PMAC
PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA
Advancing Standards™

June 18, 2014

The Secretary
Ontario Securities Commission
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Fax: 416-593-2318
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Re: Introduction of Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution in Ontario

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The Portfolio Management Association of Canada (PMAC), through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to submit comments regarding 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 Exempt 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)* (the "**Proposed Amendments**").

As background, PMAC represents investment management firms registered to do business in Canada as portfolio managers. In addition to this primary registration, many PMAC member firms are also dually registered as investment fund managers or other registration categories. PMAC was established in 1952 and currently represents over 180 investment management firms that manage total assets in excess of $800 billion (excluding mutual funds assets). Our mission is to advocate the highest standards of unbiased portfolio management in the interest of the investors served by members. For more information about PMAC and our mandate, please visit our website at www.portfoliomanagement.org.

General Comments

Our key observation on the Proposed Amendments is that regulatory cooperation and coordination of prospectus exemptions across all jurisdictions in Canada should be a priority for the OSC and CSA and we believe that certain aspects of the Proposed Amendments are a step backwards in this regard. There continues to be significant local differences between the exemptions available in the Canadian jurisdictions which will continue to complicate exempt offering distributions conducted in more than one jurisdiction and will perpetuate the already uneven playing field for market participants. The Proposed Amendments exacerbate these already complicated differences. Harmonization of NI 45-106, generally, would promote further efficiency in Canadian capital markets to the benefit of investors who are currently impacted in how they access investing opportunities depending on where they live.

We note the important steps that have already been taken in this direction but believe there is still work to be done in this area.

In particular, we believe that greater harmonization of the OM exemption and exempt distribution reporting forms should be prioritized. We oppose the part of the Proposed Amendments regarding these exempt distribution reporting forms because they will create more unnecessary complexities and confusion for the market. We query what data a regulator should reasonably require about an exempt distribution of an investment fund's securities to enable it to discharge its mandate. We agree that where regulators require enhanced understanding of certain market activity because there has been significant, recurring issues or systemic risks identified, this information should be required and disclosed by registrants. We also support the notion that regulators need information to enable them to facilitate more effective regulatory oversight and be adequately informed to make decisions about regulatory changes. However, we do not believe that the exempt market has raised such elevated concerns so as to move in the proposed direction. We believe that the proposed reporting will not advance the OSC's mandate in understanding the exempt market in Canada.

SUMMARY OF KEY COMMENTS

1. Harmonization, regulatory cooperation and coordination of prospectus exemptions across all jurisdictions in Canada should be a priority for the OSC and CSA.
2. Harmonization of the OM exemption across Canada.
3. We do not support the new Form 45-106F10 *Report of Exempt Distribution for Investment Fund Issuers* and oppose quarterly reporting. Exempt market reporting for investment fund issuers should be harmonized and streamlined.

Our comments on the Proposed Amendments focus on the Proposed OM Exemption and the Reports of Exempt Distribution.

1. OM Exemption

a) Lack of harmonization

While we believe it is a positive development that the OSC has proposed an OM exemption, we have significant concerns with the proposal. Our main concern is that, as proposed, the Ontario OM exemption will now result in Canada having 4 different versions of the same exemption:

- British Columbia version – (BC, NS and NL)
- Alberta version – (MB, NWT, NU, PEI and YK)
- Modified Alberta version (QC, AB and SK)
- Ontario version (ON and NB)

We do not believe it is desirable to fragment the OM exemption more than it already is. Less harmonization of the OM exemption means, more confusion for issuers, more complication and coordination of meeting various tests and reporting requirements, and this may result in less reliance on the exemption. We recommend the OSC reconsider its proposal and either work collaboratively with the other provinces to achieve harmonization for this exemption or fully adopt an existing OM model that is already available and in use.

We note the divergence from the Alberta version of the OM exemption regarding the investment limits for both eligible and non-eligible investors that are individuals. We believe it will be difficult for an issuer or registrant to ensure the investor caps are not breached. Investors may not hold all of their investments with one registrant (IIROC, MFDA, EMD or PM) or issuer and the registrant or

issuer would have to rely on investor disclosure and of more concern, where there is a breach, what can be done to correct the breach (particularly, in a locked-in fund situation). In our view, a better approach would be to have a cap on the issuer vs. the investor.

