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The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

Re: Comments on Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* and Companion Policy 45-106CP *Prospectus and Registration Exemptions*, Proposed Amendments to OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions*, Proposed Multilateral Instrument 45-108 *Crowdfunding* and Companion Policy 45-108CP *Crowdfunding*, and Proposed Form 45-106F10 *Report of Exemption Distribution for Investment Fund Issuers (Alberta, New Brunswick, Ontario and Saskatchewan)* and Form 45-106F11 *Report of Exempt Distribution for Issuers Other than Investment Funds (Alberta, New Brunswick, Ontario and Saskatchewan)*

We submit the following comments in response to the Notice and Request for Comments published by the Ontario Securities Commission (the "**OSC**") on March 20, 2014 with respect to proposed amendments (the "**Proposed Amendments**") to National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**"), Companion Policy 45-106CP *Prospectus and Registration Exemptions* ("**45-106CP**") and OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions*, proposed Multilateral Instrument 45-108 *Crowdfunding* ("**MI 45-108**") and Companion Policy 45-108CP *Crowdfunding* ("**45-108CP**") and proposed Form 45-106F10 *Report of Exempt Distribution for Investment Fund Issuers (Alberta, New Brunswick, Ontario and Saskatchewan)* ("**Form 45-106F10**") and Form 45-106F11 *Report of Exempt Distribution for Issuers Other than Investment Funds (Alberta, New Brunswick, Ontario and Saskatchewan)* ("**Form 45-106F11**", and together with Form 45-106F10, the "**Proposed Forms**"). While we have certain other specific comments, our comments relate primarily to the following four new proposed capital raising prospectus exemptions:

- an offering memorandum ("**OM**") prospectus exemption (the "**OM Exemption**");

- a family, friends and business associates prospectus exemption (the "**FFBA Exemption**");

- a prospectus exemption for distributions by a reporting issuers to its existing security holders (the "**ESH Exemption**"); and

- a crowdfunding prospectus exemption (the "**Crowdfunding Exemption**") and regulatory requirements applicable to a crowdfunding portal (the "**Portal Requirements**").

We have organized our comments below with reference to the proposed rule, policy or form to which the comments relate. All references to parts and sections are to the relevant parts or sections of the applicable rule, policy or form.

Thank you for the opportunity to comment on the Proposed Amendments and the Proposed Forms. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

A. General Comments

a. *Harmonization*

Given the Canadian Securities Authorities' (the "**CSA**") commitment to ensure that a harmonized and national approach continues to be taken with respect to prospectus exemptions, we question why the Proposed Amendments do not mirror the equivalent prospectus exemptions available in other CSA jurisdictions. It is our view that the implementation of harmonized rules under NI 45-106 represented a vast improvement over the historically disparate approach, and resulted in greater certainty and ease of application of the rules. This ultimately has facilitated corporate finance activities in Canada for both domestic and international issuers. We note that a move away from harmonization is unproductive, leads to an increased regulatory burden and uncertainty across jurisdictions, and discourages participation in Canadian capital markets. For example, we note that the addition of the Proposed Forms will create an administrative burden for issuers which will potentially be required to deliver three separate forms (one of which will also need to be filed electronically in Ontario) for one distribution. As the CSA look to enhance the existing rules, we strongly encourage all regulators, including the OSC, to continue to strive for greater harmonization at a national level and preserve what has been accomplished under NI 45-106.

b. *Risk Acknowledgement Forms (Form 45-106F13, Form 45-106F12 and Form 45-108F2)*

We have a number of concerns with the proposed requirement that an issuer obtain from a purchaser who is an individual a signed risk acknowledgement form

(a "**RAF**") at the same time or before the individual signs the purchase agreement in order for the OM Exemption, the FFBA Exemption or the Crowdfunding Exemption to apply to a distribution. While we acknowledge the concerns expressed by the OSC in proposing this requirement, we urge the OSC to consider the practicality of imposing such a requirement on issuers.

We respectfully submit that if the OSC is concerned with investors investing in inappropriate products or products which the investor does not understand, the proper avenue to address this concern is through dealer "know your client", "know your product" and suitability obligations, and that requiring an additional RAF will not address the investor "gap" (i.e., whether an investor understands the products in which he or she is investing and whether the products are appropriate for the particular investor), to the extent there is one. We note that a dealer involved in a distribution already has "know your client", "know your product" and suitability obligations. In the event that an investor is purchasing securities directly from the issuer, we acknowledge that such investor protections will not be available; however, we believe that these concerns can be addressed by requiring the issuer to disclose to the investor that the issuer is not a registrant and therefore is not subject to the same obligations vis-à-vis the investor as a dealer. Given the fact that the policy decision has been made to allow an issuer to distribute its securities directly to the public, in such circumstances, issuers should only be required to disclose the fact that the issuer is not a registrant and that no registrant is involved in the issuance.

In addition, we anticipate that the RAF requirement will place an undue and unnecessary administrative burden on issuers, as the RAF must be presented to purchasers in physical form on one double-sided page and two (2) copies of the form are required to be physically signed. In keeping with developing practices in terms of how transactions are executed, the bulk of document execution and delivery now takes place electronically and not in physical form. As such, if the RAF requirement is retained, accommodation should be expressly made for electronic transmission, execution and retention.

