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Submitted via e-mail to comments@osc.gov.on.ca

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
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Proposed Amendments to National Instrument 45-106 – *Prospectus and Registration Exemptions*

Dear Sirs/Mesdames:

We are writing to you in response to the request of the Ontario Securities Commission (the "OSC") for comments on the proposed amendments to National Instrument 45-106 – *Prospectus and Registration Exemptions* ("NI 45-106"), OSC Rule 45-501 – *Ontario Prospectus and Registration Exemptions* and proposed Multilateral Instrument 45-108 – *Crowdfunding* published on March 20, 2014 (collectively, the "Proposed Amendments").

This comment letter is divided into two parts. Part One sets out our comments regarding Annexes A through D of the Proposed Amendments (i.e., the four proposed new prospectus exemptions) and Part Two sets out our comments on Annex E of the Proposed Amendments (i.e., the proposed new reports of exempt distribution). Our comments in Part Two should be read in conjunction with our comments on the proposed amendments to NI 45-106 published by the Canadian Securities Administrators (the "CSA") on February 27, 2014, which are set out in our comment letter dated May 28, 2014.

Part One: Proposed New Prospectus Exemptions

Offering Memorandum (OM) Prospectus Exemption

We are generally supportive of the adoption in Ontario of an offering memorandum prospectus exemption (the "OM Exemption"). However, our support for the OM Exemption set out in the Proposed Amendments is limited as a result of the variations in the exemption across the CSA jurisdictions, which reduce some of the benefits of harmonization. We encourage the OSC to redouble its efforts to formulate an OM Exemption with consistent application across the country, as this will yield the best result for capital markets.

We suggest adopting a flexible approach to the disclosure that must be provided by non-reporting issuers that use the OM Exemption. We believe that requiring a non-reporting issuer to adopt a particular ongoing disclosure standard will have a chilling effect on the use of the OM Exemption by non-reporting issuers. Rather, we believe that issuers who use the OM Exemption should be required to specify the ongoing disclosure they will provide to securityholders in the

offering memorandum delivered to investors as well as the length of time during which such disclosure will be provided. Potential investors can assess this information as part of their investment decision process. However, purchasers under the OM Exemption should be provided a right of action against the issuer in circumstances where an issuer does not satisfy its commitment to provide ongoing disclosure or the disclosure provided contains a misrepresentation.

We are unclear why the Proposed Amendments exclude investment funds from using the OM Exemption. While we appreciate that the Proposed Amendments' origins are traceable to a desire to facilitate capital raising for start-ups and small and medium-sized enterprises ("SMEs"), there appears to be no clear policy rationale to preclude investment funds from using the OM Exemption. Accordingly, we believe that the OM Exemption in the Proposed Amendments should be modified to permit its use by investment funds.

Proposed Changes to Section 3.3 of the Companion Policy to NI 45-106

We note that the OSC is proposing to add guidance to the companion policy to NI 45-106 which appears to impose local content requirements and disclosure standards on marketing materials used in Ontario in addition to or in place of an offering memorandum or other offering document. If that is, in fact, the purpose of this commentary, then we believe it ought to be clearly stated in a rule rather than in a companion policy. The purpose of a companion policy is for the regulators to express a view on how a particular provision is to be interpreted or applied; it is not appropriate in our view to use policy statements to create new obligations or to impose new standards on market participants. For this reason, and for the reasons set out below, we believe the proposed guidance in Section 3.3 of NI 45-106CP should be deleted in its entirety.

Even if expressed in a rule, however, we would object to the proposed changes for the following reasons:

- We object to the creation of content requirements or disclosure standards for marketing materials used in the context of private placements to accredited investors. We believe this will discourage participation in the Canadian exempt market and will further reduce Canadian institutional investors' access to exempt market securities, including, in particular, foreign securities.

- The persons who are obligated to review the marketing materials is too broad. "Seller" as presently defined is non-exhaustive and expressly includes registered dealers. We submit this should be clearly limited to the issuer and/or selling securityholder, as applicable, who are actually selling the securities.

- We object to any requirement that marketing materials be held to a new, separate standard of being "fair, balanced and not misleading". Notably, in the final marketing rules for prospectus offerings in Canada, the securities regulators removed the earlier proposed concept of a "fair, true and plain" standard for marketing materials which was included in the November 2011 proposed amendments to the prospectus rules.