We are also surprised that the Ontario version of the OM exemption is not more in line with the version available in British Columbia given the commitment of both provinces towards establishing a cooperative securities regulator. It would appear that the OSC is furthering its policy development without regard to this important national commitment. We believe the OSC should reconsider its proposal on the OM exemption and instead, in the short term, align with an existing version of the OM exemption currently in use with a view to, in the longer term, full harmonization of the OM exemption across the CSA.

b) Investment fund carve out

The Proposed OM Exemption does not contemplate the inclusion of investment funds. This exclusion appears to be based on the fact that Ontario is considering investment funds separately and may not reflect a policy-based decision. We request that the OSC provide its rationale in limiting to the use of the OM exemption in Ontario at this time. In our view, allowing participation by investments funds in the OM exemption would create more democratized investing opportunities for investors and increase access to investments that are generally only available to the high net worth or institutional investors.

Investment funds can also aid the OSC in their goal to improve the accessibility of capital to Small and Medium Enterprises (SMEs). The OM Exemption helps investors who do not meet the accredited investor definition to invest in the exempt market. As these investors are not accredited, they cannot necessarily make as large of an investment as those who are accredited. This means that a SME that wants to raise capital through the OM Exemption would potentially need to deal with more investors than if they raise capital though the Accredited Investor or Minimum Amount Prospectus Exemptions. An increase in the number of investors would add to the administration of the SME. investment fund managers have the infrastructure to deal with many investors whereas SMEs do not.

c) Related party distributions

Registrants that are related to an issuer (i.e., affiliates or in the same corporate structure) will be prohibited from participating in an OM distribution. We understand that OSC Staff continue to identify significant compliance issues with exempt market dealers (EMDs) that distribute securities of "related issuers" and "connected issuers". While we believe these registrants should be dealt with appropriately, we do not believe non-compliance should necessarily be addressed by blanket prohibitions. Despite these non-compliance issues, we believe there are adequate safeguards in place on how to deal with conflicts of interest regarding related issuer distributions. This is most evident in the case of the larger banks that provide a multitude of services for their clients through related entities such as banking, insurance, investments, capital market activities, etc. In this context, there are already various securities law requirements that cover related party distributions such as the Principal Distributor rules within National Instrument 81-102 *Mutual Funds.* Also, National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* requires advisors and dealers to provide clients with relationship disclosure information which would include disclosing any related issuers.

We believe the prohibition on related issuers' participation in an OM distribution will stifle product innovation and investment options for investors. The prohibition would also impede start-ups, SME's and investment vehicles' abilities to raise capital within the exempt market, as it can be difficult to have a product sold by a third party. Many IIROC dealers require historical performance and

minimum assets under management before they will consider adding a product to their shelf. When looking at EMDs to distributed third party products, generally EMD firms either distribute only proprietary products or they require a formal due diligence review. If an EMD only sells proprietary product, an unrelated issuer would not be able to have their product distributed by that EMD. If an EMD does sell third party products, they usually require a formal due diligence review by either a related party to the EMD or a third party. These reviews are costly and to get access to different distribution streams an issuer may have to have pay for two different due diligence reviews.

We recommend the OSC reconsider this prohibition and instead monitor the use of the exemption by related issuers in advance of taking a definitive policy approach on this.

2. Exempt Market Reporting Regime – Proposed Reports of Exempt Distribution

The Proposed Amendments state that "[t]he Proposed Reports are intended to *streamline* the current Exempt Distribution Report…" [emphasis added] and to collect additional information regarding exempt market activity. In our view, these objectives are not met by the proposals because the Proposed Reports fail to strike an appropriate balance between the benefits of collecting additional information and the resulting compliance burden on issuers and underwriters. The Proposed Amendments make compliance with the exempt trade reporting regime more costly to manage and exceedingly confusing for investment funds (both foreign and domestic).

The introduction of Form 45-106F10 *Report of Exempt Distribution For Investment Fund Issuers (Alberta, New Brunswick, Ontario and Saskatchewan)* ("Form 45-106F10" or "F10") means that investment fund managers will now need to complete three different forms of Report of Exempt Distribution, which imposes a significant, additional compliance burden.

As a general concern, for investment fund managers, the additional administrative burden of the Proposed Reports and the added costs of filing more frequently will act as a competitive disadvantage. Investment fund managers may be incented to offer fewer funds in order to keep administrative burdens at a manageable level. This will likely result in decreased competition among fund companies and less choice for Canadian investors. Consequently, this will lead to reduced access to the exempt market for issuers and investors alike. This is not in the best interests of Canadian investors.

