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October 13, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

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

- and -

c/o Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Dear Sirs and Mesdames:

CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* relating to Reports of Exempt Distribution

This letter is provided to you in response to the CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 Prospectus Exemptions relating to Reports of Exempt Distribution, published on August 13, 2015 (the "**Proposed Amendments**").

In this letter, we will respond to the specific questions set out in the Request for Comment in the order in which they appear, repeating each question prior to providing our response. Thereafter we will provide additional general comments.

Responses to Specific Questions

1. The information collected in the Proposed Report would enhance our understanding of exempt market activity and, as a result, facilitate more effective regulatory oversight of the exempt market and inform our decisions about regulatory changes to the exempt market. Do the reporting requirements of the Proposed Report strike an appropriate balance between: (i) the benefits of collecting this information, and (ii) the compliance burden that may result for issuers and underwriters? If not, please explain.

We have previously expressed our concerns regarding the changes to Form 45-106F1 proposed by the CSA in the Notices and Requests for Comments published on March 20, 2014 and February 27, 2014 (the "**Earlier Proposals**").

We wish to reiterate and amplify our previously stated concern that imposing more detailed, complicated and cumbersome private placement trade reporting requirements is not in the public interest. We understand that the CSA has stated that they are proposing changes to the private placement trade reporting requirements in order to gather more information about the Canadian exempt market, with the ultimate objective of using that information to help facilitate capital raising while concurrently protecting the interests of investors. However, with respect, we believe that the benefit of gathering this additional information about the operation of the Canadian exempt market will be significantly outweighed by the additional compliance burdens being imposed. Further, specifically with respect to international securities offerings extended into Canada on a private placement basis, we do not believe that foreign dealers operating under the international dealer exemption will be able to comply with the new reporting requirements on a cost effective basis, if at all. As a result, Canadian institutional and other accredited investors may not be able to continue to participate in global offerings of non-Canadian securities on a private placement basis.

The new form proposed will require, among other things, significant additional information which is not currently required in order to complete existing Form 45-106F1. Each piece of additional information may not seem onerous in isolation, and may in fact be a

reasonable requirement in certain circumstances. But the cumulative effect of these additional information requirements imposes a new and burdensome compliance requirement on capital markets participants, which is especially problematic when considered in the context of a lawyer, paralegal or other service provider (the "**Preparer**") completing the required trade report form on behalf of an issuer (the "**Issuer**") or a dealer that has acted as the underwriter, initial purchaser or placement agent (the "**Dealer**"), particularly in the case of a U.S. or global offering by a non-Canadian Issuer. We note that in the context of a U.S. or global offering, the Dealer is often making sales into Canada as underwriter without any involvement of the Issuer (this being a matter completely within the discretion of the Dealer). As such, the Preparer taking instructions from the Dealer in this case will have no access to the Issuer or its representatives to obtain detailed information relating to the Issuer that is not otherwise made publicly available in readily accessible form (this being the case with much of the additional proposed information requirements).

We acknowledge that the CSA have revised the Earlier Proposals to provide exemptions from certain information regarding the directors, executive officers, control persons and promoters of the Issuer in the context of an Issuer distributing eligible foreign securities solely to permitted clients. However, we do not believe that these accommodations go far enough to address our very significant remaining concerns about the burdensome nature of certain other required information, taken as a whole. We have provided more specifics about these burdens as they relate to the specific proposed information requirements in our responses to the relevant questions below.

2. Are there reasons why any of the information requested in the Proposed Report should not be required? Is there any alternative or additional information, including as requested in the March 2014 Proposals, that would better support compliance or policy analysis?

We are concerned that the extensive amount of new information required by the Proposed Report will introduce undue complexity and administrative burdens into the exempt trade report process which are not justified by any demonstrated investor protection objective or similar public interest. In addition to other concerns addressed elsewhere in this letter, some examples include:

<u>Issuer Information (Non-Investment Fund Issuers)</u>

Legal entity identifier of Issuer. The Preparer will have to seek out an individual at the Dealer or the Issuer who is sufficiently knowledgeable about the Issuer to provide this information.

