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Re: Commentary on Multilateral CSA Notice of Publication and Request for Comment- Proposed Amendments to NI 45-106 Prospectus and Registration Exemptions relating to the Offering Memorandum Exemption and in Alberta, New Brunswick and Saskatchewan, Reports of Exempt Distribution and in Ontario amendments to OSC rule 45-501 Ontario prospectus and registration exemptions and related amendments.

I am writing to comment on the proposed amendments to NI 45-106. In the main body of the submission is my discussion of the overall scope of the proposed changes; Appendix A is my response to your specific questions put forward in the proposal.

Accilent Capital Management Inc. is a registered as a Portfolio Manager (BC, AB, SK, MB, ON, QC), Investment Fund Manager (ON), Exempt Market dealer (BC, AB, SK, MB, ON, QC) and Commodity Trading Manager (ON). Accilent Capital Management (ACM) is a significant participant in the exempt market both before and after the implementation of NI 31-103. Registered since 2002 our business model since 2008 is to design, distribute and manage investment products for the exempt market.

I would first like to commend the Canadian Securities Administrators (CSA) on the implementation of NI 31-103. It has been a valuable step towards investor protection and also creating an organized and regulated market to serve the special needs of small and medium size enterprise (SME), eligible and accredited investors. This is a solid foundation upon which the industry and regulators can build.

It is commendable that the CSA is taking a particular interest in ensuring access to capital for SMEs while maintaining a strong commitment to investor protection with the proposed amendments to NI 45-106. It is also equally good that there is a comment period on these proposals because, as they are currently proposed, several will have an adverse effect on both accessibility of capital and investor protection.

Annual investment limits on eligible investors.

Creating an annual limit on how much an investor can allocate in total to exempt market securities appears to be a solution to the issue of over-concentration of some investors in some exempt market securities. Reducing over-concentration in investors' portfolios is a worthwhile goal not just for regulators, but for all investment practitioners regardless of whether their regulator is the CSA, MFDA or IIROC. If you look anecdotally at any financial tragedy the underlying reason is that investors had far too large an exposure in their portfolio. Portfolios are purposely not homogenous specifically because investing involves far too many unknowns to concentrate too heavily on one investment or one sector. Lack of proper diversification is the most common investment error and helping people avoid that error is a commendable goal. However, creating "one size fits all" investment cap is a significant move in the wrong direction. After all of the good work that has been done with the introduction and implementation of NI 31-103 and the renewed emphasis and clarity on KYP, KYC and client suitability, to then undermine the spirit of all that work by mandating annual caps, effectively doing a philosophical about-face, would be unfortunate for the regulatory regime.

Here are several issues that may come into play if investment caps are implemented:

1. Issuers that promote with the biggest marketing budgets and/or the highest commissions will get priority treatment when potential business is either actually or perceived to be restricted. These budgets inevitably come from investor's returns in terms of higher management fees, commissions or expenses creating a race to the bottom in terms of performance. The goal rather, should be to increase investment volumes in a responsible fashion, so that investment costs go down for issuers and investors creating more efficient exempt markets that also provide strong investor protection.
2. A mandated dollar cap will create an overly competitive environment among issuers which will foster an emphasis on transactional relationships rather than advisory relationships to the detriment of investors.
3. With an annual cap of only $30,000 or $10,000 it could take investors five years or more to create a diversified portfolio of exempt securities which is still just a sub-portfolio of their overall financial assets. Long implementation periods can be more risky than the same plan executed over 12-24 months because in the formative stages you would by definition, with caps, have an exempt portfolio of only one security, then two etc. This is the antithesis of portfolio theory and the true goal of the CSA.
4. Rebalancing an eligible investors' portfolio may be impaired by not wishing to reduce exposure for fear of losing the ability to ever get that investment room back into the portfolio or conversely taking on too much risk at the wrong time for fear of the same.

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5. Investors may be tempted to also invest in less than ideal investments before the "annual window" closes and they lose that investment room. More suitable opportunities may be on the horizon, but "good enough" opportunities right now may be more attractive than losing the investment limit for the year.
6. When the focus of any investment service becomes transactional in nature you create an industry culture of "If I don't get this money than someone else will". In my experience it is often the lower quality, less conscientious participants who have the advantage in this type of arena because they are often not weighed down by a long term commitment to the client and a moral compass that is just too heavy to move swiftly enough to compete in the short term.
7. For investors that are incorrectly being advised to buy only one security from a single issuer they will still have portfolios that are concentrated. It will just happen over a longer period of time. The end results of poor diversification will still be the same it will just take longer to see the results and reduce the time available to recover from the error.