Additionally, foreign funds find the fragmented Canadian regime particularly challenging. The introduction of Form 45-106F10 and volume of additional information requested is likely to act as (i) an additional disincentive for funds that are currently distributed in the exempt market to continue to do business in Canada, and (ii) a barrier to entry for new funds. Foreign funds that issue securities to Canadian investors are subject to, and comply with, regulatory requirements in their home jurisdictions. They are also generally limited to dealing with permitted clients. To our knowledge, no other jurisdiction requires investment funds to meet such onerous reporting requirements on their investors.

For these reasons and those set out below, Form 45-106F10 is problematic.

a) Lack of harmonization

The harmonization of reporting requirements for investment funds is of paramount importance. An investment fund distributes the same security to investors across Canada; however, filing and disclosure requirements as well as filing methodology differ significantly across jurisdictions. Such differences effectively negate any benefits that investment fund managers could realize through operational economies of scale. Further, these jurisdictional differences impose additional administrative burdens and create opportunities for human error.

The Proposed Amendments will require reporting to occur by use of multiple forms, depending on the exemption relied upon and jurisdictions involved. The introduction of the F10 will require an investment fund to file different information about exempt distributions of its securities with regulators in Ontario, Alberta, Saskatchewan and New Brunswick (Form 45-106F10 for investment funds and Form 45-106F11 for all other issuers), and in a different format, from that provided to all other jurisdictions. For instance, in British Columbia, Form 45-106F6/Form 45-106F1 will be required.

We urge the OSC to work with the CSA to harmonize the reporting requirements so that the needs of each jurisdiction can be met by relying on one form with one filing method.

b) Content requirements

The Proposed Amendments state that the objectives for the reports are to "enhance our understanding of exempt market activity", "facilitate more effective regulatory oversight", and "inform our decisions about regulatory changes". In our view, the information requested Form 45-106F10 is neither appropriate nor necessary to achieve these stated objectives.

We note that public funds generally do not disclose information about purchasers to the regulators, so we query why investment funds distributed in the exempt market should be required to do so. For example, we do not see any benefit to requiring the age range of the purchaser as contemplated in Schedule 1 to Form 45-106F10.

i. Duplicating existing information

Certain sections in Form 45-106F10, such as Item 7, require detailed information about the investment fund manager that is either already available to the regulators through other sources such as NRD or Form 32-102F2 . Thus, it is not clear why the investment fund manager should have to provide this information again on the F10 since it is already accessible.

Other items, such as Items 2, 6 and 8, appear to be of limited value. For example, an investment fund that is a reporting issuer in a Canadian jurisdiction would generally not offer securities in the exempt market elsewhere in Canada. For Item 6 of the F10, the assets under management (AUM) that would be reported in 3 of the 4 reporting periods is not an audited value and while it is calculated for management reporting purposes, it is not verified and if provided in good faith, may put the issuer offside with the certification required under Item 18. We also note that the Form 33-109F6 currently does not require registered firms to disclose their officers and directors and we question why investment fund managers operating in the exempt market should be required to do so under Item 8. We do not believe it is necessary to charge fund managers $500 per quarter to provide information that is generally already available or of limited value in meeting the stated objectives of the Proposed Amendments.

ii. Scope of information requested

The F10 significantly expands the reporting obligations of all investment funds, including those that are not relying on the new exemptions that are set out within the Proposed Amendments. Additionally, as noted above, investment funds offered under a prospectus do not disclose information about their purchasers to the regulators. One of the overarching objectives of the proposed amendments to NI 45-106, is to increase access to the capital markets for issuers (particularly start-ups and SMEs) and for investors who are not accredited investors or permitted clients. While we appreciate that additional disclosures may be relevant in connection with the proposed exemptions intended to assist such parties, issuers, (particularly investment funds relying

on the existing accredited investor exemption) should not be adversely impacted if they are not availing themselves of the proposed exemptions.

Accredited investors and permitted clients are sophisticated parties who invest in investment funds that are offered in the exempt market because they are deliberately seeking alternatives to 'plain vanilla' public mutual funds or ETFs. They are also looking for structures where they can actively negotiate the terms of their relationship with the investment fund (including fee schedules, servicing requirements, and more tailored reporting). In contrast to investors who may be seeking access to the exempt market via the proposed exemptions such as the crowdfunding or OM exemptions, accredited investors and permitted clients generally have means and access to professional advice (legal, investment, actuarial, etc.) and other resources which assist them to make informed investment decisions. We believe the current accredited investor exemption appropriately balances exempt market access with investor protection concerns. In light of the above, we do not believe that the proposed requirement to provide more detailed information about the purchasers of investment funds that is not necessarily relevant to the accredited investor criteria (e.g., age range, location of foreign purchasers, personal e-mail address) will achieve the stated objectives.

