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June 16, 2014

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The Secretary
Ontario Securities Commission
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22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Dear Sirs/Medames:

Re: CSA Notice and Request for Comment on Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* Relating to the Offering Memorandum Exemption

Reference is made to the CSA Notice and Request for Comment regarding proposed amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**") and in particular to those amendments (the "**Proposed Amendments**") relating to the Offering Memorandum Exemption (the "**OM Exemption**").

Please find below a number of comments on the Proposed Amendments. These comments are not intended to be exhaustive but are limited to the OM Exemption and the proposed amendments related thereto:

1. Aggregate Investment Limits

The Proposed Amendments impose investment limits on subscribers utilizing the OM Exemption of (i) $10,000 per calendar year for individuals that do not meet the definition of "eligible investor"; and (ii) $30,000 per calendar year for individuals that qualify as "eligible investors". In our view, such investment limits are both unduly restrictive and unnecessary.

Our view in this regard is informed by the underlying rationale for the exemption. The entire prospectus regime in Canada is predicated upon the premise that an investor is entitled to make their own investment decisions provided that they are provided with full, true and plain disclosure regarding the investment at issue. The OM Exemption is based on the similar premise that an investor does not need the protection of a full prospectus (and the issuer need not be subject to the existing continuous disclosure regime for reporting issuers) if a similar disclosure document, in the

form of the offering memorandum, is provided and the investor is granted a right of action or rights of rescission for any misrepresentation contained in such offering memorandum. To the extent that the Canadian Securities Administrators (the "**CSA**") believe that the form of offering memorandum does not provide adequate information to protect an investor we would recommend that the form of offering memorandum be amended to include whatever additional disclosure the CSA believes is necessary in order to adequately inform an investor, rather than imposing an arbitrary investment limit on subscribers.

In addition, a significant number of issuers utilizing the OM Exemption distribute securities through arrangements with registered exempt market dealers ("**EMDs**"). Such EMDs operate in a regulated environment and have been required to be registered with applicable securities regulatory authorities under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registration Obligations* ("**NI 31-103**"). Pursuant to NI 31-103 EMDs have existing "know your client", "know your product" and suitability obligations (collectively, the "**KYC Obligations**") to their clients in connection with advice and recommendations given to such clients. Where an EMD has fulfilled its KYC Obligations with respect to an investment in an exempt market offering we do not believe any additional investment amount limitation should apply. Requiring such an investment limit in these circumstances would appear to undermine the role of the EMD in safeguarding the interests of their clients.

In our view, the imposition of an investment restriction in the form contemplated by the Proposed Amendments may in fact create additional risk for an investor as it may serve to limit diversification in an investor's portfolio. Instead of allowing an investor who desires to participate in the exempt market to diversify amongst a variety of exempt market offerings an investment restriction limit in the nature of that contained in the Proposed Amendments may encourage such an investor to put their maximum allowable investment into just one preferred investment, rather than across multiple offerings. We expect this would have a particularly negative effect in the venture capital area with respect to start-up companies. Such early stage ventures often utilize the OM Exemption for early financing rounds. The capitalization of early stage start-up companies is critical to innovation in, and to the overall health of, the Canadian economy. Start-up companies are, by their nature, riskier investments than issuers with greater cash flows. As a result, the imposition of a limit on an investor's ability to utilize the OM Exemption may result in an allocation of capital to more established businesses and away from the start-up companies to which such financing is critical.

We additionally note that imposing a restriction on the amount that an investor is able to invest using the OM Exemption may require that issuers significantly expand the number of subscribers to an offering in order to obtain the required amount of capital. This significantly expanded base of security holders is likely to be accompanied by additional costs and administrative burden to the issuer.

Far from facilitating an efficient capital market, adding an investment restriction in the OM Exemption could in our view unnecessarily constrain the capital markets for no tangible additional benefit.

We additionally have concerns with the Proposed Amendments in that they require issuers to determine the amount a potential subscriber to an offering using the OM Exemption has previously invested in the calendar year preceding such investment. We fail to see how any issuer could definitively determine whether or not a new subscriber has exceeded the imposed annual investment limits. While inquiries can be made in this regard and representations can be obtained from the investor in the subscription agreement relating to the offering, an issuer will have no way to independently verify whether such limit has in fact been exceeded.

2. Ongoing Disclosure Obligations

The Proposed Amendments require issuers to deliver to investors and the applicable CSA member: (i) annual audited financial statements; (ii) an accompanying annual notice disclosing the use of aggregate gross proceeds raised in all offering memorandum distributions; and (iii) notice of certain corporate events, changes to the issuer's capital structure, business, or directors and officers and notice of significant acquisitions. This disclosure would be required notwithstanding that the issuer may have long since ceased distributing securities under the OM Exemption. In our view, such a requirement conflates reporting issuers and non-reporting issuers and imposes an unnecessary administrative and financial burden on non-reporting issuers.

Particularly for early stage businesses, the costs associated with an annual audit can be significant and an issuer that utilizes the OM Exemption should not automatically be required to incur such audit costs simply because they've utilized the OM Exemption to raise capital. We note that existing corporate legislation already imposes a requirement to provide annual audited financial statements to shareholders, unless such shareholders have agreed to dispense with that requirement. For the CSA to impose such an audit requirement upon issuers where corporate law would not otherwise require it seems unnecessary and, in our view, may prohibit early stage companies from being able to effectively utilize the OM Exemption to raise much needed start-up capital.

We believe it would be preferable to instead require disclosure in the offering memorandum itself of the type of financial and other reporting that investors can expect to receive and then allow the investors themselves to decide whether they are willing to acquire the securities being offered with full knowledge of that reporting.

3. Eligible Investor Definition

The Proposed Amendments create two different definitions of "eligible investor" depending upon the jurisdiction where the offering is being made, with separate thresholds existing in Ontario and New Brunswick from those deemed suitable in all other provinces. We view this as a negative result and a departure from the desirable trend towards harmonization of Canadian securities legislation across the provinces. We urge the CSA to re-examine the need for two separate "eligible investor" definitions and favour the definition currently proposed for use in provinces other than Ontario and New Brunswick.

We would like to take this opportunity to thank the CSA for its continued efforts to pursue improvements to Canada's exempt market regime. Should you wish to discuss any of our comments,

please direct inquiries to Bruce Hibbard at (403) 298-8141, or by e-mail at hibbardb@bennettjones.com.

Yours truly,

Bennett Jones LLP

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