Date of formation. The Issuer's date of formation is not typically considered an important or material piece of information, and may be difficult to identify, particularly for an Issuer incorporated or formed in a non-Canadian jurisdiction.

Additional information from Issuers without a SEDAR profile. The Preparer will have to seek out the Issuer's head office address, date of formation, financial year-end, public listing status and size of assets from the contents of the offering memorandum or, if not included in the offering memorandum (or if there is no offering document), from a person involved in the offering who has knowledge of this information.

Primary industry of Issuer. The Preparer will have to review the offering memorandum to determine this information. If not disclosed, or if no offering memorandum was used, or if the correct industry remains unclear, the Preparer will have to seek out an individual at the Dealer or the Issuer who is sufficiently knowledgeable about the Issuer to provide this information.

Size of Assets. This information may be difficult for the Preparer to ascertain. Further, the Issuer may have concerns regarding the public disclosure of this information if it is not a reporting issuer.

Investment Fund Issuer Information

Date of formation. The Issuer's date of formation is not typically considered an important or material piece of information, and may be difficult to identify, particularly for an Issuer incorporated or formed in a non-Canadian jurisdiction.

Net Asset Value. This information may be difficult for the Preparer to ascertain. Further, the Issuer may have concerns regarding the public disclosure of this information if it is not a reporting issuer (or the equivalent in a foreign jurisdiction).

Other

Schedule 1 – Addresses of Directors, Executive Officers, Control Persons and Promoters

Business contact information for CEO of Issuer. This information will not be available to the Preparer, may not be known to the Dealer and may not be information that the Issuer is willing to provide to the Preparer or the Dealer.

Schedule 2 – Purchaser Information

Identification of whether the purchaser is an insider of the Issuer or a registrant. Determining whether the purchaser is an insider of the Issuer will require the Preparer to

make inquiries of either the Issuer or the purchaser. Determining whether the purchaser is a registrant will require the Preparer either to make inquiries of the purchaser or to conduct a search of the registrant database (containing information that is already available to the CSA). We note that these information requirements currently form part of British Columbia Form 45-106F6, which have in our experience may have contributed to the decision of certain market participants not to offer foreign securities for sale in the Province of British Columbia. We strongly urge the CSA not to impose similar requirements in the other provinces and territories of Canada.

3. The Proposed Report would require information about the issuer's size by number of employees, size of total assets or, for investment funds, net asset value. Are there other metrics that would be more appropriate to assess the issuer's size? Do the pre-selected ranges compromise sensitive financial or operational information about non-reporting issuers that participate in the exempt market?

We are concerned that the new information about the issuer's size, combined with other new information requirements described above, will introduce undue complexity and administrative burdens into the exempt trade report process and could compromise sensitive financial or operational information about non-reporting issuers. In particular, we note the following:

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

Net asset value (NAV) as of most recent NAV calculation. While an offering document may contain disclosure of a fund's NAV, the Preparer will have no way to know whether or not this is in fact the most recent NAV calculation, and will have to contact the Issuer to find out. Alternatively, the offering document may not contain any specific NAV information, or there may not be an offering document used. The Preparer will have to contact the Issuer in order to request the most recent NAV calculation information, and the Issuer may not be willing to provide it to the Preparer, or may have concerns about the public disclosure of such information in the trade report form if public disclosure of this information could compromise sensitive financial information and is not already required in Canada or any other country.

4. The Proposed Report would require issuers, other than investment funds, to use the NAICS codes to identify their primary industry. As noted above, using a standard industry classification is intended to provide securities regulators with more consistent information on the industries accessing the exempt market and to facilitate more direct comparison to other statistical information using the same classification, such as reports from Statistics

Canada. Would the application of NAICS present challenges for issuers? Are there alternative standard industry classification systems that may be more appropriate? If so, please specify.