- We submit that the general expectation that a "seller" will confirm "whether any claims set out in the marketing materials adequately refer to the information to support these claims" should be removed as it is vague and goes beyond what is required in marketing materials used in connection with public offerings.

- We do not believe the proposed guidance regarding the use of "benchmarks" is appropriate in the context of private placements to accredited investors. We believe this will discourage participation in the Canadian exempt market and will further reduce Canadian institutional investors' access to exempt market securities, including, in particular, foreign securities.

Family, Friends and Business Associates (FFBA) Prospectus Exemption

We are supportive of the OSC's initiative in the Proposed Amendments to adopt a prospectus exemption for investments made by family, close personal friends and close business associates (the "FFBA Exemption"). However, we suggest that the OSC take further steps to make the Proposed Amendments consistent with the FFBA Exemption currently available in the majority of other Canadian jurisdictions. For instance, we believe that the Proposed Amendments' limitation on the type of securities that can be distributed under the FFBA Exemption is unnecessary. The rationale underlying the adoption of the FFBA Exemption – that is, that the investor has a relationship with an insider of the issuer that enables the investor to obtain sufficient information about the securities being offered to make informed decisions – is equally applicable to all types of securities. Accordingly, we see no reason to limit the universe of securities that may be offered under, or to exclude investment funds from the use of, the FFBA Exemption.

The Proposed Amendments also prohibit advertising to solicit investors in connection with a distribution under the FFBA Exemption, citing concerns that investors the issuer has to locate through advertising may fall outside the intended scope of the exemption. We suggest that such prohibition be removed, at least in circumstances where a concurrent distribution is being made under a prospectus exemption that permits the use of advertising. It is common for an offering to be made under several prospectus exemptions and we anticipate that financings under the FFBA Exemption will be routinely undertaken concurrently other exemptions where advertising is permitted (such as the accredited investor exemption). We think the prohibition on advertising in connection with the use of the FFBA Exemption will result in an unnecessary limitation on the circumstances where the exemption could be otherwise used.

Although the FFBA Exemption imposes no obligation for an issuer to provide investors with an offering memorandum, the Proposed Amendments indicate that a private right of action must be available to investors where an offering memorandum is voluntarily provided. While we recognize that the requirement to provide a right of action in these circumstances is intended to protect investors, we are concerned that it may have the unintended effect of reducing the amount of information provided to investors. We fear that issuers may be incentivized to not provide an offering memorandum where they otherwise would have in order to avoid triggering the requirement to provide a private right of action. In the context of the FFBA Exemption, it is unlikely that the investors will have sufficient leverage to demand written disclosure.

Finally, as a practical matter, we do not see the utility in mandating that investors be presented with the risk acknowledgement form on one double-sided page, particularly as subscription documents are now, more often than not, provided electronically. While we are unsure of the policy goal underlying this proposed requirement, if the OSC is concerned that potential investors are not reading the entire risk acknowledgement form, we suggest that the form be modified to require a confirmation from the investor on each of the two pages.

Existing Security Holder Prospectus Exemption

We support the OSC's initiative in the Proposed Amendments to adopt a prospectus exemption for investments by existing security holders (the "Existing Security Holder Exemption") based on similar exemptions currently available in other jurisdictions. However, we suggest that the OSC re-consider the Proposed Amendments' requirement that issuers have a 12-month reporting history prior to using the Existing Security Holder Exemption. While we generally are supportive of a minimum reporting history for the use of the exemption, we do not believe that the incremental benefit of a minimum reporting history is a sufficient reason to deviate from the parallel exemption available in other jurisdictions.

As noted above in our comments about other elements of the Proposed Amendments, we would propose that the Existing Security Holder Exemption be made available to distributions of securities by investment funds. Notwithstanding that the development of the Proposed Amendments resulted from a desire to increase capital raising alternatives for SMEs, we believe that the same policy rationale underlying the Existing Security Holder Exemption applies to distributions by investment funds to their current securityholders.

We support limiting the use of the Existing Security Holder Exemption to listed reporting issuers only. However, we suggest that the OSC consider expanding the exchanges on which issuers can be listed to include non-Canadian exchanges with disclosure rules similar in substance to those governing issuers listed on Canadian exchanges. Again, while we acknowledge that the Proposed Amendments were formulated to address perceived problems with the ability of Canadian SMEs to raise capital, we do not believe the policy rationale underlying the Existing Security Holder Exemption is limited to those circumstances. Making the Existing Security Holder Exemption available to non-Canadian issuers would permit Canadian investors to participate in offerings by foreign issuers under the "pre-emptive" rights of existing shareholders, where now many such offerings are limited to holders in Canada who are accredited investors.