Here are some logistical issues of implementing investment caps:

1. Is this going to be implemented through self-reporting by investors? What if investors make an error of amount or date?
2. Can an investor carry forward unused investment limits? How is this going to be monitored?
3. Redemptions and distributions. Are these going to add to investment limits? What if the investors' non-exempt investments have a particularly good period of returns and rebalancing, which is a proper activity in any portfolio, exceeds the available investment limit?
4. How is a dealer or even less likely, an issuer, to know how much a client has invested in exempt market securities in the last year in order to monitor the cap?
5. What happens if a client has over-invested? Are the dollars returned? What if the act of returning the investment harms other investors in the same portfolio?
6. Forcing investment timing into artificial one year "seasons" just creates an industry focused around the availability of funds and ignores the availability of proper investments. It will create much inefficiency and substandard portfolios.

The bottom line for the fixed dollar caps is they create a lot of negative unintended consequences while not solving concentration issues in portfolios in any meaningful way. I believe there is a better way to solve concentration issues without using a bright line test rule in order to do it.

Investment Funds prohibited from using the eligible investor exemption.

I believe the proposed prohibition on investment funds being able to use the eligible investor exemption is misguided. Investment funds in the exempt market provide a valuable conduit for capital to companies and niche investments for eligible and accredited investors. These funds provide SMEs capital through lending; direct share purchases from treasury; purchase and restructure companies in private equity transactions and; in general provide sophisticated financial management and services in a corporate sector which is unable to be served by the other categories of registrants.

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It is surprising to see this restriction on fund participation from regulators whose purported goal is investor protection and efficiently functioning capital markets. I am at a loss to understand how having a fund, run by a skilled professional, registered and regulated, would not be a welcome risk reduction tool for eligible investors while being desired for other categories of investors such as accredited investors and for the general investing public. How do regulators believe that an investor making a single investment of $10,000 with one company is less risky than placing that $10,000 with a fund where it is allocated across multiple investments of the same theme?

The investments in my main fund activity are venture capital-like in their returns. Many of the investments in a portfolio will not perform well, yet a few perform spectacularly well, driving the performance for the overall portfolio. This kind of investing cannot be successfully executed by an individual investor making individual investments. We make roughly 25 investments in each of our portfolios, a number requiring too much capital for eligible, and most accredited, investors to make, plus it requires constant monitoring and specialized knowledge to manage well. Greater specialization and infrastructure than an EMD could provide on a portfolio of similar single investments is also required. This is just too specialized an activity for individuals or dealers to take on. A fund is the best way to structure these investments. All the funds I have seen raising capital in the eligible investor space, offer the same general features to their investors; professional management; specialized sector knowledge, specialized infrastructure and networks; and diversification. Prohibiting eligible investors from accessing these investment features would be a significant step back in terms of investor risk and small and medium size enterprise (SME) access to capital.

I have heard a senior regulator say that one reason they did not want funds to be able to use this exemption is because they did not want to undermine the public markets regulatory regime by providing a venue for funds to operate away from the prospectus regulations. On the surface this would appear to be a valid reason. If someone wants to run a fund why don't they raise the money with a prospectus and become reporting issuers like everyone else? However, having experience structuring closed end funds for the public capital markets and the exempt market I can assure the CSA this is not the case. My funds and every other fund I have seen currently operating in the exempt sector, would not meet NI 81-102 requirements. Whether it is the allocation to private securities, an inability to cost effectively strike a timely NAV, lack of liquidity to offer redemption ability etc., all of the investment thesis' of these funds would not meet NI 81-102 for any number of reasons.

The overarching business reason these funds could not meet NI 81-102 is also directly related to the immense value they add to the Canadian economy. They almost invariably concentrate their efforts on the SME sector either completely or in majority. Because of its small enterprise size, small transaction size, lower liquidity and high transactional effort this sector cannot be served efficiently by the other participants in the financial markets.