Identifying the correct NAICS code will require the Preparer to enlist the assistance of someone more knowledgeable about the Issuer's business, likely either a lawyer or investment banker who participated in the securities offering, or an appropriately senior employee of the Issuer. It may be difficult even for those individuals to identify the correct NAICS code if the Issuer has not previously been required to do so for any other purpose, particularly in the case of a foreign Issuer. While the Statistics Canada industry search tool is helpful, the selection of the correct NAICS code using that tool will still be time consuming and require the time and attention of an individual who is very familiar with the precise nature of the Issuer's business activities. For example, entering the keyword "manufacturing" returns 328 possible NAICS codes to choose from. The amount of time that will be required to review all 328 of the possible codes to select the appropriate one will be substantial.

5. The Proposed Report would not require: (i) foreign public issuers and their wholly owned subsidiaries, or (ii) issuers that distribute eligible foreign securities only to permitted clients, to disclose information about their directors, executive officers, control persons and promoters. Do these carve-outs provide appropriate relief to issuers that are either subject to certain foreign reporting regimes or have their mind and management outside of Canada? If not, please explain.

While we appreciate the accommodations that have been made in Item 5 of the Proposed Report, we do not believe that those accommodations will be sufficient to alleviate the difficulties that will be faced by Issuers of eligible foreign securities and the Dealers that distribute their securities into Canada. We note that our firm currently files approximately 300 to 350 trade reports annually on behalf of such Issuers and Dealers solely out of our New York office, with more being prepared and filed regularly from our offices in Canada, and the filings made by our firm would account for only a portion of all such filings.

We believe that the additional reporting burdens imposed by the Proposed Report would be viewed by the international financial community as a significant backwards step for Canada, running contrary to the much welcomed "wrapper" exemption relief which came into effect on September 8, 2015, and appeared to signal recognition of the important public policy objective of facilitating access to global investment opportunities by Canada's largest institutional investors.

In particular, we note that the Proposed Report would still require a Preparer acting on behalf of an international dealer distributing securities to Canadian permitted clients to:

- Provide the Issuer's legal entity identifier, which will require contacting the Issuer;

- Determine the Issuer's NAICS industry code, which will require having the Preparer contact and enlist assistance from an individual at the international dealer, or an employee of the Issuer, who is sufficiently familiar with the Issuer's business to identify the correct code;

- Ascertain the Issuer's date of formation, which is not typically considered an important or material piece of information in other jurisdictions, and may be difficult to identify;

- Determine the size range of the Issuer's assets, requiring a review of financial statements contained in the offering document, or reviewing other publicly available disclosure, or contacting the Issuer; and

- Identify the Issuer's website, which will require expending time to search the internet for that information, or contacting the Issuer to request it.

The Proposed Report carries forward in all provinces the requirement that currently applies only in British Columbia, under Form 45-106F6, to identify whether the purchaser is an insider of the Issuer, or a registrant. This British Columbia requirement has proved to be burdensome in the context of sales of eligible foreign securities. Determining whether or not a purchaser is a registrant can easily be ascertained by a Preparer through a search of the registration database, but will add time and expense to the trade report preparation process. Identifying definitively whether or not a particular investor is an insider of the Issuer as a result of beneficial ownership of the Issuer's securities will not be possible without contacting the investor, which could effectively mean that every Preparer of every report would have to contact every investor, and specifically an appropriate representative of the investor who has knowledge of the investor's ownership position in the Issuer. Further, there is no assurance that the investor would be willing to share this information with the Preparer. We note that reference to SEDI would not be a definitive source of confirmation that the investor is not an insider, as the investor could be exempt from SEDI filings as an eligible institutional investor. Reference to SEDAR filings will also not be a definitive source of confirmation, as the investor may be eligible to report its shareholdings under the Alternative Monthly Reporting System and not yet have been required to file an initial report. Further, there is no assurance that any beneficial ownership information publicly filed by the investor will be accurate or up to date. We are concerned that the Proposed Report requires the filer to certify all information in the report, even information that is not within the knowledge or control of the Issuer or the Dealer, subject to all applicable penalties for a false certification.