We are concerned that the ability of an issuer to allocate undersubscribed portions of offerings under the Existing Security Holder Exemption at its discretion has the potential for abuse. Accordingly, we suggest that the OSC revisit allowing issuers this discretion as it may be readily used by management to increase the proportionate interest of the issuer held by "friendly" shareholders, which we believe would be contrary to the proper functioning of the capital markets. Instead, we suggest that existing security holders should be permitted to subscribe for unsubscribed securities in proportion to their pro rata share (similar to the way the unsubscribed securities are allocated in a rights offering) in order to minimize the risks of abuse of this exemption.

We do not agree with the proposal to impose an absolute limit on the aggregate amount invested by an investor in the previous 12 months under the Existing Security Holder Exemption, specifically with respect to accredited investors, who are not otherwise subject to any limits on the amount they can invest. At a minimum we believe that accredited investors should be exempt from any quantitative limits imposed under this exemption.

We note that some of the commentary in the Proposed Amendments indicates that any efforts by an issuer to solicit investors to purchase shares in the market in order to use the Existing Security Holder Exemption will be treated as "improper". We are uncertain as to what the Proposed Amendments mean by "improper" in this context and can find no clarification as to its meaning or intent in the Proposed Amendments. We suggest that the Proposed Amendments be clarified to expressly state in NI 45-106 any prohibition that the OSC wishes to impose on the use of this exemption.

Crowdfunding Prospectus Exemption

We remain skeptical about the advisability of adopting a crowdfunding prospectus exemption (the "Crowdfunding Exemption") in Ontario. As outlined in our comment letter submitted on March 8, 2013 regarding OSC Consultation Paper 45-710 – *Considerations for New Capital Raising Prospectus Exemptions*, we are concerned that the Crowdfunding Exemption does not correctly address the protection of investors in the context of the relaxation of the prospectus requirement that the Crowdfunding Exemption envisages. We note that, other than the Crowdfunding Exemption, the recent trend in regulatory initiatives regarding exempt distributions is to provide additional protection to retail and quasi-retail investors (for example, the proposed additional requirements for distributions to accredited investors who are individuals and the limitation of the availability of the substantial purchase exemption to individuals). Contrary to this trend, the crowdfunding initiative will allow highly speculative securities to be made available to the retail segment with only limited protections.

As discussed in our previous comment letter, the primary protection for an investor under the Crowdfunding Exemption against an issuer – the right of action for a misrepresentation in the crowdfunding offering document – provides only an illusory benefit, as the cost of enforcement of that right would easily exceed amounts available for recovery. Accordingly, despite concerns that additional burdens will impede the establishment of funding portals, a significant diligence mandate must be established for funding portals to ensure vulnerable investors are adequately protected. In addition to the already mandated criminal record and background checks of each director, executive officer, control person and promoter of an issuer, funding portals should be required to thoroughly review the issuer's constating documents and business plan to gain a full understanding of the structure, features and risks of each security distributed. Portals should be incentivized to be selective in approving issuers and must ensure only those with legitimate and achievable business objectives are permitted to make use of the exemption. Additionally, funding portals should be required to ensure the validity of the offering, the accuracy of the information in the crowdfunding offering document and the integrity of the issuer, as well as confirming an issuer has met its ongoing diligence obligations.

We agree that funding portals should be required to register as dealers in order to ensure a minimum level of sophistication and experience in dealing with securities. Securities regulators

must review funding portal practices regularly and ensure that only scrupulous and reputable funding portals are permitted to operate.

Part Two: Proposed Amendments to Post-Trade Reporting Regime

We regularly advise foreign securities dealers that are engaged in the business of underwriting foreign securities offerings regarding compliance with Canadian securities laws whenever those offerings are extended to Canadian investors on a private placement basis. Our comments in this part focus on issues raised by the Proposed Amendments to the post-trade reporting regime in connection with these cross-border private placements. In the interests of time, we have not addressed unique issues that the Proposed Amendments may raise with respect to private placements by Canadian issuers, although many of the issues raised in this part may also be applicable in that context.