These are not funds that are hiding from greater scrutiny or regulation. These funds have identified specific business and investor needs and have developed strategies to profitably fill those needs for their investors, for the SMEs and for themselves. The funds cannot raise capital under NI 81-

102 because the underlying nature of what they do does not allow a fit with the requirements of that national instrument. NI 45-106 is the only avenue they have to execute their investment thesis.

Another compelling argument for exempt funds not wishing to raise money in the public markets, even if they could, is that they would raise too much money either overall or too quickly. These investment ideas in the exempt market are often niche in nature and they just can't practically absorb the size or speed of investment capital that would be generated from a public fund offering. Nor could they tolerate a reversal of that capital flow which is also common in the public markets when something falls out of favour. Niche markets need to be served by niche products with capital raised from niche investors. Finding an efficient method of allocating capital is the market operating naturally.

Having an active capital markets for funds and SMEs has real economic benefits. Here are two personal examples from just the last year for our funds. We have many more throughout our history. One company which we funded as a private company pre-IPO starting in 2012 and invested in every non-brokered private placement they had since, drilled a discovery hole in the Athabasca basin this past winter. Our funds are one of the largest non-founding shareholders of the company. Another company in which we started investing in 2011, when everyone else sharply reduced their commitments. We have continued to invest in since, becoming their largest shareholder. They also drilled a discovery hole in the basin. The first company has now started to get support from the smaller brokerage firms and the second has not yet but soon will. My point however, is both of these companies, were it not for the availability of capital from my funds and others like mine who concentrate on the smallest of the small in the sector, those holes would never have been drilled or would have been delayed many years or even decades. The jobs related to making those discoveries and all the jobs which will come after would not exist. The resources which have been found would not benefit Canada's economy. The returns generated by these discoveries would also not accrue to the investors whose money we directed to these investments. I am positive that the lending, private equity, and other funds raising capital in the exempt market also have many stories similar to these.

The activities of funds in the SME sector raising money in the exempt market are providing valuable services to their investors, the companies they finance, the employees of those companies and to the Canadian economy every day. This is not a service that can be provided by other sectors or that other sectors are willing to provide and it is essential to the continued health of the economy and to the investment returns of our investors.

Prohibition of distributing securities of related issuers

This proposal is particularly important to me because this is how my company got started and has grown. Breaking into the industry, it is very difficult for new fund managers with new methods or markets to gain traction. Developing and expanding proof of concept for my fund ideas was entirely started by self-distribution. No third party was or would be willing to take a chance on a new name so I had to do it all myself initially. Once proof of concept was attained I could then start approaching EMDs to carry my funds. As part of the due diligence process, then and now, a performance record is a key piece of information. Attaining this milestone will be nearly impossible for new fund managers without

the ability to use the only person who initially believes in them, themselves, to distribute their products. Now that ACM is established, over 90% of our capital is raised by other dealers. This proposal will still have a measurable impact. However it will hand a large portion of the EMD funds sector permanently over to the few established fund managers serving the space. In doing so it will kill the establishment of new entrants and any innovative ideas they may bring. There is no incubator for fund companies in capital markets, this is the only place they can take the stage. To remove it will be harmful to the overall exempt space and future capital allocation efforts.

Furthermore, the exempt space is still maturing. The participants are still gaining experience and the overall market structure of EMDs is still fairly small. The dealers hold a huge amount of power in the space due to the concentration of distribution with just three larger EMDs and a handful of smaller ones. Complete dependence on external distribution is a large business risk that can only be managed by having a credible ability to self-distribute if accessing the EMD channel becomes too expensive or is closed due to other unforeseen issues. Self-distribution adds balance to the current oligopolistic market structure of dealers and prevents market abuse. When I use the term oligopolistic I want to make it clear that I do not think that the market participants are being predatory, or acting in any non-competitive way. I use oligopoly purely as a description of the market structure.