Perhaps the most significant and burdensome new requirement, however, is the requirement to identify the specific subparagraph of the "accredited investor" definition under which each purchaser qualifies. This is not information that international dealers have previously been required to maintain records of. While we expect that an international dealer will have taken appropriate steps to verify the status of the investor as both an "accredited investor" and also as a "permitted client", there is currently no database field in any existing computer system that tracks the specific subparagraph of the definition which establishes eligibility as an accredited investor for the purposes of trade reporting. If this requirement is adopted without further relief, we believe that every international dealer would have to undertake fairly significant changes to its computer systems to be able to maintain and easily access this information for trade reporting purposes. While the requirement to identify the specific subparagraph of the "accredited investor" definition under which each purchaser qualifies may be appropriate for registered dealers that distribute securities to Canadian individual investors, we respectfully submit that in the case of a sale of an eligible foreign security to a permitted client by an international dealer, it should be sufficient for all purposes to indicate that the purchaser is a permitted client, without having to indicate the specific subparagraph of either the accredited investor definition or the permitted client definition under which the investor so qualifies.

6. *The Proposed Report would require public disclosure of the number of the issuer's voting securities owned or controlled by directors, executive officers, control persons and promoters of certain non-reporting issuers, and the amount paid for them. This information is intended to provide valuable information for investors and increase transparency in the exempt market. Would disclosure of the percentage of voting securities owned or controlled by directors, executive officers, control persons and promoters of the issuer also be useful information for potential or existing investors?*

While we note that this requirement would not apply to reporting issuers, or Issuers of eligible foreign securities sold only to permitted clients, we believe that this requirement will be difficult if not impossible to comply with for some Issuers that would be subject to it. For example, the Issuer will not necessarily have access to current information regarding share ownership by its directors and executive officers, as such information is often only solicited on a periodic basis and may require updating. Further, the Issuer will not necessarily be in a position to compel its control persons and promoters to provide current information regarding their share ownership. To impose a requirement to disclose information that may not be known to or ascertainable by the Issuer or Dealer, with attendant penalties for a false certification, is in our view unreasonable and unfair.

Also, this proposed disclosure requirement does not take into consideration the complexity of the capital structures that are often employed by venture capital-funded private companies. These companies often have multiple classes of voting securities, preferred shares which may be convertible into voting securities, convertible debt securities and

option plans or other equity compensation instruments. In practice, it may be very difficult for many of these non-reporting issuers to identify the number of voting securities held by all directors, executive officers, control persons and promoters, and the "total amount paid" for all such voting securities, especially in light of the fact that reporting may be required of deemed beneficial ownership of voting securities underlying a convertible instrument, for which the future purchase price of the underlying security may be based upon a formula and not yet determinable. The space provided in Item 5(a) of the Proposed Report is not sufficiently detailed to allow such complex information to be provided accurately, and even if the form were revised to accommodate this potential complexity, gathering the required information would in many cases be extremely time-consuming and intrusive. The requirement to provide the total amount paid for the voting securities beneficially owned by such persons is likely to be difficult for many issuers, even in the case of voting securities that are already issued and outstanding and have been fully paid for in the past. The Issuer, and the persons whose beneficial ownership must be reported, may have to consult with their accountants and other financial record-keepers in order to assemble this information. This requirement of the Proposed Report seems to impose a compliance burden unreasonably disproportionate to the regulatory objective of obtaining information regarding new exempt market sales of securities by an Issuer.

7. The Proposed Report would require the disclosure of the residential address of directors, executive officers, control persons and promoters of certain non-reporting issuers in a separate schedule that would not be publicly available. Do you have any concerns regarding the requirement to disclose this information to securities regulators?