We are also concerned with the requirement that the issuer keep a copy of the RAF for eight (8) years following the distribution. We consider this to be an unnecessarily lengthy period of time that does not appear to reflect applicable retention or limitation periods under the *Securities Act* (Ontario) or IIROC requirements. Once again we note the administrative burden of maintaining RAFs, particularly for such a lengthy period of time. Further, it is unclear to us whether the RAF is required to be retained in physical form and note that this requirement could result in an issuer having to maintain and store paper files. We respectfully request that the OSC clarify that RAFs need not be physically retained and that retention of electronic copies of the RAF will satisfy the retention requirement.

We would also note that most of the information included in the RAF is information that would typically be included in the subscription agreement between an investor and the issuer and/or in the offering document (wherein it is clarified that the purchaser is required and deemed to have made such representations).

Imposing the RAF requirement might be seen as undermining the validity of representations made in subscription agreements and/or offering documents and as calling into question the ability to rely on them (see section 1.9 of 45-106CP which states that "[i]n determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false."). We submit that to do so amounts to requiring the conducting of due diligence as to the basis of counterparty representations in agreements where, typically, unless a party is aware of a reason to question a particular representation, such party is entitled to rely on the representation without further investigation.

As such, in our view, given the administrative burden of completing and maintaining the RAF, the duplicative nature of the information contained in the RAF and our other above stated concerns, the OSC may wish to reconsider the RAF or consider alternatives to this requirement, such as requiring that such disclosure be provided and acknowledged, while leaving it to the issuer or registrant to determine the appropriate form. Other options to provide greater flexibility to address the needs and circumstances of the broad range of capital market participants should also be considered. For example, it may be appropriate to impose the RAF requirement only upon investors investing below a particular threshold. However, we note that under the Crowdfunding Exemption, as currently proposed, investors cannot invest more than $2,500 in a single investment and under the OM Exemption, as currently proposed, non-Eligible Investors are limited to investments of $10,000 and Eligible Investors are limited to investments of $30,000. These investment limits already serve to provide investor protections without the requirement to sign a RAF. Further, in certain circumstances, an "evergreen" RAF may be appropriate (similar to, for example, the notice requirement in the April 2013 "wrapper" relief), particularly where an investor has an ongoing relationship with a dealer and/or an investment strategy that suits the use of an evergreen RAF. At the very least, we urge the OSC to revise the Proposed Amendments to allow for electronic execution, dissemination and retention of the RAF and for a shorter retention period. In addition, we ask that the OSC please confirm that the RAF requirement would not extend to a holding company of an individual purchasing securities under any of the OM Exemption, the FFBA Exemption or the Crowdfunding Exemption.

c. *Risk Acknowledgement Forms – Technical Issues*

With regard to the specific requirements on the RAF, we note that part 5 of the RAF proposed for the OM Exemption is required "to be completed by the person involved in the sale of the securities". The instructions included on this form of RAF further state that "[a]ny person involved in selling these securities (which may involve meeting with or providing information to the purchaser) must complete this section by answering 'yes' or 'no' and filling in their contact information before delivering to the purchaser". We are of the view that it is unclear who the "person involved" in the sale or a meeting would be. "Involved" is a broad and ambiguous term that may include individuals who are not directly participating in the sale of the securities, such as, for example, referring parties, lawyers, administrative staff,

etc. In addition, we note that in many cases there may be more than one person "involved", potentially resulting in more than one RAF being required to be completed for a particular purchaser to account for multiple persons involved in the same sale. We are of the view that multiple RAFs should not be required in any circumstance and that the rules should be clear in this regard.

Finally, we are of the view that the requirement that a person involved in the sale of the securities select "yes" or "no" with regard to the statement that he or she is "generally not qualified to provide investment advice" is inappropriate. This statement is confusing, ambiguous and may imply to the purchaser that the person is not qualified to sell securities. We do not take issue with certification as to whether a person involved with the sale of securities is registered with a securities regulator, which by contrast, is clear and factually based.

B. The OM Exemption

a. ***Definition of "Eligible Investor"***

We agree that an appropriate basis for an investor to qualify as an eligible investor is by obtaining advice from an eligibility advisor that is a registered investment dealer (i.e., a member of the Investment Industry Regulatory Organization of Canada). However, we believe that the category of registrants qualified to act as an eligibility advisor should be expanded to include EMDs and other appropriate categories of Restricted Dealer.

b. ***Marketing Materials***

We support the proposed OM Exemption with respect to advertising and marketing materials. In particular, we agree that there should be no restrictions on advertising and that marketing materials should be incorporated by reference in the OM. We would further support the extension of this policy to offering memoranda that are delivered to the OSC in non-OM Exemption distributions (i.e., where an OM is prepared and provided to a prospective purchaser in connection with an offering in reliance on a different exemption).

c. ***Definition of "OM Standard Term Sheet"***

We note that part (c) of the definition of "OM standard term sheet" restricts the information that may be included in such a term sheet and tracks the definition of "standard term sheet" found in National Instrument 41-101 – *General Prospectus Requirements*. From our experience working with standard terms sheets, we note that exclusion of a CUSIP appears to have been inadvertently omitted. We further believe that information such as credit ratings and government spreads should be specifically permitted, the omission of which under the prospectus rules has caused significant difficulty in preparing a standard term sheet, particularly for highly-rated investment grade debt issuers. We also note that the three line limit for information contained in the "OM standard term sheet" is too restrictive in offerings where complex securities are issued (e.g., convertible debentures).

