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RE: Request for Comments on the Proposed Amendments to National Instrument 45-106 ("NI 45-106") relating to the Introduction of Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution

Dear Sirs/Mesdames:

Blakes appreciates the opportunity to comment on the proposed amendments to NI 45-106 and welcomes the goal of broadening access to the exempt market and maintaining appropriate investor protection and regulatory oversight. The focus of our comments is on how to best achieve these goals, without imposing compliance burdens on issuers and underwriters that are disproportionate to any possible benefit.

We are not commenting here upon the proposed amendments to add new prospectus exemptions. Our focus here is on proposed amendments that would have an impact on the broader existing regime for exempt distributions, in particular, the proposed new exemption distribution reports in Forms 45-106F10 ("**F10**") and 45-106F11 ("**F11**", and, together with F10, the "**Proposed Reports**"). The enhanced reporting in the Proposed Reports is not limited to crowdfunding or other new exemptions.

These comments apply to all Canadian private placements generally. However, we feel there is also a particularly concern about the potential introduction of significant requirements that do not exist in other major investment markets and which could lead to foreign issuers, in the United States or globally, choosing to bypass Canada, resulting in Canadian investors becoming unable to access those offerings[1]. Many of the private placements in which we are involved are by foreign issuers. In our experience, even seemingly minor compliance obstacles can result in foreign issuers and underwriters foregoing the extension of an offering into Canada.

We are also concerned that in the context of U.S. and global offerings certain of the proposed requirements are not merely minor compliance obstacles, but may be impractical to provide for Canadian post-trade filings.

The new information required in F11 for issuers that are not investment funds includes:

- Business email address of the issuer's chief executive officer ("**CEO**") and the underwriter's CEO.
- Year the issuer was formed and its approximate number of employees.
- Names of all marketplaces on which any securities of the issuer are traded.
- Name, title and jurisdiction of residence of each director, executive officer, control person and promoter of the issuer.
- For each investor, their age range if an individual and specific paragraphs of all categories of the accredited investor exemption that may apply.
- Filing copies of not only offering memoranda, but also copies of all presentations or other marketing materials that had been provided to investors in connection with the distribution.

[1] See letters of RBC Global Asset Management Inc. and AGF Investments Inc. dated February 26, 2014 and of Alberta Investment Management Corporation, Caisse de dépôt et placement du Québec and Ontario Teachers' Pension Plan Board dated February 26, 2014 in respect of proposed amendments to National Instrument 33-105 *Underwriting Conflicts* and proposed Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions* about concerns of institutional Canadian investors about difficulties accessing offerings by foreign issuers.

In addition to the information required in F11, investment funds would be required to disclose in F10:

- Legal structure and type of fund.
- Net asset value of the fund as of the date of the report.
- Full details of the investment fund manager, including the business email address of the CEO of the investment fund manager ("**IFM**").
- Name, title and jurisdiction of residence of all directors and executive officers of the fund and its IFM.
- The fund's trustee, portfolio manager, sub-portfolio managers, custodian, registrar/transfer agent and auditor.
- Total dollar value of redemptions since the last report filed, or in the case of the first report, all redemptions since the fund was created.

The Request for Comments makes the following two specific requests for comment:

1) Do the changes to the reporting requirements strike an appropriate balance between: (i) the benefits of collecting information that will enhance our understanding of exempt market activity and as a result, facilitate more effective regulatory oversight of the exempt market and inform our decisions about regulatory changes to the exempt market, and (ii) the compliance burden that may result for issuers and underwriters?

2) Should any of the information requested through the Proposed Reports not be required to be provided? Is there any alternative or additional information that should be provided that is not referred to in the Proposed Reports?