While we note that this requirement will not apply to reporting issuers, or to Issuers distributing eligible foreign securities only to permitted clients, we believe that it remains a burdensome requirement for those Issuers to which the requirement would apply and it is unclear that this requirement will facilitate more effective regulatory oversight of the exempt market or inform CSA decisions about regulatory changes to the exempt market. The Issuer will not necessarily be able to obtain the required information from its control persons and promoters. Also, an Issuer will not necessarily always have up-to-date records regarding the residential addresses of directors or executive officers, as people do change addresses and may not always communicate updated information to the Issuer immediately.

8. The information collected in the Proposed Report will be publicly available with the exception of the information required in Schedule 1 and Schedule 2. Does the Proposed Report appropriately delineate between public and non-public information? In particular:

a. Would non-reporting issuers have specific concerns regarding the public disclosure of this information and, if so, why?

We believe that some Issuers may have significant concerns about the public disclosure of information called for in the Proposed Report. Some of the required information may be information that is not otherwise required to be publicly disclosed under the laws of the Issuer's home country, particularly in the case of foreign issuers that are not reporting issuers or public companies in their home countries.

We also believe that some Canadian issuers that are not reporting issuers in Canada may have significant concerns about the required public disclosure of information such as the number of employees and asset size, which they may consider to be competitively sensitive information.

b. Is the publication of firm NRD number, which will help identify the involvement of a registrant in a distribution for compliance purposes, appropriate?

The NRD number of a registrant cannot easily be obtained through a search of the publicly available information in the national registration database. In order to provide this information, a Preparer will be required to contact the Dealer involved in the distribution to request its NRD number, if not already known to the Preparer. We note that this is one of numerous incremental requirements that, taken as a whole, increase the burden and complexity, and therefore the cost, of preparing trade reports without any apparent corresponding benefit from a compliance perspective. Regulatory authorities having concerns about the compliance of a particular Dealer should easily be able to identify it, and its registration or international dealer exemption status, by name.

9. In an effort to simplify and streamline the exempt market reporting regime for market participants, the Proposed Amendments would create one form for all issuers, with some items applicable only to non-investment fund issuers and some items applicable only to investment fund issuers. Should we require a specific form for investment fund issuers, as proposed in the March 2014 Proposals and, if so, why?

We commend the CSA for its effort to simplify and streamline the exempt market reporting regime. Subject to the concerns we have noted regarding certain information proposed to be required to be included, we believe it will be very helpful to participants in the exempt market to have a single form of trade report applicable in all provinces for all issuers, including both investment funds and non-investment funds. We urge the CSA to continue its efforts to harmonize the electronic filing systems for exempt market reporting, as it is cumbersome and inefficient for Preparers to be required to address two separate electronic filing and fee payment systems (in Ontario and British Columbia) in addition to the paper filing and fee payment requirements in other jurisdictions. We understand that a longer-term CSA project is underway to create a single integrated filing system for reports of exempt distribution.

10. The Proposed Report would change the deadline for investment funds reporting annually to within 30 days after the calendar year-end (i.e. by January 30), rather than 30 days following their financial year-end. The purpose of this proposed change is to improve the timeliness and comparability of information from all investment fund issuers, regardless of their different financial year-ends. Would this proposed change present a significant burden for investment fund issuers?

We are supportive of having a common deadline for annual trade reporting by investment funds as we believe that it will be helpful to reduce the complexity now presented by the requirement to maintain compliance systems which require tracking different year ends. However, this change will result in an increase in the volume of trade reports that will be due by the January 30 deadline. We urge the CSA to consider extending the filing deadline to 45 or 60 days following December 31, at least in the first year following the transition to the new regime. We also urge the CSA to allow non-year end funds to delay filing their annual trade report until the first new filing deadline that is more than twelve months since the date of their previously filed report, so that the change will not result in a requirement for non-year end funds to incur the legal fees, time expenditures and other burdens associated with the trade reporting process twice in the same calendar year. It should be recognized that these compliance costs are significant, will not have been anticipated or budgeted for by the investment funds and will ultimately be borne by the fund's investors.

