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June 18, 2014

Alberta Securities Commission
Financial and Consumer Affairs Authority (Saskatchewan)
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)

c/o Ms. Denise Weeres
Manager, Legal, Corporate Finance
Alberta Securities Commission
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and

c/o The Secretary
Ontario Securities Commission
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and

c/o Me Anne-Marie Beaudoin
Corporate Secretary
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Montréal (Québec) H4Z 1G3
consultation-en-cours@lautorite.qc.ca

and

c/o Ms. Susan Powell
Deputy Director, Securities
Financial and Consumer Services Commission (New Brunswick)
85 Charlotte Street, Suite 300
Saint John, NB E2L 2J2
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Dear Sirs and Mesdames:

Re: Request for Comment – Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution in Ontario

Multilateral CSA Notice of Publication and Request for Comment Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* Relating to the Offering Memorandum Exemption and in Alberta, New Brunswick and Saskatchewan, Reports of Exempt Distribution

This letter is provided to you in response to the OSC Notice and Request for Comment – Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution in Ontario, published on March 20, 2014 (the "**Ontario Proposed Amendments**"). This letter is also provided to you in response to the publication of the Multilateral CSA Notice of Publication and Request for Comment Proposed Amendments to National Instrument 45-106 - *Prospectus and Registration Exemptions* Relating to the Offering Memorandum Exemption and in Alberta, New Brunswick and Saskatchewan, Reports of Exempt Distribution (together with the Ontario Proposed Amendments, the "**March 20th Proposed Amendments**").

Our comments in this letter address the proposed new reports of exempt distribution in Alberta, New Brunswick and Saskatchewan. We are not commenting specifically on the proposed new prospectus exemptions in the March 20th Proposed Amendments. However, as a general comment, we must express our extreme disappointment that the members of the CSA have not been able to agree upon on a uniform framework of nationally available prospectus exemptions and exempt trade reporting requirements. We believe that continuing to have a patchwork of inconsistent requirements across the country is detrimental to Canada's capital markets, its credibility in the international arena and the ability of issuers and investors to engage, on a harmonized national basis, in capital-raising activities that are beneficial to the Canadian economy and necessary for Canada to remain globally competitive. While we acknowledge that certain prospectus exemptions are designed to facilitate early stage and small business financing, which can be local in nature, this local activity does not warrant a fragmented approach to prospectus exemptions or exempt trade reporting. In our view, Canada's capital markets, including investors, intermediaries and issuers operating in local markets only, would greatly benefit from consistent, harmonized securities regulation.

Proposed New Reports of Exempt Distributions in Four Provinces

We have previously expressed our concern regarding the changes to Form 45-106F1 proposed by the CSA in the Notice and Request for Comment published on February 27,

2014 (the "**February 27th Proposed Amendments**").[1] Those changes were relatively modest in comparison to the extensive changes to the Canadian private placement trade reporting regime set out in the March 20th Proposed Amendments.

We wish to reiterate and amplify our previously stated concern that imposing more detailed, complicated, cumbersome and nationally inconsistent private placement trade reporting requirements is not in the public interest. We understand that the regulatory authorities in the Provinces of Alberta, New Brunswick, Ontario and Saskatchewan (the "**Four Provinces**") are proposing changes to the private placement trade reporting requirements in order to gather more information about the Canadian exempt market, with the ultimate objective of using that information to help facilitate capital raising while concurrently protecting the interests of investors. However, with respect, we believe that the benefit of gathering this additional information about the operation of the Canadian exempt market will be outweighed by unintended detrimental effects. We are gravely concerned that the proposed exempt trade reporting requirements will substantially increase the costs of capital raising for Canadian businesses through the significant additional compliance burdens they would impose. Further, we do not believe that foreign dealers operating under the "international dealer" exemption will be able to comply with the new reporting requirements on a cost effective basis, if at all. As a result, we do not believe that Canadian institutional and other accredited investors would be able to continue purchasing non-Canadian securities on a private placement basis, because foreign dealers may not be able to obtain the information required by the new reporting forms. The long-established market practice of selling securities of non-Canadian issuers into Canada on a private placement basis, through the use of a "wrapper" around a non-Canadian offering document, or in reliance on the "wrapper" exemption orders that have been obtained by some dealers, could be brought to an end.