We have serious concerns that the proposed Form 45-106F10 – *Report of Exempt Distribution for Investment Fund Issuers (Alberta, New Brunswick, Ontario and Saskatchewan)* ("Form 10") and Form 45-106F11 – *Report of Exempt Distribution for Issuers Other than Investment Funds (Alberta, New Brunswick, Ontario and Saskatchewan)* ("Form 11"), which call for enhanced post-trade reporting, will strongly discourage our clients from offering foreign securities to sophisticated Canadian institutional and other accredited investors. Form 10 and Form 11 would require foreign dealers to obtain and disclose information regarding foreign issuers and Canadian investors to which they do not have access, that they have no contractual or legal right to receive and, in any event, would be difficult to obtain within the prescribed 10-day filing deadline. More importantly, however, certain of the proposed disclosure requirements are so onerous that we believe many foreign issuers and dealers would voluntarily elect not sell into Canada rather than comply with some of the new rules, including the requirement to provide copies of presentations and marketing materials to Canadian securities regulators.

We are also very concerned about the lack of harmonization regarding post-trade reporting that would result in the various jurisdictions of Canada if the new Form 10 and Form 11 are adopted in Alberta, New Brunswick, Ontario and Saskatchewan. We believe this will significantly increase the compliance burden on market participants and further discourage them from accessing the Canadian capital markets. If foreign dealers are unable or unwilling to comply with their post-trade reporting obligations in Canada, they will no longer extend foreign securities offerings to their Canadian clients which, in our view, would be highly detrimental to Canadian capital markets.

1. Issues Common to Both Form 10 and Form 11

We have identified the following issues that are common to both Form 10 and Form 11:

Requirement to Provide Disclosure for Both Registered Advisor and Beneficial Owner

Instruction 8 to Form 10 and Instruction 9 to Form 11 would require that the applicable disclosure be provided for the beneficial owner of the securities and, if applicable, the trust company or registered advisor acting on behalf of a fully managed account.

We are supportive of the requirement to provide the applicable disclosure for a trust company or registered advisor acting on behalf of a fully managed account, however we submit that disclosure should not also be provided in respect of the beneficial owner(s) in those circumstances.

A trust company or registered advisor acting on behalf of a fully managed account qualifies as an "accredited investor" pursuant to paragraphs (p) and (q) of the definition thereof in section 1.1 of NI 45-106 and, pursuant to subsections 2.3(2) and (4) of NI 45-106, they are deemed to be purchasing the securities as principal. The issuer or underwriter filing the Form 10 or Form 11 will only have a relationship with the trust company or registered advisor because that is where the investment decision is made. They will have had no interaction with the beneficial holders of the accounts to which a trust company or registered advisor may ultimately allocate because the identity of the account holder is not relevant to the determination as to whether the prospectus exemption is available in respect of the trade with the trust company or the registered advisor, as the case may be. In addition, the trust company or registered advisor may, for confidentiality or competitive reasons, be unwilling or unable, without the account holder's consent, to provide the information in respect of the underlying account holder that would be required in order to complete Form 10 or Form 11. Therefore, we would propose revising the wording of Instruction 8 and 9 (as applicable) as follows:

> *"References to a purchaser in this report are to the beneficial owner of the securities. However, if a trust company or a registered advisor has purchased on behalf of a fully managed account under subsections 2.3(2) and (4) of National Instrument 46-106 Prospectus Exemptions, provide the information solely in respect of the trust company or registered advisor, as the case may be."*

Requirement to Disclose Directors, Officers, etc. of the Issuer

Form 10 would require disclosure of the investment fund's and the investment fund manager's directors and executive officers and their respective jurisdictions of residence, while Form 11 would require disclosure of the issuer's directors, executive officers, control persons or promoters and their respective jurisdictions of residence. In regard to issuances of securities by a foreign issuer, this new requirement will be extremely onerous (if not impossible) to comply with in practice, particularly within the 10-day filing deadline.

In most foreign securities offerings carried out by our foreign dealer clients, the issuers are not reporting issuers in Canada. Often, however, they are public companies in their home jurisdictions. As such, they are subject to the continuous disclosure obligations imposed upon them by the securities regulatory authority in that jurisdiction and by the rules of the stock exchanges on which their securities may be listed. As a result, the information about directors, officers, control persons and promoters required in order to complete Forms 10 and 11 may or may not be publicly available. If the underwriters do not have access to the information required to properly complete Form 10 and 11, they will have to obtain it from the issuer. Issuers may be unwilling to provide it (and to provide it on a timely basis), particularly in circumstances where the information is not required to be publicly disclosed in their home jurisdictions. As a result of

the added time, expense and aggravation, we fear that many foreign dealers will elect to not offer securities into Canada as a result of the increased compliance burden.