11. The Proposed Report includes Schedule 1 and Schedule 2, which would be required to be filed in electronic format. We anticipate that filing in electronic format will improve our information collection, enhance our ability to conduct compliance and policy analysis, and potentially lead to technological efficiencies for filers. If we were to provide templates in Excel format, would there be any specific technological barriers that would be burdensome for filers to overcome? If so, are there other formats that would be less burdensome and would accomplish the same goals of filing in the proposed format?

We are supportive of the use of Excel format for the provision of the information to be required by the Schedules. We do not believe that the use of Excel would give rise to technological difficulties for filers as Excel is already widely, and perhaps universally, used by industry participants. We do urge the CSA to provide templates to filers in order to ensure that there is a consistency in the format and presentation of the information provided by different filers, and to eliminate the significant burden and complexity that we believe each filer would face in developing its own templates. Finally, we note that the ability to provide information in a format such as Excel allows Preparers to handle and process the data much more efficiently, and allows the contents to be reviewed and approved by others prior to submission, which would not be the case if the data were required to be entered through a web-based interface and could not be saved, printed, reviewed and edited prior to submission.

Additional Comments

Certification

We are very concerned that the Proposed Report now requires the inclusion of information about parties other than the Issuer or the Dealer, but still requires the filer to certify that "all of the information provided in this report is true". We do not believe it is appropriate to require the filer to certify, under penalty of law, information that can only be obtained from third parties (such as promoters or control persons) and that is not within the filer's own knowledge and control. We strongly urge the CSA to reconsider this requirement and, to the extent that such third party information continues to be required, that the wording of the required certification be revised to apply a "best of knowledge after due inquiry" standard for that type of information.

Collection of Information About Individuals

The Proposed Report contains a certification by the filer that each individual listed in Schedule 1 and 2 of the report resident in Canada has received certain notices regarding the collection of personal information (including the title, business address and business telephone number of the public official who can answer questions about the collection of information), and has authorized the indirect collection of information by the securities regulatory authorities. This certification is similar to the certification currently contained in Form 45-106F1 regarding purchasers resident in the Province of Ontario. The reason that this certification requirement relating to Ontario purchasers was included in Form 45-106F1 was because of a requirement specific to Section 39(2) of the Ontario Freedom of Information and Protection of Privacy Act (the "**Ontario FIPP Act**"). Our understanding is that there is no provision corresponding to Section 39(2) of the Ontario statute in the freedom of information and protection of privacy legislation of any other province of Canada. We do not believe that it is appropriate to require Issuers who have distributed securities in other provinces of Canada to certify that they have complied with the requirements of the Ontario FIPP Act with respect to purchasers in provinces other than Ontario when those requirements do not form part of the legislative requirements of any other province.

Instruction Regarding Determining Jurisdiction of Distribution

Instruction 2 to the Proposed Report states: "Generally, in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories and Nunavut, a distribution is considered to occur in the jurisdiction if the issuer of the securities is located in, or has a significant connection to, that jurisdiction."

While we understand this to be the longstanding position taken by the Alberta Securities Commission and the British Columbia Securities Commission, and the necessary implication of Section 12 of the *Securities Act* (Quebec), we do not believe that this is a correct statement of the views historically expressed by the securities regulatory authorities of a number of provinces in addition to the Province of Ontario, notably including the Provinces of Saskatchewan, Manitoba and Nova Scotia. By way of an illustrative example, we refer to the provisions of Sections 4.2 and 4.3 of Companion Policy 71-101CP, the companion policy to the Multijurisdictional Disclosure System ("**MJDS**"). Section 4.3 outlines filing procedures that may be followed by an Issuer in Saskatchewan, Manitoba, Ontario and Nova Scotia to clear a U.S. registration statement under MJDS without filing a concurrent Canadian prospectus, which would not be possible if the regulators in those provinces had been of the view that a distribution of securities takes place in the province as a result of the Issuer being located in that province. Accordingly, it is our understanding that the provinces of Saskatchewan, Manitoba and Nova Scotia (and perhaps certain others that do not act as principal jurisdictions for the purposes of MJDS and so are not named in Section 4.3 of the companion policy) have historically embraced the same position regarding the application of their securities laws to "outbound" distributions as has the Province of Ontario.