The new forms proposed for the Four Provinces will require, among other things, significant additional information which is not currently required in order to complete existing Form 45-106F1. Each of these additional items imposes a new and burdensome compliance requirement on capital markets participants, but is especially problematic when considered in the context of a lawyer, paralegal or other service provider (the "**Preparer**") completing the required trade report form on behalf of an international dealer (the "**Dealer**") that has acted as the underwriter, initial purchaser or placement agent of a U.S. or global offering by a non-Canadian issuer (the "**Issuer**"), with private placement sales having been made to Canadians with a Canadian "wrapper":

[1] Please refer to the Osler comment letter filed with the CSA on May 28, 2014.

Form 11 for a Non-Investment Fund Issuer:

- *The name of the issuer's parent, if applicable*. The Preparer will have to review the offering memorandum to determine this information. If not disclosed, or if no offering memorandum was used, the Preparer will have to seek out an individual at the Dealer who is sufficiently knowledgeable about the Issuer to provide this information.

- *The business e-mail address of the issuer's chief executive officer*. This information will not be available to the Preparer, may not be known to the Dealer and may not be information that the Issuer is willing to provide to the Preparer.

- *The year of the issuer's formation.* Unless this information is clearly stated in the offering document, which may well not be the case, the Preparer will have to contact the Issuer to obtain this information, as it will not likely be known to the Dealer.

- *The approximate number of employees of the issuer*. If not stated in the offering document, the Preparer will have to seek this information from the Issuer, who may not be willing to provide it, or attempt to conduct research to obtain this information from a publicly available source. A public source may not have reliable or current information.

- *A list of all exchanges or marketplaces where the issuer's securities are quoted or traded.* The Preparer will have to obtain this information from the Dealer, who would have to consult a Bloomberg terminal, trading screen or similar source of financial information in order to supply a comprehensive list.

- *A list of the directors, executive officers, control persons and promoters of the issuer, their titles or positions, and their jurisdiction of residence*. It is unlikely that all of this information will appear in an offering document. The Preparer would have to contact the Issuer to request this information, and the Issuer is unlikely to be willing or able to provide it.

- *A copy of all marketing materials, including investor presentations, to be submitted with the exempt trade report (not only the offering memorandum, as currently required)*. The Preparer would have to obtain copies of these documents from the Dealer or the Issuer. Unless the document is an "offering memorandum" as defined under applicable Canadian securities laws, it may not be possible for the Dealer to be able to identify with certainty what documents have been delivered to particular investors in specific provinces. Further, investor presentation materials are often made available by way of the internet, on a basis

that does not permit the viewer to download, record or print the contents. Neither the Dealer nor the Issuer will wish to provide copies of such materials to securities regulatory authorities in Canada if copies are not required to be delivered to the home country securities regulatory authority, or securities regulators in any other country. We believe that in most circumstances the Dealer and the Issuer would not be willing to offer securities to Canadian investors if this requirement were to be adopted.

Further, we note that additional guidance regarding advertising of private placement offerings is proposed to be added to Section 3.3 of Companion Policy 45-106CP. The additional guidance would state certain expectations of the Ontario Securities Commission regarding the use of marketing materials in addition to or in place of an offering memorandum or other offering document. We do not believe that the statements proposed to be added to Section 3.3 constitute the appropriate subject matter of a companion policy, and that the Ontario Securities Commission is improperly attempting to effect a change to the legislative framework, established by statute and rule, regarding the requirements for and consequences of the use of an "offering memorandum" as defined by statute under Ontario securities laws. If such changes are to be considered, we respectfully suggest that they should be the subject matter of a statutory amendment or rule.