To the extent the issuer is a reporting issuer in Canada, this information will be publicly available to securities regulators in Canada and, therefore, it would be unnecessary to require it in Forms 10 and 11.

We therefore submit that the requirement to disclose the directors, officers, control persons and promoters of the issuer, investment fund or investment fund manager, as the case may be, should not apply where (a) the issuer is incorporated or formed under the laws of any jurisdiction outside of Canada, or (b) the issuer is a reporting issuer in any jurisdiction of Canada. In the alternative, we would propose an exemption from the requirement to provide this information if all of the purchasers in Canada are accredited investors.

Requirement to Identify Each Applicable Paragraph of "Accredited Investor" Definition

Virtually all sales made by our foreign dealer clients into Canada are limited to sophisticated institutional investors and other accredited investors who satisfy one or more of the criteria to qualify as "permitted clients" as defined in National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103"). In all cases, the Canadian purchasers will satisfy one or more of the criteria to qualify as "accredited investors" as defined in NI 45-106.

The customary practice for obtaining confirmation that Canadian investors are "permitted clients" and "accredited investors" is to include a representation to that effect in either a Canadian "wrapper" affixed to the foreign offering document or, if the trade is made in reliance upon an exemption from the requirement to deliver a Canadian-wrapped offering document, in a separate one-time "notice and acknowledgement" delivered by the Canadian purchaser to the applicable dealer.[1]

Currently, the issuer or underwriter making the distribution is only required to disclose generally the applicable prospectus exemption relied upon to make the trade. Form 10 and Form 11 would require the issuer or underwriter to disclose <u>all applicable paragraphs</u> in the definition of "accredited investor" that the purchaser satisfies. The stated policy rationale for this change is that some individual investors may not understand the risks associated with exempt market investments or may not in fact qualify as accredited investors, and this additional disclosure will assist the CSA in carrying out its compliance and enforcement mandate.

[1] The form of "notice and acknowledgement" was prescribed by the "wrapper relief orders" granted by the CSA in 2013. The form did not require the investor to specify which paragraph(s) of the definition of "permitted client" and "accredited investor" were applicable to it. Delivering these notices to, and collecting signed acknowledgements from, every potential Canadian client was an extremely expensive and time-consuming process, one which the dealers are not inclined to repeat. If the Proposed Amendments are adopted, not only would dealers be required to re-deliver accredited investor certificates, but presumably they would have to periodically update the certificates to ensure that circumstances have not changed (i.e., the purchase now satisfies an additional criteria to be classified as an accredited investor).

In our view, the policy concerns raised by the CSA do not apply in the context of securities distributed on an a private placement basis to sophisticated Canadian investors that are "permitted clients" for purposes of NI 31-103. As stated by the CSA in the proposed amendments to Section 1.9 of the Companion Policy to NI 45-106 published on February 27, 2014, the person relying on a prospectus exemption must take reasonable steps to verify that the exemption is available, and whether or not the steps are reasonable "will depend on the particular facts and circumstances of the investor and the offering".

We agree with this statement. However, in the context of sales to institutional investors such as Canadian financial institutions, pension funds and registered advisers, we submit that it is reasonable to rely on a representation from the prospective purchaser that it is eligible to purchase the securities in reliance on the applicable prospectus exemption. The CSA accepted this reasoning in granting the wrapper relief and allowed the named dealers to distribute foreign securities to "permitted clients" on the basis of the representations contained in the "notice and acknowledgement" prescribed by the relief orders. We see no policy reason to deviate from this accepted practice.

We also see no compelling public interest rationale for requiring dealers to identify every category of "accredited investor" that each Canadian purchaser may satisfy. The person relying on an exemption must take steps to confirm that the exemption is in fact available, but we fail to see how identifying each applicable paragraph in the definition of "accredited investor" assists in that endeavour. We believe it would impose an unnecessary compliance burden on issuers and dealers without any concomitant public interest benefit.

We therefore submit that Form 10 and Form 11 should not contain a requirement to disclose all of the paragraphs of the "accredited investor" definition that are applicable to a Canadian investor. As an alternative, we would submit that the requirement should not apply where (a) the investor is not an individual, or (b) the investor is an individual who is a "permitted client" as defined in NI 31-103.