We also have concerns with Item 15 which requires disclosure of information on redemptions since the date of the last report. This information will be extremely difficult to obtain. We also have concerns with the requirement to disclose each Canadian and foreign jurisdiction where purchasers reside. Sales made in foreign jurisdictions are made pursuant to the securities laws of those jurisdictions and beyond the scope of reporting for Canadian purposes. Requiring the reporting of all sales by an issuer regardless of where the purchaser resides, and requiring detailed individual information on investors who reside outside the local jurisdiction (and in particular outside Canada), will result in unnecessary data chasing that could lead to a disincentive for foreign investors to purchase securities of Canadian funds.

iii. Alternatives

We believe a better reporting approach should be developed. For example, there are two basic types of information: fund information, principally included in Items 1 through 9 ("Fund Data"), and that about its exempt distributions, principally included in Items 10 through 19 ("Distribution Data"). The Fund Data will typically persist unchanged from report to report, whereas most of the Distribution Data will be different for each report. It would be much more effective to have these two different types of data handled separately and differently. First, the system could be designed so the investment fund manager can "set up" the fund initially on the web portal with all applicable Fund Data, and update the Fund Data only when information changes. Then the "high frequency" Distribution Data could be uploaded and filed on a quarterly basis only if there are changes/activity "against" the previously-established record for the fund and if not, filing should continue to be required only annually.

We also recommend the regulators consider other ways to obtain targeted information from investment funds. For example, if the regulators wish to understand the "unregistered" investment fund market better, a more effective and efficient means would be to develop a list of targeted questions and conduct a survey of a sample of investment fund managers. Select a few of those investment managers to meet with, and discuss the market and any issues of regulatory concern.

In addition, if the regulators wish to better protect investors that are purchasing securities in the exempt market, it would be more appropriate to refine or reconsider the criteria for access (i.e., the individual exemptions), for example by refining the definition of accredited investor, than to request information after the fact. We believe this approach would identify potential risks *before an investment is made*. We believe that it is sufficient for regulators to require investment fund managers to confirm which exemptions they have relied on in distributing securities to investors and

what steps that they have taken to ensure that investors meet the requirements of those exemptions.

The OSC could more efficiently monitor exempt market activity by:

- Harmonizing the reporting requirements across Canada and streamlining the reporting process for investment funds that issue securities on a continuous basis;
- Collecting documents that investment fund managers already produce and make available to investors in the ordinary course of their businesses and in accordance with local jurisdiction requirements (e.g., audited annual fund financial statements denominated in the fund's currency)

If necessary, information/dollar amounts should be provided in the investment fund's currency in order to reduce the risks associated with converting values to CAD.

c) Increased frequency of reporting

The Proposed Amendments seek to increase the frequency of reporting from an annual basis to a quarterly basis however; it is not clear in the Proposed Amendments why annual reporting has not been sufficient. It would be helpful to understand if and how annual reporting previously failed to capture sufficient information or alternatively, what was ineffective about annual reporting to necessitate a shift to more frequent (and costly) reporting. In addition, there will be various filing deadlines to comply with dependent upon the jurisdiction (i.e. annually, quarterly and within 10 days of trade date).

Of additional concern, the increased reporting schedule for exempt distributions will effectively quadruple the OSC's fees for those who currently report. The rationale for this increase is heavily weighed to the regulator's concern over monitoring distributions that are the result of the proposed new prospectus exemptions where there could be a concentration of capital raising activity in shorter periods of time by parties who do not necessarily have the proficiencies to determine suitability for those who provide capital. This rationale does not apply to investment funds that rely on the existing prospectus exemptions but are managed, advised and distributed by registrants who must meet capital, proficiency and fiduciary standards. Similarly, we note that since the Proposed Amendments carve out investment funds from access to the new exemptions, there will be minimal increased activity. Transactions made in investment funds issued under the current AI and MA exemptions are generally much less frequent than retail distributions and generally experience low investor turnover. Because investment funds are a relatively economical way to provide advice to clients who are seeking similar investment opportunities, some funds are relatively small in terms of AUM and there is not enough activity in them from one quarter to another to justify this increased reporting schedule and its associated cost. For example, there may be one distribution per quarter across all or most of an investment fund manager's funds. If that investment fund manager has 30 investment funds with one distribution in Ontario each quarter, the number of reports that the investment fund manager must file increases to 120 reports per year, however, it would be the same information that could be reported in 30 reports.