Finally, self-distribution is a perfectly acceptable practice in all areas of commerce and particularly finance. My 75 year old mother is regularly asked by the teller at her bank if she would like to invest some of her savings in mutual funds. Those mutual funds, I can assure you, are managed by an entity related to the bank. My mother knows this and acts accordingly. The same happens in insurance, brokerage services, car dealerships etc. Most everyone is aware of the conflicts and potential conflicts of the arrangement, but we go further in finance and disclose it up front to investors. To allow self-distribution to occur in other sectors while prohibiting it in the exempt market is clearly inconsistent and does not serve a useful purpose except to paper over the real issue with self-distribution. I believe I understand why the CSA has flagged the issue. I am sure it has to do with some self-distributing issuers selling far too much of their investment product to individual investors and causing a concentration risk in their portfolios. Some of these issuers have subsequently run into financial trouble handing those investors, who were sold far too much, a serious financial blow. I also believe that this situation is already easing as regulatory efforts at enforcing better KYC and suitability are improving practices. At ACM, in addition to our own funds, we also carry eight other investment products from unrelated issuers that our Dealing Representatives can use in creating client portfolios. There is no incentive or pressure to use our funds in preference to any other and suitability is just as important when investors purchase our investments from us as it is when they purchase others'. We believe that is a responsible model to follow. In fact it is a more open market model than the one that is adopted by large financial institutions such as the major banks. Many other small issuers in the exempt market also use this model and we encourage others to do the same. Unfortunately, not every issuer sees the merit in this model, but I believe there is a solution.

Alternative solution to dollar caps and prohibition on related entity distribution.

In the proposals for capping eligible investors annual investment amount and the prohibition of distribution of exempt products to eligible investors by related entities I strongly believe the CSA are reacting to the actions of a few market participants who have improperly and to the detriment of clients created portfolio concentration issues by selling too much of their own securities to clients. However, there are many issuers in the market place who operate prudently and create very good portfolios for their clients. I do not believe the proposed solutions would be effective at avoiding or eliminating the poor behaviour regulators are targeting. I propose a different solution which will lead to greater attention by all market participants of the types of portfolios they are creating. The idea I put forward is the CSA require a concentration report be submitted by all dealers and issuers that would list all the investors who make an investment that brings an investment position equal to or greater than 10% of financial assets. When I say all dealers I mean all CSA regulated as well as the MFDA and IIROC SROs, because good portfolios benefit all investors, not just exempt investors. The principle I am relying on is one of "what gets measured, gets managed". By requiring this report the regulators can be confident that dealers and issuers will be very sure that if a client has an investment that puts them on the concentration report that it has definitely been given a lot of scrutiny because nobody wants to be at the top of a regulator's reading list without a good reason. Clients will also know that this report is created and will provide a point of sober second thought that if regulators feel strongly enough to commit resources to monitoring portfolio concentrations then perhaps they had better work through it carefully with their advisor. By using such a reporting mechanism the CSA can leave all dealers to operate to their clients' best interests and not assign caps or other arbitrary controls which interfere with proper market functions. At the same time CSA members would be alerted to market participants that may require some additional attention to ensure investors' interests are being protected. Lastly, in order to create and monitor this report dealers and issuers would have to accurately monitor their clients net financial assets leading to a higher quality of know your client interaction and hopefully, better portfolios, fewer financial tragedies, and a more trusted financial industry.

I would like to thank the Canadian Securities Administrators for providing the opportunity to comment. Please contact the undersigned if there are questions regarding the main body of commentary or the Appendix A answers to your questions.

Sincerely,

Daniel Pembleton, MBA, CFA
President & Portfolio Manager

Appendix A

Question I

Under the current framework in Alberta, Quebec and Saskatchewan, both individual and non-individual investors are subject to the $10,000 annual investment limit if they do not meet the definition of eligible investor. Should non-individual investors, such as companies, be subject to the $10,000 limit if they do not qualify as an eligible investor? Please explain.

Answer:

Yes.

For securities purposes we do not believe there should be a distinction for eligibility purposes between an individual and their holding company.

Question 2:

Are there circumstances where it would be suitable for an individual eligible investor who is not an accredited investor and not eligible to invest under the FFBA exemption to invest more than $30,000 per year under the OM Exemption? If so, please describe them.

Answer:

Yes.

There are numerous examples of high net worth individuals and/or high income earners that have substantial incomes but do not quite reach the accredited investor level in either net financial assets, net assets, or income, who would be suitable to invest more than $30,000 per year under the offering memorandum exemption. Some examples are as follows:

1. "saving years" Investor – late 50's
    a. Earns $175,000, spouse does not work, children grown
    b. Financial assets of $675,000 and increasing quickly, all invested in large cap mutual funds and various bond funds. Wants more exposure to tangible assets and less to stock and bond markets.