We submit that such a significant change to policies regarding the extent of the application of a particular province's securities laws should not be introduced through the addition of an instruction to the Proposed Form, and should not be made without more extensive consideration and industry consultation.

Finally, the instructions state that an Issuer located outside of Canada generally need only include information about purchasers resident in Canada in the report. The implication of this instruction is that the converse is true for Issuers located in Canada, or at least Issuers located in those provinces such as Alberta, British Columbia and Quebec where a distribution is considered to occur solely by virtue of the issuer being located there. We respectfully submit that an Issuer located in such a province should not be required to include details of purchasers outside of Canada in its trade report filings. Transactions undertaken in the United States or other countries, though conducted by Canadian Issuers pursuant to and in compliance with available Canadian prospectus exemptions, may entail sales of securities to hundreds, if not thousands, of purchasers. We question the regulatory purpose in requiring Issuers in such provinces to provide detailed information regarding the non-Canadian purchasers of their securities, and submit that any Canadian public interest that might be served by providing such information through the trade report process is greatly outweighed by the cost and inconvenience such a requirement imposes on Issuers and Dealers. We propose that it should be sufficient to report private placement sales made outside of Canada by a Canadian Issuer only on an aggregate basis, if at all, without having to provide detailed information regarding each foreign purchaser.

Instruction Regarding References to Purchaser

Currently, Instruction 1 to Form 45-106F1 states: "References to a purchaser in this report are to the beneficial owner of the securities." It is well accepted that the purpose of the trade report is to gather information regarding the actual purchaser of securities, and not the name of a nominee or custodian who may be taking legal title to the security on behalf of the true beneficial owner. In that regard, the use of the words "beneficial owner" have been understood to be used in contrast to the registered or legal owner whose name may appear in the books and records of the Issuer or its transfer agent.

Instruction 4 to the Proposed Report repeats the first sentence that appears in Form 45-106F1, and then goes on to provide an example clarifying that if an individual acquires securities registered in the name of his or her investment advisor, the purchaser is in fact the beneficial owner for reporting purposes, and not the investment advisor. We fully agree with this analysis in the case of an individual who has personally made an investment decision to purchase securities based on advice received from his or her investment adviser.

However, the instruction also goes on to state:

> "If a trust company, trust corporation, or registered adviser has purchased the securities on behalf of a fully managed account under subsections 2.3(2) and (4) [*Accredited Investor*] of NI 45-106, provide information about both the trust company, trust corporation or registered adviser and the beneficial owner of the fully managed account."

We respectfully submit that this statement in the instruction would introduce an inappropriate and unworkable change to the current exempt reporting regime. Where a discretionary account manager purchases securities for a *fully managed account*, that discretionary account manager is deemed by subsection 2.3 of NI 45-106 to be purchasing as principal, and is for all purposes the "purchaser" of the securities. Consider the example of a discretionary account manager in the Province of Ontario that purchases securities of an Ontario Issuer, on a fully discretionary basis, for the benefit of accounts whose beneficial owners are located in the Provinces of Alberta, British Columbia and Manitoba. In this example, there is a distribution of securities in the Province of Ontario only, and an exempt trade report would be required to be filed only in the Province of Ontario. This is because no trade in securities has taken place in any other province, nor have any acts in furtherance of the trade taken place in any other province. The Ontario discretionary account manager, having been deemed to be purchasing as principal by NI 45-106, is properly reported as the "purchaser" for trade reporting purposes. From the perspective of the Issuer or Dealer involved in the sale, the counterparty to the purchase transaction is the discretionary account manager alone. The Issuer and the Dealer would not necessarily even

know what accounts the manager might choose to allocate the securities to, or who the beneficial owners of those accounts might be, or where they might be located.