d. ***Section 2.9(6) of NI 45-106***

Section 2.9(6) of NI 45-106 states:

> *If the securities legislation where the purchaser is resident does not provide a comparable right, an offering memorandum delivered under this section must provide the purchaser with a contractual right to cancel the agreement to purchase the security by delivering a notice to the issuer not later than midnight on the 2nd business day after the purchaser signs the agreement to purchase the security. [Emphasis added]*

The timing requirement for the delivery of the notice is ambiguous as an issuer may not know exactly when a purchaser "signs" the purchase agreement and may only know when the issuer receives the agreement or when the purchaser sends the agreement to the issuer. Given this ambiguity, we respectfully request that the OSC provide a more specific time from which to calculate the two-day period.

e. ***File vs. Deliver***

We note that in certain subsections of section 2.9 of NI 45-106 issuers are required to "deliver" documentation (see, e.g., subsection 2.9(17.2)), whereas in other subsections issuers are required to "file" certain documentation (see, e.g., subsections 2.9(17) and 2.9(17.1)). In most jurisdictions, we understand that the obligation to "file" implies filing in a manner that renders the document publicly accessible. With respect to an OM in particular, in our view, this is not appropriate as they may contain commercially sensitive or otherwise confidential information about private entities that should not be publicly accessible (see, for example, the comments under 45-106CP which acknowledge such privacy and confidentiality right which OSC staff have confirmed).

f. ***Ongoing Disclosure Requirements for Non-Reporting Issuers***

i. Audited Financial Statements

We respectfully submit that the proposed ongoing disclosure requirements for non-reporting issuers in connection with the OM Exemption are overly onerous and impracticable for non-reporting issuers. Requiring non-reporting issuers to make available to investors and deliver to the securities regulatory authority audited annual financial statements prepared in compliance with the requirements of National Instrument 51-102 *Continuous Disclosure Obligations* and National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* will place both financial and administrative burdens on non-reporting issuers. This requirement is not consistent with the current expectations and practices of non-reporting issuers. We also note that from an investor protection perspective, investors participating in an OM Exemption distribution will be required to acknowledge, in the proposed RAF (Form 45-106F13), that they will be provided with less disclosure than public companies (i.e., reporting issuers) will be required to

provide to their investors. Given these burdens, the OSC may wish to reconsider the requirement that non-reporting issuers make available to investors and deliver to the securities regulatory authority such audited annual financial statements. In the alternative, we would suggest that a threshold for the requirement for audited financial statements be implemented similar to that currently proposed in the Crowdfunding Exemption. While we believe that such threshold should be sufficiently/meaningfully high (for example, $2,500,000) and that small companies should be exempt from the requirement, we believe that industry participants would be best suited to recommend an appropriate threshold.

ii. Notice of Events

We also submit that the requirement that non-reporting issuers make available to investors notice of certain events within 10 days of the event is overly onerous. In addition, the events requiring disclosure are similar to those that would be considered "material" (as defined in the *Securities Act* (Ontario)); however, these events are not defined with reference to a generally accepted and understood standard, such as "materiality", and the language used (i.e., "fundamental change" and "significant change") is subject to interpretation and is ambiguous. We further note that purchasers under the OM Exemption who purchase securities from non-reporting issuers have no ability to sell their securities other than pursuant to another prospectus exemption or under a prospectus and, as such, notification of such events may have little or no impact on the market for these securities. We respectfully urge the OSC to reconsider this disclosure requirement and, in the least, consider amending the 10 day requirement to one that is less frequent (i.e., quarterly).

iii. Cessation of Disclosure

We respectfully submit that the period for which a non-reporting issuer is required to provide investors with ongoing disclosure is too long. We urge the OSC to consider additional events which would allow a non-reporting issuer to discontinue providing such disclosure, including, for example, going private transactions, the issuer being purchased by a third party or falling below a certain threshold number of shareholders (for example, where the issuer qualifies as a "private issuer").

C. The FFBA Exemption

a. *Qualification Criteria*

We do not see any reason for investment funds being prohibited from relying on the FFBA Exemption. To the extent such a prohibition is implemented, it should be supported by sufficient policy rationale.

b. *Investment Limits*

We agree that there should be no investment limits under the FFBA Exemption.

c. *Types of Securities*

We do not agree that the types of securities to be issued under the FFBA Exemption should be limited as proposed.

D. The ESH Exemption

We are providing comments on the ESH Exemption although we acknowledge that this exemption has been adopted in the other CSA jurisdictions (excluding Newfoundland and Labrador). While we believe that the following comments would enhance the ESH Exemption, we once again note that the implementation of harmonized rules under NI 45-106 represented a vast improvement over the historically disparate approach, and resulted in greater certainty and ease of application of the rules. As such, we respectfully urge the OSC to consider the following comments and coordinate with the other members of the CSA for harmonization in this regard.

a. *Dilution*

Under the ESH Exemption, an offering cannot result in an increase of more than 100% of the outstanding securities of the same class. We respectfully submit that this dilution rate should be calculated on a fully diluted basis to include securities convertible into the class of securities being offered (i.e., warrants). We also urge the OSC to provide clarification as to when this dilution rate should be calculated.

b. *Section 2.9(2)(g) of NI 45-106*

Section 2.9(2)(g) of NI 45-106 provides that the ESH Exemption is available provided that, among other things:

> *(i) the purchaser has obtained advice regarding the suitability of the investment and, if the purchaser is a resident of a jurisdiction of Canada, that advice is from a person or company registered in that jurisdiction as an investment dealer;*

We do not believe that suitability should be an issue for existing shareholders given that they already hold securities of the issuer. We respectfully submit that the OSC reconsider this requirement. In the alternative, we submit that the requirement should be broadened to permit advice not only from an investment dealer but from EMDs and appropriate categories of Restricted Dealers in Canada. We also note that the wording of this section could serve to require that non-Canadian purchasers obtain suitability advice in order to purchase under the ESH Exemption. We

question whether Canadian advisors could even provide such advice to a foreign resident under foreign law and respectfully suggest that this section of NI 45-106 be limited to Canadian purchasers.

c. ***Investor Qualifications***

We respectfully request that further guidance be provided as to why an investor must represent in writing to the issuer that the investor "continues to hold" the type of security being acquired under the ESH Exemption. We do not think that it is necessary for an investor to continue to hold such security provided that the investor was a security holder as of the record date.

In addition, we note that the requirement that the record date be at least one day prior to the day that an issuer issues the offering news release does not provide any advance notice to investors. The offering news release may also affect sales in the market. We respectfully suggest that advance notice be provided of the record date similar to what is required for a dividend issuance (e.g., 7 days).

d. ***Investment Limits***

Given that an offering is permitted to result in an increase of 100% of the outstanding securities of the class, we respectfully submit that investments should not be limited to a $15,000 investment, subject to suitability advice, in a 12 month period, but rather to an investor's *pro rata* ownership of securities of the issuer so as to permit the investor to maintain its *pro rata* position in such issuer. We also submit that the investment limit should not be aggregated for all investments made by a single investor under the ESH Exemption in multiple issuers, particularly given the difficulty for an issuer to comply with this requirement.

e. ***Exchanges***

We respectfully submit that the ESH Exemption should permit the sale of equity securities listed on new recognized exchanges from time to time in addition to the Toronto Stock Exchange, the TSX Venture Exchange and the Canadian Securities Exchange. We also respectfully request guidance as to whether securities listed on NEX would qualify for issuance under the ESH Exemption given that NEX is a separate board of the TSX Venture Exchange.

f. ***Misrepresentation***

As currently proposed, the ESH Exemption would require that the subscription agreement between the issuer and purchaser contain a contractual right of action against the issuer for any misrepresentation in a "document" or "core document" (each as defined in section 138.1 of the *Securities Act* (Ontario)). We respectfully submit that given the broad range of what may be a "core document" or a "document" the requirement would import exposure similar to that under the secondary market liability regime into the ESH Exemption without the same

procedural safeguards. Therefore, we believe that, extending such liability to "documents" would result in unwarranted risk exposure for issuers.

E. The Crowdfunding Exemption

a. *Qualification Criteria*

We disagree with the requirement that issuers must be incorporated or organized in Canada to be able to use the Crowdfunding Exemption. While we agree with a requirement such as the business having its principal place of business in Canada (which serves the objective of assisting Canadian start-ups and SMEs with raising capital) we do not believe that incorporation or organization provides a sufficient or relevant nexus. There are many reasons why a business may be organized outside of Canada while still being a "Canadian" business. For example, many "B Corps" (corporations certified to meet certain standards of social and environmental performance, accountability, and transparency) incorporate or organize in other jurisdictions, such as Delaware, where legislation currently exists where it is possible to incorporate a B Corp or that is more favourable to B Corps than the *Canada Business Corporations Act* or other Canadian corporate statutes. We believe that these are the types of entities that would benefit the most from, and make the most use of, the Crowdfunding Exemption.

We also note that the requirement that a majority of the directors of the issuer be resident in Canada is inconsistent with Canadian corporate law. For example, the *Canada Business Corporations Act* only requires that 25% of the directors of a corporation be resident in Canada (see s. 105(2)); the same residency requirement is mandated by the *Business Corporations Act* (Ontario) (see s. 118(3)). In other Canadian jurisdictions (i.e., British Columbia and Québec) there are no such residency requirements. We do not see any reason for a higher requirement to be imposed for the purpose of the Crowdfunding Exemption.

b. *Offering Parameters*

The Crowdfunding Exemption prohibits the completion of an offering unless the issuer has "financial resources sufficient to achieve the next milestone in [its] written business plan, or if no milestones, to carry out the activities set out in the business plan". We do not believe that this requirement will achieve any significant investor protection given than the milestones may not be significant or represent any minimum level of achievement by the issuer.

c. *Restrictions on Solicitation and Advertising*

We respectfully submit that issuers should be able to direct investors to a portal's website by way of email, other electronic communication (i.e., text messages) or orally (phone calls or in person) and not just paper notice or through social media.

We also note that "person[s] involved with a distribution" under the Crowdfunding Exemption are prohibited from advertising the distribution or

soliciting potential purchasers. We request that guidance be provided as to the meaning of "involved" as this term is ambiguous and may include a broad range of persons (i.e., directors and officers of the issuer, etc.).

d. *Investment Limits*

While we support the current investment limits provided in the Crowdfunding Exemption, we believe that accredited investors should not be subject to such limits. We would also suggest that the investment limits should not extend to anyone who would be able to purchase securities through another prospectus exemption.