- *The specific exemption being relied upon (including, for an accredited investor, all of the subparagraphs of the definition that the investor qualifies under, not just the one being relied upon).* Neither the Preparer nor the Issuer could possibly have access to this information and we believe that in most cases the Dealer will not be able to provide this information, or obtain it from the investor. Sales to institutional investors that are made with a Canadian "wrapper" generally rely on deemed representations and warranties that the investor is an accredited investor, and that reliance is reasonable in circumstances where it is obvious that the investor meets at least one of the criteria for qualification as an accredited investor. However, there is no way a Dealer would be able to identify all of the potential subcategories under which an investor might qualify without obtaining that information from the investor specifically for the purpose of trade reporting. There is no reason that such information would have been previously obtained or retained. The Dealer is unlikely to be willing or able to obtain this information from the investor each time a particular offering is conducted, and is also unlikely to be willing or able to maintain databases or other information systems to keep track of this information comprehensively for all of its Canadian clients.

- *For individual purchasers, the purchaser's age range.* In most cases the Dealer will be unable to supply this information to the Preparer. There is no reason to

expect that the Dealer would be aware of this information with respect to its individual clients, and it is not reasonable to expect that the Dealer would obtain and retain this information for each of its individual clients.

- *Disclosure regarding beneficial purchasers where sales are to an investment manager*. The instructions to Form 45-106F1 currently include a statement that references to a purchaser in the report are to the "beneficial owner" of the securities. In practice, in the context of purchases by an investment manager on a fully discretionary basis, this statement has been interpreted to refer to the trust company or investment manager that is deemed to be purchasing as principal pursuant to Section 2.3(2) or Section 2.3(4) of National Instrument 45-106. It has been assumed that because such purchasers are deemed to be purchasing as principal, they are in fact to be treated as if they were also the beneficial owners for the purposes of this reporting requirement. A change is being proposed to the instruction that would expressly state:

  > If a trust company or a registered adviser has purchased on behalf of a fully managed account under subsections 2.3(2) and (4) of National Instrument 45-106 *Prospectus Exemptions*, give information about both the trust company or registered adviser and the beneficial owner of the fully managed account.

  In most cases, it will not be possible for the Preparer to obtain information regarding the beneficial owners of the fully managed accounts in these circumstances. The Dealer will not have access to this information, as the purchaser to which it is confirming the sale will be the discretionary manager. Persons acting on behalf of a managed account on a fully discretionary basis are not required, and generally will not be willing, to disclose the identity of the underlying beneficial owner of the account to the Dealer.

Additional or Different Information Required by Form 10 for an Investment Fund Issuer:

- *The date that the fund was created.* This information is unlikely to be included in the Issuer's offering document, and there is no reason to expect that the Dealer would have access to this information. Individual officers of the Issuer who are contacted by a Preparer seeking this information are unlikely to be in a position to provide a response as they would have no reason to know the answer. A review of the issuer's formation documents will not necessarily provide responsive information either, if the intention is to provide the date that securities of the Issuer were first sold to investors. Obtaining that information could require a review of historical documentation long predating the employment of any of the current officers or employees of the Issuer.

- *The full legal names of all directors and executive officers, and their titles and jurisdiction of residence.* The names listed in an offering document, or appearing in the Issuer's records, may not be full legal names and are unlikely to include all of the relevant individuals or all of the required information about them. It is likely that the Preparer would have to contact each of these individuals directly in order to solicit this information. Further, the directors and executive officers, and their titles and jurisdiction of residence, may change from time to time. In consequence, a Preparer would be required to conduct an ongoing update of this information on a quarterly basis in order to ensure that it is correct each time that a trade report is filed pursuant to the proposed quarterly trade reporting requirements for investment funds.

- *The size of the fund (its global net asset value) on the date the trade report is filed.* This information is typically only available to an investment fund on specific cut-off dates for record keeping or reporting purposes, most likely tied to the preparation of annual, quarterly or monthly portfolio statements. Some amount of time is needed to collect and process the relevant information for the cut-off date, so this information will always be with respect to an earlier date of determination. The Issuer will not be able to provide the Preparer with this information for the specific date of the trade report filing.