Requirement to Disclose the E-Mail Address of Issuer's and Underwriter's Chief Executive Officer

It is unclear to us why the CSA requires the e-mail address of an issuer's and, if applicable, underwriter's chief executive officer. In large organizations, the chief executive officer of an issuer may, and the chief executive officer of the underwriter will, have no involvement whatsoever in the distribution. If he or she were to receive an e-mail from a Canadian securities regulator regarding the distribution, it could take days or weeks before the e-mail is read and forwarded to the appropriate person within the organization (or external counsel) who is knowledgeable about the distribution. There is already a requirement in both Form 10 and Form 11 to provide the contact information for the person filing the applicable form. In the highly unlikely event that the regulators need to correspond directly with the issuer's or underwriter's chief executive officer, the appropriate contact information can be obtained on an *ad hoc* basis from the person filing the report.

We therefore submit that this should not be a requirement in Form 10 or Form 11.

2. Issues Specific to Form 10

We have identified the following issues with respect to Form 10:

Requirement to Disclose Redemptions Made by the Investment Fund

The proposed Form 10 would require an investment fund issuer, the first time it files a Form 10, to disclose the total dollar value of all redemptions it has made since its inception. For subsequent reports, the issuer must disclose the total dollar value of all redemptions since it last filed a Form 10.

We do not understand how this dollar figure alone, without any context, will be of any assistance to the CSA. For example, an investment fund may have had $10 million of redemptions since its inception but $25 million of new investments over the same period. Similarly, an investment fund may have had relatively few redemptions over a particular period, but its assets under management may have decreased significantly due to poor performance. The point is that the dollar value of all redemptions, without more, is insufficient to assess the performance of an investment fund which, in any event, is not the role of securities regulators. It is not clear to us why this information is relevant or needed.

Secondly, to the extent the investment fund is a reporting issuer, this information can be obtained from its financial statements which are publicly available. To the extent it is a private fund, this information will be in the fund's financial statements delivered to its investors, who are in a better position to assess the fund's overall performance based on their review of the entire financial statements and not just one or two pieces of information viewed in isolation.

We therefore submit that this should not be a requirement in Form 10.

Requirement to Disclose Information Regarding Service Providers

For many of the same reasons outlined above under the heading "*Issues Common to Both Form 10 and Form 11 – Requirement to Disclose Directors, Officers, etc. of the Issuer*", we submit that Form 10 should not include the requirement to disclose the name and municipality of the principal or head office of any trustee, portfolio manager, sub-portfolio manager, custodian, registrar, transfer agent or auditor of an investment fund. The compliance burden on dealers, who will have to obtain this information from the fund itself, will greatly exceed any benefit to the CSA in having this information. At a minimum, this requirement should not apply where (a) the investment fund is formed under the laws of any jurisdiction outside of Canada, or (b) the investment fund is a reporting issuer in any jurisdiction of Canada. In the alternative, we would propose an exemption from the requirement to provide this information if all of the purchasers in Canada are accredited investors.

Requirement to Disclose the Size of the Investment Fund

It is not clear to us why this a meaningful piece of information about the exempt market in Canada. The size of the investment fund has no bearing on the size or type of offering that it may undertake, the type of investors who may purchase the offered securities or on whether or not there is an available prospectus exemption to effect the distribution. Furthermore, if the fund

is a reporting issuer in Canada, this information will be publicly available. If it is a private fund, this information is confidential and will be shared only with its investors.

We therefore submit that this should not be a requirement in Form 10.

3. Issues Specific to Form 11

We have identified the following issues with respect to Form 11:

Requirement to Provide Copies of Presentations and Marketing Materials

Item 4.3 of Form 11 would require the issuer or underwriter filing the Form 11 to provide the applicable securities regulators with copies of any presentations or marketing materials provided to Canadian purchasers. This would be in addition to the existing requirement to provide regulators with a copy of any offering memorandum used in connection with the distribution. We believe that this requirement will result in many foreign issuers and dealers refusing to extend foreign securities offerings into Canada.

In general, foreign dealers will offer foreign securities to certain institutional and other sophisticated investors in Canada to meet Canadian demand for foreign securities, which offer diversification options which the domestic securities market cannot. Foreign dealers will generally extend such offerings into Canada if the time and cost of compliance is relatively minimal and if the disclosure standards and potential liability for both themselves and the issuer are more or less consistent with those in the United States and other foreign jurisdictions with developed and robust securities markets.