In response to 1), the benefit of collecting the additional information in some cases is not apparent, and thus in our view would impose an unbalanced compliance burden. We respectfully submit that some of the new requirements would not contribute anything material to regulatory understanding of exempt market activity nor would they make a material contribution to effective regulatory oversight of the exempt market sufficient to justify the additional burden. The explanation stated in the Request for Comments as the purpose for the Proposed Reports was simply "to obtain better information on exempt market activity". This may apply to reporting overall as a concept. Without more detail, it is difficult to comment on the benefits of requiring any particular additional item of information. Further, we submit that some of the proposed items that may provide better information on exempt market activity with respect to transactions that largely involve Canadian entities, including Canadian issuers, would not provide better information on exempt market activity in Canada where the transaction has little or no connection with Canada other than a very small number of Canadian institutional investors purchasing securities through exempt international dealers.

Only Ontario, Alberta, Saskatchewan and New Brunswick are proposing the new Proposed Reports. We view it as unfortunate that the private placement reporting regime in Canada is proposed to become so fractured. This can only drive up issuer and dealer costs. Accordingly, the benefits must be substantial. The details of those particular items which we feel seem to be unduly burdensome without a clear and material offsetting benefit are set out in this comment letter.

Accordingly, in response to 2), we feel that some of the information requested through the Proposed Reports should not be required to be provided.

When the British Columbia Securities Commission introduced its own Form 45-106F6, we expressed similar concerns. This led, in part, to the establishment by the British Columbia Securities Commission of BCI 45-533 *Exemptions from Form 45-106F6 requirements*, which provided a number of practical exemptions.

The following items are the specific reporting requirements in the Proposed Reports that we recommend should either not be required to be provided or, as discussed below in certain cases, if required, an exemption should be provided for distributions of securities of foreign issuers to permitted clients.

Item 1 (F10) and Item 2 (F11): Business email address of underwriter's CEO

Items 18 of F10 and 6.1 of F11 (as does current Form 45-106F1) already include the business email address of the person certifying the Proposed Report on behalf of an underwriter and Items 19 of F10 and 6.2 of F11 include the business email address of a contact person if different from the certifying person.

We note that this disclosure would be in the publicly available portion of the Proposed Reports, and thus would make public the individual email address of these underwriters' CEOs. That is not a customary disclosure. These entities may be global brands, where public disclosure of a CEO's individual email address may give rise to abuse, phishing or hacking attempts.

The purpose for this disclosure is unclear, given that the Commission already has the designated contact information. We respectfully submit that these existing other items provide sufficient initial contact information if a regulator wishes to obtain further information in respect of the filing of the Proposed Report and that this information does not enhance regulatory understanding of exempt market activity.

With respect to offerings by exempt international dealers, we note that in no other respect, including in its registration exemption filings, is there any requirement to provide information about the chief executive officer of an exempt international dealer.

Item 3 (F11): Business email address of issuer's CEO

The above comments with respect to the underwriter's CEO also apply to the issuer's CEO, but we would additionally note that certain information on the F11, in particular the identity of purchasers, may not be known to the issuer, if the underwriter is filing the report. Thus the utility of the Commission staff directly contacting an issuer's CEO is unclear.

(a) It is ordinarily an underwriter that handles the post-trade filings with Canadian securities regulators, with no involvement in the filing on the part of the issuer. More generally, under the agreement with the underwriters, compliance with securities legislation outside the home jurisdiction typically is the responsibility of the underwriters and foreign issuers usually do not retain their own Canadian counsel for this purpose.

(b) The effectiveness of such an initial communication is questionable. The CEO of a foreign issuer whose securities are distributed globally may not be aware that the securities are being sold, for example, into Ontario.

(c) The CEO of a foreign issuer (or other employees of the issuer or underwriters) may consider it inappropriate to provide information of that nature to the public, or even privately to a Canadian regulator, where it is not required by other foreign regulators, or even the home jurisdiction regulator, and, accordingly, may decide not to extend an offering to Canadian investors if it would trigger such personal disclosure.

This requirement becomes particularly problematic in the case of distributions by foreign issuers. It may significantly impact the number of foreign offerings to which Canadian investors have access without providing any regulatory benefit.

Item 3.3.1 (F11): Size of issuer and financial year-end

While the financial year end is a reasonable and simple to answer, we question the regulatory relevance of the month/day/year of formation of the issuer and its number of employees.