2. Chiropractor/Dentist/Lawyer/Accountant in first 5 years of their career
    a. Income is at $ 150,000 per year, and increasing annually
    b. Investing in long term value investments to enhance their expanding traditional portfolio of ETF investments

3. Business Owner – late 40's
    a. Business is estimated to be worth $2-4 million
    b. Has income of $150,000
    c. Understands business and investing very well. Wants private equity style investments to enhance and diversify her main business asset

There are many scenarios that occur where an eligible investor would very reasonably purchase more than $30,000 per year under the offering memorandum exemption. The Proposed Amendments apply a "one size fits all" approach that unnecessarily restricts the rights of investors and investor choice. That approach takes the suitability and KYC work and virtually throws it away in favour of a mandated approach.

Question 3:

Given the costs associated with doing so, how likely is it that an individual would create a corporation or other entity to circumvent the $30,000 cap?

Answer:

Very unlikely. The annoyance factor of having to run a corporation just to skirt an arbitrary investment cap would seem very costly.

Question 4:

Investors who do not qualify as eligible investors based on net income or net assets can qualify as eligible investors on the basis of advice from a registered investment dealer. In what circumstances do investors actually seek and receive advice from a registered investment dealer? Does this introduce any complications or difficulties?

Answer:

Investors are wary of using an investment dealer because they understand their bias that any investment that isn't on their books is a bad idea because they just have not been exposed to the private side of the capital markets. We have had instances where investment dealers didn't even know it existed. Imagine the complications that situation would create.

Question 5:

The eligible investor definition includes persons that have a net income of $75,000 and persons that have net assets of $400,000. These income and asset thresholds currently apply equally to individual and non-individual investors, such as companies.

a. ***Should the $75,000 income threshold only apply to individuals? If so, please explain.***

Answer 5a:

The $75,000 threshold should apply to both individuals and companies. We see no reason to differentiate for eligibility determination purposes.

Controlling shareholder(s) of the holding company could be required to satisfy the criteria for "eligible investor".

b. ***Should the net asset amount exclude the value of the principal residence for individual investors? If so, should the $400,000 net asset threshold be lowered as a result?***

Answer 5b:

The principal residence should be included. We take the view that assets are assets and liabilities are liabilities. This also reduces the renter's bias where individuals who downsize and rent would show better on a net financial assets test than a home owner. The character of an investor's assets and liabilities is where suitability of an investment or investment plan is determined.

c. ***Should pensions be included in the net asset test under the OM Exemption? Please provide the basis for your answer.***

Answer 5c:

Again we view all assets as assets and they should be included in the net asset test but also the nature of the asset would be factored into security selection and suitability decisions.

Question 6:

The FCAA would appreciate feedback on whether lawyers and public accountants should continue to be considered "eligibility advisers" in Saskatchewan for purposes of the OM Exemption. Please provide the basis for your opinion.

Answer:

Lawyers make good eligibility advisers. Only lawyers familiar with securities law and practices normally give advice and they usually go beyond the financial aspects of an investor's affairs and inquire into the nature, viability and suitability of the investment. Lawyers generally ask good questions and often can recognize investments that just don't make sense.

Public accountants (new title to be Chartered Professional Accountants) also make good eligibility advisers. They are highly qualified to evaluate the investor's financial position as well as the business and financial aspects of the investment and advise accordingly.

In general, however, eligibility advisor tend to gravitate to the extremely sceptical end of the spectrum because there is only downside for them if they offer an opinion on an investment.