The feedback we routinely receive from our foreign dealer clients and from Canadian institutional investors is that Canada's exempt market requirements are the most onerous and prohibitive in the world. For example, Canada is the only jurisdiction that requires the preparation of a Canadian "wrapper" in connection with certain private placements which must be affixed to the front of the foreign offering document in order to comply with Canadian rules regarding disclosure of underwriter conflicts of interest. We also understand that it is one of the few jurisdictions in the world with substantial post-trade reporting obligations, which are also among the most onerous in the world. Although exemptive relief orders granted in 2013 have eliminated the wrapper requirement in connection with some foreign private placements, a large number of offerings do not qualify for the relief. In any event, the relief is cumbersome to comply with and does not eliminate many of the problems identified during the wrapper relief application process.

We fear that this new proposed requirement to file presentations and marketing materials is another major – and insurmountable – step in the wrong direction. We support the underlying principle that Canadian institutional investors should be able to purchase foreign securities based solely on the disclosure provided to institutional investors in the offering's home or principal jurisdiction (i.e., using just the foreign offering document), and that post-trade reporting for these transactions should be limited to payment of the applicable activity fee and submission of a report that contains basic information about the purchaser and the offering.

We understand that, in nearly all U.S. registered or Rule 144A offerings, road show communications (including slides or other visual aids available only as part of that road show) are not required to be filed with the Securities and Exchange Commission or any other regulatory body in the United States. We have been advised by several clients that foreign issuers and dealers will no longer extend offerings (including those which are conducted primarily in the United States) into Canada on a private placement basis if they are required to provide Canadian securities regulators with copies of road show materials as part of the post-trade reporting package, particularly when no similar requirement exists in the United States.

We also note that the proposed requirement to provide regulators with copies of presentations and marketing materials used in connection with a private placement is broader than the requirement to file "marketing materials" in connection with an IPO or other long-form prospectus offering in Canada. Specifically, Section 13.12(1)(a) of National Instrument 41-101 – *General Prospectus Requirements* ("NI 41-101") provides an exemption from the requirement to file marketing materials in connection with a "U.S. cross-border offering" where, among other things, there is a reasonable expectation that the securities will be sold primarily in the United States.

It is not clear to us why the CSA is proposing a more stringent requirement in connection with private placements, which are limited to Canada's most sophisticated investors, than would be required in connection with a U.S. cross-border public offering, which may be sold to retail investors in Canada. We submit that the CSA should include an express exemption from the requirement to provide presentations and marketing materials in connection with a Form 11 if all of the purchasers in Canada are "accredited investors". Alternatively, if the CSA determines that this is too low of a standard, this exemption should be available where all of the purchasers in Canada are "permitted clients".[2] If neither of these two exemptions are introduced, we fear the result will be a complete prohibition on extending foreign offerings into Canada on a private placement basis, which furthers limits the ability of Canadian institutional investors to diversify their investment portfolios.

Requirement to Disclose Approximate Number of Employees of the Issuer

It is not clear to us why this a meaningful piece of information about the exempt market in Canada. The number of employees of an issuer has no bearing on the size or type of offering that it may undertake, the type of investors who may purchase the offered securities or on whether or not there is an available prospectus exemption to effect the distribution. We therefore submit that this should not be a requirement in Form 11.

[2] To be clear, we submit that only one of the two foregoing alternatives are appropriate in the context of private placements. An exemption similar to the one available in the public offering context in Section 13.12 of NI 41-101 would not be sufficient, even if the CSA were to expand the scope of the exemption to all cross-border offerings (whether public or private) involving jurisdictions other than the United States and replace the requirement that there be a reasonable expectation that the offering will be sold "primarily in the United States" with a reasonable expectation that over 50% of the offering will be sold in jurisdictions outside of Canada.

4. General Comments

Lack of Harmonization Across Canada

We are very concerned about the lack of harmonization for post-trade reporting in Canada that would result if the Proposed Amendments are adopted. Consider, for example, a scenario in which an issuer distributes securities into every province of Canada. Currently, that issuer (or an underwriter on its behalf) would be required to file Form 1 in all provinces except British Columbia and Form 45-106F6 in British Columbia.[3] In Ontario, the report must be filed electronically. If the Proposed Amendments are adopted, the issuer or underwriter would have to file four different reports, as follows:

- Form 10 or Form 11, as applicable, electronically in Ontario;
- Form 10 or Form 11, as applicable, in paper form in Alberta, Saskatchewan and New Brunswick;
- Form 1 in Manitoba, Quebec, Nova Scotia, Newfoundland and Labrador and Prince Edward Island; and
- Form 6 in British Columbia.