F. The Portal Requirements

a. *Registration*

The Portal Requirements provide that portals will not be permitted to register in any other dealer or adviser category (i.e. there will be no dual registration of portals). We respectfully request that the OSC reconsider this prohibition as we question the policy rationale for this exclusivity requirement. In addition, we request further clarification as to whether subsidiaries of registrants could be registered as restricted dealers for portals.

b. *Additional Portal Obligations*

We respectfully submit that the additional portal obligations are inconsistent with the prohibited activities for portals. As proposed, portals will be prohibited from providing specific recommendations or advice to investors; however, portals will be required to, among other things, review information provided on the portal's website and, prior to allowing an issuer to access the portal's website, "make a good faith determination that it does not appear that", among other things:

> *(ii) the issuer's offering documents or other materials contain a statement or information that is false, deceptive, misleading or that constitutes a misrepresentation,*
>
> *(iii) the business of the issuer may not be conducted with integrity and in the best interests of security holders because of the past conduct of*
>
> > *(A) the issuer, or*
> >
> > *(B) any of the issuer's executive officers, directors or promoters, [and]*
>
> *(iv) the issuer is not complying with [NI 45-106]…*

These requirements lead to an implication and indirect requirement for portals to vet issuers and their offerings that is inconsistent with the prohibited activities. As an alternative, we respectfully suggest conforming the portal requirements to the

proposed U.S. standard which focuses on fraud and compliance with securities legislation.

c. ***Risk Acknowledgement Form***

Given the nature of crowdfunding portals and their online presence, we believe that the RAF that portals are required to obtain from investors should be able to be completed in electronic form as a "click-through" online form.

d. ***Restriction on Cross Ownership***

Section 39 of MI 45-108 prohibits an issuer to access a portal's website if the portal, or any officer, director or significant shareholder of the portal or any affiliate of the portal, has beneficial ownership of, or control or direction over, more than 10% of the issued and outstanding securities of the issuer, or securities convertible into securities of the issuer. We respectfully request that the OSC provide guidance as to when and how this calculation should be conducted, whether the calculation should be conducted on a fully diluted basis and the type of securities to which this prohibition is referring (i.e., equity, debt, etc.).

e. ***Secondary Trading***

We do not agree that portals should be prohibited from facilitating secondary trading (resales) in any securities issued under the Crowdfunding Exemption. Given that investors will be subject to resale restrictions, a portal could help facilitate exempt market trades if any liquidity in an issuer exists which we believe would ultimately provide additional transparency and would be better for investors.

G. The Proposed Forms

a. ***Otherwise Available Information***

We note that much of the new information being requested in the Proposed Forms is otherwise available to the regulators, such as whether an issuer is a reporting issuer and in which jurisdictions the issuer is a reporting issuer, whether a class of securities of the issuer is listed or traded on an exchange or marketplace and details regarding an issuer's financial year end. We respectfully suggest that, to the extent information in the Proposed Forms can otherwise be obtained, that it be excluded from the Proposed Form so as to reduce the administrative burden placed on issuers and underwriters in completing the forms.

b. ***Privacy Concerns***

We raise privacy concerns in respect of the information required to be included in Schedule 1 to each of the Proposed Forms. Despite the fact that these schedules will not be placed on the public file of any securities regulatory authority or regulator, we note that freedom of information legislation may require a regulator to make the information available upon request. The information of concern includes

names, addresses, email addresses, phone numbers and age ranges. We also note the additional administrative burden placed on issuers by requiring them to collect this type of information from each purchaser.

c. ***Additional Filing Requirement***

As noted above, the Proposed Forms would be filed in addition to Form 45-106F1 in other CSA jurisdictions and Form 45-106F6 in British Columbia. The Proposed Forms would have different information requirements and potentially different filing deadlines (e.g., in the case of Form 45-106F10) than the currently existing forms which would result in an increased regulatory burden and compliance costs for issuers. Ultimately, we believe that the Proposed Forms will also cause unnecessary confusion. Once again, we stress the importance of harmonization across the CSA jurisdictions.

d. ***Jurisdiction of Purchasers***

The Proposed Forms each state that the report should identify any purchasers in each Canadian and foreign jurisdiction. While we acknowledge the guidance that says that the filer must look to the local securities regulation to determine if there is a distribution in that jurisdiction, we strongly urge the OSC to take this opportunity to clarify when there is a distribution in the local jurisdiction.

In this respect, we have set out below our comments based on our understanding of the law (or regulatory staff views) in each CSA jurisdiction with regard to whether or not a distribution to a purchaser outside the local jurisdiction is a distribution in the local jurisdiction.

As expressed in section 1.3 of 45-106CP, a person must comply with securities legislation in each jurisdiction "where the distribution occurs." In our view, a Form 45-106F1 should be filed in a jurisdiction only when a distribution has occurred *in that jurisdiction*, identifying only those purchasers *in that jurisdiction* to whom the distribution is a distribution. We acknowledge that the laws and regulatory staff views across the CSA jurisdictions differ with respect to when a distribution is considered to occur in the jurisdiction. However, we urge the CSA to ensure that Form 45-106F10, Form 45-106F11 and all staff guidance and instructions are carefully drafted to accurately reflect the law in each jurisdiction.