Question 7:

How common is it for an issuer that relies on the OM Exemption to make annual financial statements available to security holders?

a. ***How is this done? Are they delivered?***

Answer 7a:

I am surprised that there would be an issuer that would not have annual financial statements available. Real investments generate a financial record investors should be able

to see that information. All of our funds have annual and semi-annual statements sent to clients by mail.

b. ***Are those financial statements typically audited?***

Answer 7b:
Depending on the size of the fund and the specifics of what it is investing in our statements are audited. If a fund can't have a full audit because of the nature of the assets, which usually means it is prohibitively expensive to value them each year, we engage a "Notice to Reader "review by our auditing firm. About 90% of our funds are audited and 10% are Notice engagements.

c. ***If the financial statements are not typically audited, is there an auditor involved and, if so, what standard of engagement is typically applied?***

Answer 7c:

See answer 7b.

d. ***Do issuers that prepare financial statements in accordance with IFRS for inclusion in their OMs typically continue to prepare financial statements in accordance with IFRS or do they transition to generally-accepted accounting principles for private enterprises (ASPE)?***

Answer 7d:

We use IFRS and maintain it.

e. ***Is it common for security holders to request annual financial statements? Do they request audited financial statements?***

Answer 7e:

We provide annual financial statements to investors automatically. See 7b for our policy on audited statements.

f. ***What do you estimate as the annual cost of preparing the proposed audited annual financial statements?***

Answer 7f:

Depending on the size of the investor base and the nature of the fund our auditing costs range from $4,000 to $15,000 annually. Plus $5.00 per financial statement for printing and mailing.

g. ***Do you anticipate that issuers will mail annual financial statements to security holders or place them on a website?***

Answer 7g:

Our financial statements are currently mailed, but we are actively examining a process to deliver electronically.

h. ***What do you estimate as the cost of making annual financial statements available to security holders?***

Answer 7h:

See 7f.

Question 8:

Under the Proposed Amendments, issuers relying on the OM Exemption would be required to deliver annual financial statements until the issuer either becomes a reporting issuer or ceases to carry on business. Are there other situations when it would be appropriate to no longer require ongoing annual financial statements for such issuers? If so, please describe them.

Answer:

No.

Question 9:

How do issuers relying on the OM Exemption typically communicate with their security holders? Do they maintain websites?

Answer:

Websites are becoming more common, we have primarily relied on mailed updates and financial statements to date.

Question 10:

Should issuers be permitted to cease providing annual financial statements to their security holders after proceeds of a distribution are fully spent? If so, is there a period of time after which it is reasonable to assume that the proceeds of a distribution under the OM Exemption will have been fully spent?

Answer:

No. Financial statements are not just for ensuring proper deployment of capital but also for monitoring the progress and state of the investment.

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Question 11:

Should non-individual investors (e.g., companies or trusts) be required to sign a risk acknowledgement form? Please explain.

Answer:

Yes. Acknowledgement of risk is an important closing step on an investment regardless of the legal status of the investor.

Question 12:

Should "permitted clients", as defined in National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Obligations be required to sign a risk acknowledgement form? Please explain.

Answer:

No. A permitted client is sophisticated and does not need to acknowledge the risk.

Question 13:

Should non-redeemable investment funds continue to be permitted to use the OM Exemption?

Answer:

Yes. See my discussion in the main body of my commentary.

Question 14:

Are there certain types of issuers that should be excluded from using the OM Exemption?

Answer:

No. Proper functioning capital markets should allow as many different types of investments to be included as possible. This will assist EMDs in creating better portfolios for their clients.

Question 15:
Should issuers that are related to registrants that are involved in the sale of the issuer's securities under the OM Exemption be permitted to continue using the OM Exception?

Answer:

Issuers that are related to registrants that are involved in the sale of the issuer's securities should be permitted to continue to use the offering memorandum exemption. Registrants selling related parties securities know their product and are bound by the, know your client and suitability rules. See my discussion of this topic in the main body of my submission.

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Question 16:

Currently, most CSA jurisdictions that have an OM Exemption have adopted local blanket orders that permit an issuer to raise up to $500,000 under the OM Exemption without having to include audited financial statements in the OM. Further, the blanket orders permit the financial statements to be prepared in accordance with ASPE rather than IFRS.

a. ***Should these blanket order be continued or revoked? Please provide the basis for your answer.***

Answer 16a:

The $500,000 raise without audit requirement is reasonable. It is a small amount of money and audit costs would get prohibitively expensive as an issue cost at anything below this amount. However, it should not be increased as investor protection when amounts get larger than $500,000 become more important.

b. **If you believe the blanket order should be continued, should the same threshold amount be used in determining which issuers are subject to an ongoing annual financial statement requirement or an audit requirement? Please provide the basis for your answer.**

Answer 16b:

Yes the same threshold should continue. See our answer in 16a.

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