Many issuers may be entities that have undergone various reorganizations and transformations over a long period of time and identifying the date on which they were formed may not be straightforward.

The need to obtain this specific information in the event the underwriters succeed in making sales into Canada may cause the underwriters to forego offering securities to Canadian investors, unless they are certain this information will be quickly available.

We also question the regulatory relevance in the case of the similar item in F10, although the date of formation generally may be more readily available in the case of an investment fund.

Item 3.3.2 (F11) and Item 2 (F10): Reporting issuer status of the issuer

In the case of a foreign issuer, it may not have a SEDAR profile number. It is actually quite difficult to certify that a foreign issuer is not a reporting issuer in Canada. Foreign reporting issuers may have elected not to file on SEDAR, pursuant to section 2.1 of National Instrument 13-101 *SEDAR*. If so, the only way to verify lack of reporting issuer status is to individually check with each of the 13 securities regulators in Canada. There is no national reporting issuer list.

Item 3.3.3 (F11) and Item 2(F10): Listing(s) of securities of the issuer

We question the regulatory relevance of naming all the exchanges or marketplaces on which securities of the issuer are listed or traded on, especially when that relates to classes or types of securities other than those being offered.

We also note that National Instrument 21-101 *Marketplace Operation* defines "marketplace" very broadly, including many locations of which an issuer may itself be unaware, such as all ATSs, ECNs or even dealers who execute trades of an exchange-traded security outside of a marketplace.

Items 4 and 8 (F10) and Item 3.3.5 (F11): Directors and executive officers, including title and jurisdiction of residence

In the case of issuers that are reporting issuers in a Canadian jurisdiction, we submit that the burden of providing this information exceeds the benefit of collecting it because it duplicates information provided by reporting issuers in other filings.

The identification of executive officers, as defined in NI 45-106, involves significant and time-consuming analysis, *e.g.*, which units are "principal business units"; which individuals have a policy-making function? To be required to perform this analysis solely for a post-closing trade report seems unnecessarily burdensome.

For many foreign issuers, it would present a further compliance burden that would impact the economics of extending an offering into the relatively small Canadian market. Some foreign issuers extending private placements into Canada are among the world's largest companies, with large boards of directors and large numbers of executive officers. Thus, even for foreign issuers for which this information is available from public filings, we would consider the burden of compliance to greatly exceed any possible benefit to collecting this information.

Item 7 (F10): IFM information

In the case of Alberta, New Brunswick and Saskatchewan, the IFM of a foreign investment fund generally is not subject to a registration requirement so that the IFM would not have even been identified. Doing so may not be straightforward where one entity has delegated most of the tasks undertaken by an IFM to one or more other entities. The benefit to collecting this information is questionable where the IFM has registered in the jurisdiction or has made the filings to be exempt from registration because it duplicates information already readily available to the regulator, other than the business email address of the CEO, for which, as stated above, the F10 is not the appropriate context for collecting the information.

Item 9 (F10): Principal service providers

Although this information is not especially burdensome to provide, we question why this information is being collected. The benefit of collecting it in the context of a post-trade filing by a foreign investment fund that may make no more than one sale of its securities into Canada in any reporting period is not clear.

Item 4.3 (F11): Documents provided in connection with the distribution – presentations or other marketing materials

Although this is similar to the new public prospectus marketing rules, this requirement would be novel for private placements and goes well beyond what is required in the United States or any other jurisdiction of which we are aware. In the United States, there is no requirement to file an electronic roadshow. Instead, in the case of a registered offering, a copy of the roadshow must be maintained. Further, there is no filing requirement in the United States in connection with electronic roadshows or other marketing materials in Rule 144A offerings, nor is there a retention requirement.

This proposed requirement is a particular concern for foreign offerings. We have been advised by a number of our foreign clients that if they are required to make filings beyond the offering memorandum, of all marketing materials broadly, including term sheets and road shows, beyond what they are required to file or furnish to a regulator in their home jurisdiction, this will very likely mean they will no longer be willing to extend offerings into the Canadian jurisdictions that impose it.