This fragmented reporting is very time-consuming and expensive. We would strongly encourage the CSA to work cooperatively to implement a uniform reporting system whereby issuers or underwriters can file the same form across the country.

In addition, we submit that if an issuer or underwriter is required to file a form electronically in one jurisdiction, all other jurisdictions that are not currently set up to receive electronic filings should be required to accept a paper print-out of the "as-filed" electronic form submitted in the jurisdiction that requires electronic filing. For example, if a distribution occurs in Ontario, Manitoba and Quebec, Manitoba and Quebec should be required to accept a print-out of the electronic form filed in Ontario.

Form 10 and Form 11 Appear to Have Been Developed in the Context of Prospectus-Exempt Offerings Extended to Retail Investors

We note that Form 10 and Form 11 were developed in the context of new prospectus exemptions that would permit issuers to distribute securities to retail investors in Canada without the benefit of a prospectus. In many cases, we expect that these exemptions will be primarily of interest to junior issuers that lack the resources needed to access the public market. As such, we query whether, from an investor protection perspective, the CSA actually requires some of the new information requested in Form 10 and Form 11 when securities are being distributed to more sophisticated investors by larger issuers, which do not give rise to the same investor protection concerns.

[3] The issuer may be entitled to file a Form 1 in British Columbia instead of a Form 6 if all of the purchasers in that province are "permitted clients" and if the issuer is not a reporting issuer in British Columbia.

For example, the requirement to disclose all of the directors, officers, control persons, etc. may be relevant where a junior or start-up issuer seeks to raise funds from less sophisticated investors so that the CSA can more easily locate the issuer's principals should the investment turn out to be fraudulent or if the issuer is found to have violated Canadian securities laws. Similarly, the requirement to identify each applicable paragraph of the accredited investor definition that would apply to a particular purchaser is based on a concern that some individual investors may not actually qualify as accredited investors and unsophisticated investors are being exposed to unsuitable investments.

We submit that these same concerns do not exist in the context of sophisticated investors purchasing securities from sophisticated dealers. We would urge the CSA to consider whether Form 10 and Form 11 should only be used when an issuer relies upon one of the new prospectus exemptions in the Proposed Amendments or when one or more purchasers in Canada is not an accredited investor. In addition to its simplicity, this solution has the added advantage of allowing the CSA to collect more information about the segments of the exempt market which are most susceptible to abuse, while at the same time avoiding placing new obstacles in the way of sophisticated Canadian investors seeking access to alternative investment opportunities.

5. Conclusion

If adopted as presently proposed, we believe the proposed amendments to the post-trade reporting regime will have a very serious chilling effect on foreign private placements in Canada. In many cases, foreign dealers will be unable or simply unwilling to comply with the onerous disclosure obligations in the new Forms 10 and 11. This will unfairly exclude Canadian institutional and other sophisticated investors from participating in highly desirable foreign securities offerings. We understand from our clients that access to U.S. and foreign capital markets is crucial to the ability of Canadian institutional investors to properly diversify their portfolios. Foreign capital markets offer Canadian investors access to a broader array of issuers, and exposure to a larger number of industries, than is otherwise available in Canada. We submit that any action that further limits the ability of foreign dealers to offer these investors the products they are seeking is highly detrimental. As stated above, we believe the CSA should move towards a regime that allows Canadian institutional investors to purchase foreign securities based solely on the disclosure provided to institutional investors in the offering's home or principal jurisdiction (i.e., using just the foreign offering document), and that post-trade reporting for these transactions be limited to payment of the applicable activity fee and submission of a report that contains basic information about the purchaser and the offering.

We thank you in advance for the opportunity to comment on the Proposed Amendments and we would be pleased to discuss our concerns with you. If you have any questions, please contact Robert Murphy by phone at 416.863.5537 or by e-mail at rmurphy@dwpv.com or Anthony Spadaro by phone at 416.367.7494 or by e-mail at aspadaro@dwpv.com.

Yours very truly,

(signed) Robert S. Murphy

Robert S. Murphy

(signed) Anthony Spadaro

Anthony Spadaro