For example, generally, if the issuer has a substantial connection to Alberta, British Columbia or Quebec and the issuer distributes securities to a purchaser outside of the local province, such a distribution is considered by the regulators to be a distribution in the local province and therefore that purchaser must be identified in Form 45-106F1.[1] (We are using Alberta, British Columbia and Quebec in this example

[1] While we have not included Saskatchewan in our comments above, we understand that under Saskatchewan General Order Ruling 72-901 this is also the position in Saskatchewan. However, we would appreciate some clarification as to whether this is the position that is applied and enforced by the Saskatchewan Financial Services Commission.

as it appears to be clear, in these provinces, that a distribution by an Alberta/British Columbia/Quebec issuer is seen by the regulators to take place in the local jurisdiction even if the purchaser is in another jurisdiction, on account of ASC Rule 72-501 and AB Policy 45-601, BC Instrument 72-503 and BCIN 72-202 and section 12 of the *Securities Act* (Quebec) (as interpreted by an AMF Staff Notice dated March 31, 2006 published in the Bulletin de l'Autorité des marchés financiers (2006-03-31 at page 2)). While beyond the scope of this comment letter, there are also broader implications from a constitutional perspective arising from these questions.

However, if an issuer does not have a substantial connection to Alberta, British Columbia or Quebec and distributes securities into Alberta, British Columbia or Quebec, the Form 45-106F1 should only identify purchasers in the local province, and not any purchasers outside of the local province, as the distribution to such purchasers is not a "distribution" in the local province. This is also what is clearly contemplated by the "Guidelines for completing and filing Form 45-106F6" in the BC Form, which states as follows:

> *In British Columbia, "distribution" also includes distributions made from another Canadian or foreign jurisdiction to purchasers resident in British Columbia. If the issuer is from another Canadian or foreign jurisdiction, complete the tables in item 8 and Schedules I and II only for purchasers resident in British Columbia. [Emphasis added.]*

With respect to all other provinces, we are not aware of any such express guidance. Further, for other jurisdictions, we are also not aware of any similar bright-line test for determining when a distribution occurs in the province. In Ontario, for example, Interpretation Note 1 (to former Commission Policy 1.5, "Distribution of Securities Outside of Ontario") sets out the circumstances when a distribution outside of Ontario may be considered a distribution in Ontario as well. In our view, it is important to note the operative paragraph of Interpretation Note 1 which states:

> *In light of [s. 53(1)] of the Act, including the broad definition of "trade," and depending on the connecting factors with Ontario, a distribution of securities outside Ontario by Ontario or non-Ontario issuers might also be considered to be a distribution of securities in Ontario…. However, where a distribution is effected outside of Ontario by Ontario or non-Ontario issuers and where reasonable steps are taken…to ensure that such securities come to rest outside of Ontario, the Commission takes the view that a prospectus is not required under the Act, nor an exemption from the prospectus requirements necessary." [Emphasis added.]*

In light of the foregoing, it is our view that the following guidance and/or instructions published by the CSA are confusing, and in some cases, not reflective of the law in some of the jurisdictions or constitutional limitations.

i. Item 15 of Form 45-106F10 and Item 4.4 of Form 45-106F11

Item 15 of Form 45-106F10 and Item 4.4 of Form 45-106F11 each require that the table in such sections be completed "for each Canadian and foreign jurisdiction where the purchasers of the securities reside." This should more accurately provide that these items be completed "for each purchaser in the local jurisdiction, and each purchaser outside of the local jurisdiction where the distribution to that purchaser is a distribution in the local jurisdiction." As currently drafted, the instruction implies that, for example, a foreign issuer that has no connection to any Canadian province or territory and which distributes securities into Canada as part of a larger international offering is required to identify each purchaser in every jurisdiction worldwide. We make the same comment with respect to column 1 of the tables in Item 15 of Form 45-106F10 and Item 4.4 of Form 45-106F11.

ii. CSA Staff Notice 45-308 – *Guidance for Preparing and Filing Reports of Exempt Distribution under National Instrument 45-106 Prospectus and Registration Exemptions* ("CSA Guidance Notice 45-308")

Paragraph 4 of CSA Guidance Notice 45-308 states:

> *4. Failing to include a complete list of purchasers in the F1*
>
> *Some F1s filed by issuers or underwriters only identified purchasers from the jurisdiction in which the F1 was filed, even though the distribution included purchasers from other jurisdictions. If distributions are made in more than one jurisdiction, the issuer or underwriter must complete a single F1 identifying all purchasers, including purchasers that reside in the jurisdiction and those that do not, and file that report in each of the jurisdictions in which the distribution is made (see Instruction 2 of the F1).*

We agree with the second sentence, in that, if a distribution is made in more than one jurisdiction, Form 45-106F1 should be filed in each jurisdiction in which the distribution is made. However, we do not agree that a single Form 45-106F1 identifying all purchasers, including purchasers that do not reside in the jurisdiction, should be mandatory as we do not believe that issuers should be required to disclose purchasers in one jurisdiction to a regulator in another jurisdiction. Rather, we respectfully propose that the filing of a single form be optional for the issuer.

iii. OSC Staff Notice 45-709 – *Tips for Filing Reports of Exempt Distribution* (the "OSC Tips Notice")

Paragraph 9 of the OSC Tips Notice states as follows:

> *Schedule 1 to Form F1 should include a complete list of purchasers under the distribution, including purchasers that*

> *reside in Ontario, purchasers that reside in other Canadian jurisdictions and purchasers that reside outside of Canada.*
>
> *If the distribution is made in more than one Canadian jurisdiction, the issuer or underwriter must complete a single Form F1 identifying all purchasers and file that report in each of the Canadian jurisdictions (other than BC) in which the distribution is made. As noted above, the issuer or underwriter must file a Form F6 with the BCSC.*

In our view, paragraph 1 above should state that Form 45-106F1 should include a complete list of purchasers under the distribution, including purchasers that reside in Ontario, "and purchasers that reside in other Canadian jurisdictions and purchasers that reside outside of Canada *where the distribution to such purchasers is a distribution in Ontario.*" We submit that this is in line with Interpretation Note 1 which contemplates that a distribution by an Ontario or non-Ontario issuer *may be* a distribution in Ontario, but is not necessarily so.