To illustrate the point further, suppose that the account manager is not in Ontario but somewhere outside Canada, purchasing securities for accounts beneficially owned by Canadians. In this situation, no Canadian trade report filing requirement would arise at all, as there would be no distribution of securities taking place in Canada. The trade, and all acts in furtherance of the trade, will be made to the account manager outside Canada, and the Issuer and Dealer involved would not even necessarily know that there are beneficial holders of those accounts in Canada. If the intention of this new statement in the instruction is to require Canadian trade reports to be filed whenever sales are made to discretionary account managers anywhere in the world outside Canada who are purchasing for accounts beneficially owned by Canadians, the result would be to introduce significant disruption to the practices and procedures currently followed in the global securities markets. We would propose that the introduction of a Canadian trade reporting requirement relating to beneficial owners of securities purchased by discretionary accounts managed by a fully discretionary account manager, whether the account manager is inside or outside Canada, would be a very significant change that should warrant much further analysis and discussion than could be achieved in the context of adding an instruction to a form.

Further, we submit that it is not appropriate to expand the scope of information required for exempt trade reporting purposes solely for the purpose of attempting to gather information regarding the beneficial owners of accounts under management by a discretionary account manager, and that there are other, better and more appropriate ways to gather such information directly from discretionary account managers subject to the jurisdiction of Canadian securities regulatory authorities, if considered necessary.

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In closing, we highly commend the CSA for their efforts to simplify and streamline the exempt market reporting regime, a goal which we believe is clearly in the best interests of all market participants, including institutional and other Canadian investors in exempt market securities. We are concerned, however, that the extent of the new information required by the Proposed Report will undermine those efforts, and result in the Proposed Amendments having the opposite effect. Foreign Issuers and Dealers selling their securities in the United States and globally generally have the ability to distribute all of the securities being sold in an offering to purchasers in countries outside of Canada, but they make a portion of the offering available in Canada on a private placement basis as an accommodation to their large Canadian institutional clients, to allow them to diversify their portfolios by investing in such foreign securities. We submit that it is not in the best interests of the Canadian capital markets, or the public interest more generally, to create a regime so complicated and burdensome that it could dissuade foreign Issuers and Dealers

from allowing the large Canadian institutional investors, charged with managing the pensions and savings of Canadian citizens, to participate global offerings. Further, Canadian issuers may be dissuaded from seeking to raise capital in the exempt market because of the added complexity, time requirements and costs involved.

We would propose that one of the factors that should be considered by the CSA before moving forward with the Proposed Amendments is a comparative study of the exempt trade reporting requirements that apply in other countries, in order to ensure that the Proposed Form does not impose burdens disproportionate to those required for sales to institutional and other investors in other countries, so that the Proposed Amendments do not have the unintended effect of placing Canadian issuers and investors (including Canada's largest institutional investors) at a competitive disadvantage to their peers in other countries in terms of their ability to have access to a sufficiently broad range of investment opportunities and generate returns on those investments. In that regard, we note that although exempt trade reporting is required in the United States for certain private placement sales, no such reporting is required for unregistered sales of securities that are made to Qualified Institutional Buyers under Rule 144A.

We wish to thank the CSA for providing us with this opportunity to comment on the Proposed Amendments. If it would be helpful, we would be pleased to discuss our comments with you further. Please feel free to contact Rob Lando at (212) 991-2504, or by e-mail at rlando@osler.com, or Mark DesLauriers at (416) 862-6709, or by e-mail at mdeslauriers@osler.com or Blair Wiley at (416) 862-5989, or by email at bwiley@osler.com.

Yours very truly,

Osler, Hoskin & Harcourt LLP