- *The names, titles and jurisdiction of residence of each director and executive officer of the investment fund manager.* This information will not be available to the Preparer, the Dealer or the Issuer. An unaffiliated fund manager will not be under any legal or contractual obligation to disclose this information to the Issuer, and it is unlikely that the fund manager would be willing to provide this information to the Issuer solely to facilitate private placement sales in Canada. Although the manager may be subject to regulation as a non-resident investment fund manager in certain provinces of Canada, the information proposed to be required for trade reporting purposes goes beyond the information required for the purposes of compliance with the fund manager registration requirements and exemptions. Further, even if the fund manager were willing to co-operate with a request for this information and provide it to the Preparer, obtaining the information and updating it on a quarterly basis (to ensure currency at the time of each required trade report filing) would be a costly process and the cost would ultimately be borne by investors.

- *The names and head office locations of the fund's trustee, portfolio manager, sub-portfolio manager, custodian, registrar/transfer agent and auditor.* At first instance, the Preparer will have to conduct a thorough review of the offering materials for the Issuer to attempt to identify this information. Some, but not all, of this required information is likely to be disclosed in the offering materials, but

it is unlikely that all of it will be, and there is no assurance that it will be current to the date of the required trade report filing as offering materials for funds are often updated only on an annual basis. Initially, and thereafter for each required quarterly trade report, the Preparer will have to contact both the Issuer and the fund manager to obtain or confirm this information.

- *The total dollar value of all distributions made worldwide by the investment fund since the date of the last trade report that was filed (and, for the first trade report being filed, the total dollar value of all redemptions ever made by the fund, worldwide, since it was created)*. We do not believe that most investment funds would track this information on a historical basis, dating back to the inception of the fund, for any commercial purpose or for the purpose of complying with the regulatory requirements of any other jurisdiction. While it should be possible for the appropriate officer of the Issuer to compile this information for the Preparer, we anticipate that in most cases a manual review of historical financial statements and other documents would be necessary, entailing significant time and expense.

- *Frequency of Reporting*. The securities regulators in the Four Provinces are proposing to require investment funds to report on private placement sales on a quarterly basis, rather than on an annual basis as currently required. While we understand that this proposal is intended to enhance the availability and timeliness of information about investment fund private placement sales, it would also increase compliance costs for both Canadian and foreign investment funds, and those compliance costs are ultimately borne by investors.

Even if all of the information necessary to complete the new proposed private placement trade report forms could be obtained, the March 20th Proposed Amendments will create a chaotic patchwork of varying requirements across Canada. There would be two new exempt distribution trade report forms required for use in the Four Provinces, with electronic filing required in Ontario and paper filing required in the other three provinces. One version of the new form would be for investment fund issuers, while another version would be for non-investment fund issuers. In addition, British Columbia will continue to have its own Form 45-106F6 form. The existing paper-based Form 45-106F1 will continue to be required in all the other provinces and territories. Preparing filings when exempt distributions occur in multiple provinces would at best be significantly more complicated, confusing, time consuming and expensive than it is at present, and at worst impossible if required information cannot be obtained.

* * * *

We would like to take this opportunity to thank the securities regulators in the Four Provinces, and the other Canadian securities regulatory authorities, for their continued

efforts to pursue improvements to Canada's exempt market regime and ensure the ongoing protection of Canadian investors. However, for the reasons we have identified in this letter, we encourage them to be mindful of the unintended and undesired consequences that would result from increasing the compliance burdens imposed on capital markets participants, particularly foreign securities dealers, investment funds and other issuers, to a degree which is disproportionate to the investor protection benefits sought to be obtained for the Canadian purchasers involved. One potential consequence could be a reduction in the availability of foreign issuer securities to Canadian investors, which would not be in the best interests of the Canadian capital markets. We respectfully suggest that an appropriate balance might be struck through the use of a tiered approach, in which the March 20th Proposed Amendments or a modified version of them would apply where warranted by investor protection concerns, but simplified reporting would be available for market participants who limit their sales of securities to large institutional investors or other sophisticated investors who are less in need of regulatory protections, and would likely be willing to forego the benefit of certain protections in order to have the benefit of continuing to be able to acquire foreign issuer securities for their investment portfolios on a private placement basis.

Should you wish to discuss any of our comments, please direct your inquiries to Rob Lando at (212) 991-2504, or by e-mail at rlando@osler.com, or Blair Wiley at (416) 862-5989, or by email at bwiley@osler.com.

Yours very truly,

Osler, Hoskin & Harcourt LLP