There is also a practical problem in trying to ascertain after completion of an offering the provinces in which marketing materials were sent. In contrast to the final Canadian offering memorandum, which would be sent to all Canadian purchasers, certain marketing materials might be sent to some potential investors and not others or, alternatively, they might be in the form of presentations for which potential investors are provided online access for viewing only.

We would urge the Commission to reconsider extending the public prospectus marketing rules to exempt distributions. If the Commission wishes to retain this requirement, we would recommend considering an exemption for cross-border exempt distributions to permitted clients.

Item 15 (F10): Aggregate purchaser information – total dollar value of redemptions

This item requires entering all redemptions since the investment fund was created for the first F10 filed by the fund and, subsequently, all redemptions since the last report was filed. The regulatory purpose for this burdensome disclosure is unclear.

An investment fund may have been created many years before. As a result, compiling the total redemptions since the fund was created could be highly burdensome.

The gap between sales to Canadian investors by a foreign investment fund could be several years so that the total redemptions between filings could again be burdensome.

In both cases we submit that the benefit to collecting this information concerning investment funds would be outweighed by the compliance burden.

Information to Be Disclosed in Schedule 1

Please see our letter dated May 27, 2014 in response to the request for comments on proposed amendments to NI 45-106 published on February 27, 2014 about our concerns for additional information relating to purchasers and a list of all applicable paragraphs of the accredited investor exemption. In the

context of institutional investors such as registered advisers, authorized insurance companies and registered pension plans purchasing securities of a foreign issuer, the requirement to list all applicable paragraphs of the accredited investor exemption would be particularly inconsistent with both industry practice and other regulatory standards such as the inapplicability of know your client requirements.

Requirement to file reports in different formats in different Canadian jurisdictions

In addition, the multiplicity of reports proposed to be required to be filed in various formats across Canadian jurisdictions also imposes additional burden on issuers. If each of the proposed amendments to NI 45-106 are adopted, including those related to the accredited investor and minimum amount investment prospectus exemptions, issuers and their underwriters would be required to:

(a) report sales to British Columbia on Form 6 in electronic form, subject to certain British Columbia exemptions;

(b) report on F10 or F11, as applicable, electronically in Ontario;

(c) report on F10 or F11 in Alberta, Saskatchewan and New Brunswick in paper form; and

(d) report on Form 1 in paper form in the remaining jurisdictions of Canada.

Filing these various reports in different formats would be time consuming and costly, and may deter issuers from offering securities in some jurisdictions altogether in order to reduce their compliance burden.

Access of Canadian investors to foreign offerings

The Canadian securities regulatory authorities recently have proposed exemptive relief from the requirements of National Instrument 33-105 *Underwriting Conflicts* in connection with private placements made by foreign issuers to permitted clients. The goal of increasing access of Canadian institutional investors to foreign offerings would be undermined by the additional proposed post-trade reporting requirements if the amendments to NI 45-106 are implemented in the manner proposed. We recommend that securities regulatory authorities consider the impact in aggregate of the proposed amendments to NI 45-106 reporting, including the filing of marketing material, Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets* and the IFM registration requirement in certain provinces and assess whether the regulatory benefit justifies the compliance cost and the extent to which Canadian institutional investors will be excluded from participating in offerings by foreign issuers. We recommend the scope of the requirements be tailored so as not to cast too broad a net in light of the regulatory burden.

Currently Canadian regulation of the private placement market is often an outlier in global capital markets. Given the size of the Canadian investor base, global capital market practice generally will not adapt to meet Canadian requirements, which will result in the exclusion of foreign offerings from Canada or particular Canadian provinces to the detriment of Canadian investors and Canada as a financial centre. We recommend the Canadian Securities Administrators establish a committee of Canadian institutional investors and ask them for input on the impact of these requirements on their access to foreign investment opportunities.

Thank you for your attention to these comments. If you have any questions on this submission, please contact Ross McKee at ross.mckee@blakes.com or 416-863-3277, Pamela Hughes at pamela.hughes@blakes.com or 416-863-2226 or Ralph Lindzon at ralph.lindzon@blakes.com or 416-863-2535.

Yours very truly,

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