We note in this respect that Interpretation Note 1 is referenced on the cover page of the OSC Tips Notice as a source for "additional guidance." We strongly suggest that Interpretation Note 1 be updated and clarified if it is to be relied upon as authority. The OSC Tips Notice also refers to *Crowe et. al v. Ontario Securities Commission*, for additional guidance as to when a distribution has occurred in Ontario. In our view, owing to the unique nature of the facts in *Crowe,* neither the OSC reasons nor the Divisional Court decision should be applicable to determining when a distribution to purchasers outside of Ontario is a distribution in Ontario, in the context of a private placement that is carried out as part of legitimate and *bona fide* capital raising activities. The Ontario Superior Court of Justice clearly limits the application of its finding, that the OSC had jurisdiction over distributions that occurred outside of the province, based on the facts at hand, citing the need to protect investors from unfair or fraudulent activities. Moreover, *Crowe* involved the contravention of, among other things, the registration requirement of the *Securities Act* (Ontario). The majority of the decision and analysis is devoted to the issue of when the registration requirement in the province is triggered, including the relevant connecting factors for determining when there is an "act in furtherance of a trade" to trigger such requirement. In our view, neither the OSC's reasons nor the Divisional Court's decision clarify whether the OSC has jurisdiction over the distributions to investors outside of Ontario in the context of legitimate private placements that do not involve fraud or other harmful activity.

e. Form 45-106F10

i. <u>Compliance with Non-Canadian Requirements</u>

We note that foreign fund managers may be required to comply with reporting requirements in other non-Canadian jurisdictions (e.g., Form PF in the United States). These forms require a large amount of information but may not be consistent with what is required in Form 45-106F10. As such, we note the significant

and undue administrative burden placed on foreign issuers required to comply with the Proposed Form. We respectfully submit that a "made in Canada" approach may not be necessary and may prohibit foreign issuers from conducting offerings in Canada. As an alternative, we respectfully suggest that the OSC consider the ability of an investment fund to provide a foreign filed report as a schedule to the Proposed Form or incorporate by reference a publicly filed foreign source document.

ii. ***Item 2 – Reporting Issuer Status and Listing Status of the Investment Fund***

Item 2 of Form 45-106F10 requires an investment fund to name all of the exchanges or marketplaces on which the investment fund is listed or traded. We note that investment funds may be listed on exchanges or marketplaces without having applied for, and without knowledge of, such listing. As such, we respectfully submit that Form 45-106F10 only require that investment funds name all of the exchanges on which the investment fund is listed and has applied for and received listing or on which the investment fund has its primary listing.

iii. ***Item 4 – Directors and Executive Officers of the Investment Fund***

The instructions to Item 4 of Form 45-106F10 state that "…for a limited partnership, list the directors and executive officers of the general partner." We note that the general partner of a limited partnership may, in some cases, be a limited partnership itself and, as such, additional guidance should be provided as to "up-the-chain" reporting. We also note privacy concerns for private limited partnerships and general partners who would be required to report such non-public information.

iv. ***Item 5 – Type of Investment Fund***

We respectfully request that the OSC provide guidance and clarification as to the definitions of "money market fund", "hedge fund" and "other investment fund" as used in Item 5 of Form 45-106F10.

v. ***Item 6 – Size of the Investment Fund***

Given that most investment funds will calculate NAV daily, weekly or monthly, we respectfully suggest that it would be more practicable to require that investment funds provide such information as at the date of their most recent NAV calculation rather than as at the date of the report.

vi. ***Item 10 – First Report***

We respectfully suggest that Item 10 should only require that the investment fund indicate whether the report is the first report of exempt distribution filed in Canada.

vii. ***Item 15 – Aggregate Purchaser Information***

Note 2 to Item 15 requires that an investment fund enter all redemptions since the investment fund was created, if the report is the first report of exempt distribution filed for the investment fund. We note that this may not be possible for large and long-existing Canadian and foreign investment funds that have undertaken many redemptions or redemptions over many years. In addition, we respectfully request clarification as to whether the redemptions referred to in Item 15 are redemptions for all classes of securities outstanding or solely the securities sold in the distribution(s) in question.

viii. Filing Frequency

We do not agree that the frequency of the alternative filing requirement for investment funds should be increased from annually to quarterly. We suggest maintaining the current annual requirement and that fees should not be increased for the filing of Form 45-106F10 regardless of the frequency.

f. Form 45-106F11

i. Item 3.3.1 Size of Issuer and Financial Year-End

We question the requirement that issuers provide the approximate number of employees of the issuer at the time of the distribution and whether this information is useful to the regulators. We are also unclear as to whether this would require reporting the number of employees outside of Canada and employees of subsidiaries of the issuer. We respectfully submit that the benefit of collecting this information is outweighed by the burden on the issuer. We urge the OSC to remove this requirement from Form 45-106F11 or, in the alternative, limit the number of employees to employees in Canada excluding subsidiaries.