In our view, investment funds, particularly those which are offered solely to accredited investors or permitted clients, should not be subject to more frequent and detailed reporting requirements. As noted above, accredited investors and permitted clients are sophisticated parties with the means and access to professional resources to make informed decisions.

In summary, investment funds can be distinguished from other issuers. Funds are generally characterized by:

- Long sales cycle (commonly 2 years or more);
- Generally less volatile;

- Low investor turn-over (new clients enter the funds from time to time; clients tend to stay in a fund once invested - they may contribute additional assets at multiple times per year, but generally do not enter and exit the fund on a frequent basis; no short term trading);
- Funds may have more restricted opening schedules (e.g. some open monthly);
- Funds are generally in continuous distribution; unlike non-investment fund issuers who may issue securities on a one-time or less frequent basis; and
- Funds are already subject to continuous disclosure requirements, including under NI 81-106.

In light of the fund features described above, we believe that reporting on a quarterly basis should not be required as the potential benefits of more frequent reporting are outweighed by the additional administrative burden. Since, generally details pertaining to an investment fund (e.g., service providers, investment objectives, structure) change very infrequently (generally no more than once or twice in the lifecycle of a fund, which may be of significant length), an annual report should be more than sufficient to keep the OSC informed.

Finally, we note that in the context of pooled funds, for example, registrants who issue pooled funds generally offer all funds in all jurisdictions where the registrant is registered. In Alberta, the annual fee applied to a pooled fund distribution is based on a percentage of the value of the fund's total distributions during the period and there is a minimum fee if the value of all distributions are below a threshold. If some Alberta clients subscribe to a fund and the total subscriptions do not exceed the threshold, the minimum fee applies. In the new reporting regime, depending on the dates of the distributions, a registrant may end up paying the minimum fee each quarter as opposed to once a year. The registrant has no ability to manage or mitigate this added expense.

d) Electronic reporting

In Alberta, New Brunswick and Saskatchewan, the F10 will be a paper form while in Ontario, this form will be an e-form as stipulated by OSC Rule 11-501 *Electronic Delivery of Documents to the Ontario Securities Commission.* First, the obvious concern with this is the inconsistent filing approach required by different jurisdictions. Second, the e-form in Ontario aims to be more "user-friendly" and easier to complete; however, the process of data submission would be rendered dramatically easier if it could be accomplished by uploading to the website one or more "flat" data files in prescribed format. Such data files could be generated from the investment fund manager's existing systems, and uploaded quickly, without the need for "copy-typing" from one medium to another. Ideally, this could be provided to all jurisdictions in electronic format.

There is also an issue relating to the choice of acceptable internet browsers available for submitting an e-form. The instructions on the web portal say that only Microsoft's Internet Explorer ("IE") version 8.0 or later, and Mozilla's Firefox 20 or earlier are acceptable. In particular the system does not work with (i) version 11 of IE, (ii) any version of Google's Chrome browser, or (iii) any version of Apple's Safari browser. In addition to representing a substantial proportion of the overall installed base of web browsers, these other versions/browsers are more up to date and better supported. We recommend the OSC and CSA consider the use of these superior browsers as compatible alternatives to those currently available on the web portal.

Finally, we recommend the OSC work with its CSA counterparts to create a centralized database that compiles statistical data on the information provided through the various report of exempt distribution forms to enable more streamlined and efficient reporting and transparency of information to the regulators.

Conclusion

The Proposed Amendments include some welcome and positive developments with expanded capital raising opportunities. However, we continue to emphasize the importance of continued harmonization of prospectus exemptions available across Canada and the exempt market reporting regime and we reiterate that this should remain a key priority for the CSA. We believe the OSC should reconsider its proposal on the OM exemption and instead align with an existing version of the OM exemption currently in use with a view to, in the longer term, full harmonization of the OM exemption across the CSA.

We strongly encourage the OSC and CSA to prioritize harmonizing the exempt market reporting regime. The bifurcation of the exempt market and its reporting regime continues to be a significant problem for market participants. One set of exemptions along with harmonized reporting forms for all market participants available in all jurisdictions would address investor protection concerns, while eliminating the current and ongoing administrative confusion and complexity associated with meeting exempt distribution reporting requirements, reducing barriers to entry for Canadian and international issuers (particularly investment funds) and maintaining investor choice.

If you have any questions regarding the comments set out above, please do not hesitate to contact Katie Walmsley at (416) 504-7018 or Julie Cordeiro at (416) 504-1118.

Yours truly,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

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