated unequivocally that status as a not-for-profit entity does not lead to the conclusion that a distribution of securities by the NFP Issuer is excluded from registerable activity. To the contrary, in the view of staff, even quite limited trading by NFP Issuers in their own securities, where no one is compensated in respect of making the distribution, will trigger the registration requirement. Unlike for start-ups and venture capital and private equity investors, there is no regulatory guidance specific to NFP Issuers.

NFP Issuers may also be start-ups, and the Proposed Amendments do not preclude NFP Issuers from relying on the guidance when they first commence their activities. However, for other NFP Issuers who cannot be said to be in "the start-up phase" or "launching" their enterprises, there is little which provides assurance that capital raising and the associated solicitation activity is not "trading for a business purpose".

We suggest the inclusion of language in 31-103CP to clarify that securities issuers who trade in their own securities in reliance on Section 2.38 of NI 45-106 will generally not be considered to be engaged in an "active non-securities business" on terms similar to that proposed for start-ups. You may wish to consider guidance along the following lines:

> …We recognize that [NFP Issuers] may from time to time need to raise capital to fund their activities. If the trading and soliciting is for the purpose of advancing the objects for which the NFP Issuer is established, then the frequency of the activities alone should not result in the NFP Issuer being in the business of trading in securities. Similarly the number of persons to whom solicitations are made should not by itself be conclusive in determining that the NFP Issuer is in the business of trading in securities.
>
> However, the capital raising must be primarily to support the advancement of the object or purposes for which the NFP Issuer is established.
>
> [The balance of 31-103CP would apply, so that the NFP Issuer would have to register if it employed or contracted individuals to perform activities similar to those performed by registrants, or solicited investors "actively" (e.g. through paid advertising campaigns) or acted as a market intermediary.]

Concluding Remarks

Thank you for providing the opportunity to comment on the Proposed Amendments.

Yours truly,

MILLER THOMSON LLP

Per:

Susan Han