ii. Item 3.3.3 Listing(s) of Securities of the Issuer

We note that issuers may be listed on exchanges or marketplaces without having applied for, and without knowledge of, such listing. As such, we respectfully submit that Form 45-106F11 should only require that issuer name all of the exchanges on which the issuer is listed and has applied for and received listing. In addition, ATSs may trade securities that are not listed on them at any time so this disclosure should be limited to exchanges.

iii. Item 3.3.4 Primary Industry of the Issuer

We appreciate that additional industry categories have been added to Form 45-106F11; however, we respectfully suggest that definitions or further guidance be provided as to what is meant by these categories to avoid ambiguity and to assist with completing Form 45-106F11.

iv. ***Item 4.3 – Documents Provided in Connection with the Distribution***

This Item requires that issuers "attach an electronic copy of any offering materials that have not been previously filed with the Ontario Securities Commission." [Emphasis added.] As noted above, subsection 2.9(17.2) of NI 45-106 refers to the delivery of OM marketing materials and not the filing of such materials. We respectfully suggest that Form 45-106F11 be amended to reflect the requirements of NI 45-106.

H. Companion Policy to NI 45-106

a. *Subsection 1.9(2) – Responsibility for Compliance and Verifying Compliance with an Exemption - Steps to Support Compliance*

Subsection 1.9(2) of 45-106CP refers to "a seller" being required to confirm compliance with terms of the exemption, particularly that a purchaser meets certain criteria. It is unclear who "a seller" would be (i.e., is this the issuer or the dealer?) and as such we request that additional guidance be included in 45-160CP with respect to who should undertake this confirmation process.

Subsection 1.9(2) of 45-106CP further states that "[w]hile the general principles associated with these procedures apply to all sellers, the details of the steps taken in each case may vary…." Notwithstanding the non-prescriptive nature of this statement, the subsequent paragraph in this subsection states that the OSC "expect[s] a seller to be in a position to explain why certain steps were not taken…" ultimately prescribing certain to be taken by the seller. Typically, representations as to a purchaser's status are included in a subscription agreement between the issuer and the purchaser. In light of this, it is our view that this verification/confirmation suggested by 45-106CP imposes an additional and onerous diligence obligation on issuers which we do not believe to be necessary or appropriate. Issuers should be able to rely on certifications made by investors for this purpose. Further, if a dealer is involved in the distribution, we note that the dealer will have "know your client" and suitability obligations that will serve similar investor protection purposes. As such, we believe that there are sufficient investor protection measures in place that will achieve the same result as increased diligence requirements.

b. *Section 3.3 – Advertising*

Section 3.9 of 45-106CP states:

> *The Ontario Securities Commission also expects a seller (including an issuer, selling security holder or a registered dealer) that uses marketing materials, in addition to or in place of an offering memorandum or other offering document, to review the marketing materials to confirm that they are consistent with the offering document and are fair, balanced and not misleading. In addition, the Ontario Securities Commission expects a seller to consider and*

> *confirm whether any claims set out in marketing materials adequately refer to information to support these claims. For example, where benchmarks are used for comparison purposes, the seller should assess whether the benchmarks are relevant and comparable to the investment in question and confirm the marketing materials:*
>
> > *(a) adequately explain differences between the benchmark and the investment,*
> >
> > *(b) make reference to the source of the benchmark and identify the date to which the information is current,*
> >
> > *(c) where relevant, caution purchasers that historical performance is not necessarily indicative of future results.*
>
> *If a seller intends to rely on marketing materials prepared by a third party, such as an analyst report that rates a security or compares a security with securities of other issuers, the Ontario Securities Commission expects a seller to perform its own assessment of the marketing materials to confirm that they are fair, balanced and not misleading. For example, if the report has been paid for by the issuer, or if there are other relationships between the analyst and the issuer, it may be misleading to describe the report as being an "independent" report without prominently disclosing the fees and relationships. A seller should not rely on marketing materials prepared by an issuer or third party without independently reviewing the materials prior to use.*

While we recognize that 45-106CP indicates that a "seller" may be an issuer, a selling security holder or a registered dealer, we respectfully request that the OSC provide further clarification as to the meaning of "seller" including whether all such enumerated examples of a "seller" would be required to undertake the activities expected of the OSC in 45-106CP. We note that arguably these obligations are already covered by registrants' "know your client", "know your product" and suitability obligations and that requiring other "sellers" to undertake such obligations would be onerous and duplicative.

In addition, we respectfully submit that the new, undefined standard of "fair and balanced" found in section 3.9 of 45-106CP is confusing and inconsistent with Canadian securities laws. We believe that the standard should be the same as required for marketing materials and standard terms sheets prepared in connection with a prospectus, as currently found in National Instrument 41-101 *General Prospectus Requirements* (i.e., all information included in the marketing materials or standard term sheet should be "disclosed in, or derived from" the OM).

* * * * *

Thank you for the opportunity to comment on the Proposed Amendments and the Proposed Forms. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Regards,

Laura Levine,
on my own behalf and on behalf of

Alix d'Anglejan-Chatillon
Ramandeep K. Grewal
Timothy McCormick
Darin R. Renton
Simon A. Romano