PRIVATE CAPITAL MARKETS ASSOCIATION OF CANADA

THE NATIONAL VOICE OF EXEMPT MARKET DEALERS, ISSUERS AND INDUSTRY PROFESSIONALS

November 9, 2015

TO: 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

DELIVERED TO:

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AND TO:

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PRIVATE CAPITAL MARKETS ASSOCIATION OF CANADA

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Dear Sir and Madame:

Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions relating to Reports of Exempt Distribution (the **Proposed Amendments**)

The Private Capital Markets Association of Canada (the **PCMA**) is pleased to provide our comments and support of the Proposed Amendments for the reasons set out below under "*Comments and Analysis of the Proposed Amendments*".

Who is the PCMA?

The PCMA is a not-for-profit association founded in 2002 as the national voice of exempt market dealers (**EMDs**), issuers and industry professionals in the private capital markets across Canada.

PCMA plays a critical role in the private capital markets by:

- assisting its hundreds of dealer and issuer member firms and individuals to understand and implement their regulatory responsibilities;
- providing high-quality and in-depth educational opportunities to private capital markets professionals;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of the private capital markets in Canada;
- being the voice of the private capital market to securities regulators, government agencies, other industry associations and the public capital markets;
- providing valuable services and cost-saving opportunities to its member firms and individual dealing representatives; and
- connecting its members across Canada for business and professional networking.

Additional information about the PCMA is available on our website at: www.pcmacanada.com

Who Are Exempt Market Dealers?

EMDs are fully registered dealers who engage in the business of trading in securities to qualified exempt market clients. EMDs are subject to full dealer registration and compliance requirements and are directly regulated by the provincial securities commissions. The regulatory framework for EMDs is set out in National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations (**NI 31-103**) and it applies in every jurisdiction across Canada.

EMDs must satisfy substantially the same "Know-Your-Client" (**KYC**), "Know-Your-Product", (**KYP**) and trade suitability obligations as other registered dealers who are registered investment dealers and members of the Investment Industry Regulatory Organization of Canada and mutual fund dealers and members of the Mutual Fund Dealers Association of Canada. NI 31-103 sets out a comprehensive dealer regulatory framework (substantially the same for all categories of dealer), which requires EMDs to satisfy a number of regulatory obligations including:

- educational proficiency;
- capital and solvency standards;
- insurance;
- audited financial statements;
- KYC, KYP and trade suitability;
- compliance policies and procedures;
- books and records;
- trade confirmations and client statements;
- relationship disclosure, including disclosure of conflicts of interest and referral arrangements;
- complaint handling;
- internal dispute resolution procedures, and external dispute resolution for clients through the Ombudsman for Banking Services and Investments;
- cost, product and account fees disclosure;
- maintenance of internal controls and supervision sufficient to manage risks associated with its business;
- prudent business practices requirements;
- registration obligations; and
- submission to regulatory oversight and dealer compliance reviews.

EMDs may focus on certain market sectors (*e.g.*, oil and gas, real estate, mining or minerals, technology, venture financing, etc.) or may have a broad cross-sector business model. EMD clients may be companies, institutional investors, accredited investors or investors who purchase exempt securities pursuant to an offering memorandum or another available prospectus exemption.

EMDs provide many valuable services to small and medium size enterprises, large businesses, investment funds, merchant banks, financiers, entrepreneurs, and individual investors, through

their ability to participate in the promotion, distribution and trading of securities, as either a principal or agent.

Comments and Analysis of the Proposed Amendments

Our answers to your Questions set out in the Proposed Amendments are out below.

Unless otherwise defined herein, capitalized terms have the same meaning ascribed thereto as set out in the Proposed Amendments.

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.*

Overall, we believe the Proposed Report strikes an appropriate balance between: (i) the benefits of collecting this information, and (ii) the compliance burden that may result for issuers and underwriters, subject to our further comments set out below.

We believe a single report of trade across Canada is appropriate, but strongly believe that the data cannot be for the exclusive benefit of Canadian securities regulators. The industry, academics, investors and others would strongly benefit from immediate and meaningful access to the data with the ability to run various reports based on the data to help make private markets and transactional activity more transparent. There is a material cost and administrative burden placed on issuers and sellers of securities to compile the Proposed Report and we strongly believe that a *more immediate plan* to readily provide such access to the data/search functions should be a CSA priority. We understand there are a number of private sector service providers that could assist the CSA with such a project and it could be well positioned as a private/public initiative.

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?*

Below are our comments on certain information set out in the Proposed Reports and our views.

(a) Item 4 – Issuer Information – (c) SEDAR profile number

We believe a note should be added in the companion policy that non-reporting issuers that are making certain filings on SEDAR, would not be required to complete items 4(d) – (h) if such a proposal becomes law. See Proposed amendments to National Instrument 13-101 *System for Electronic Document Analysis and Retrieval (SEDAR)* (NI 13-101) and Multilateral Instrument 13-102 *System Fees for SEDAR and NRD.*

We also believe Item 4 should distinguish information about the issuer that is specific to Canada and information about the issuer outside of Canada in order to collect the correct data about our Canadian capital markets. With this in mind, we recommend the following:

- Item 4(b) should identify the number of employees of the issuer inside and outside of Canada;
- Item 4(d) should identify the issuer's head office in Canada but also its registered office outside of Canada, if the registered office is not in Canada;
- Item 4(e) inquires about the date of formation. We note that the date of formation for an amalgamated entity would be the date of amalgamation and not necessarily the date of formation for a predecessor entity. The CSA should request information about the history of an amalgamated entity to correctly identify the issuer's predecessor entities which may provided a more accurate indicator of the age of an entity; and
- Item 4(h) refers to the size of an issuer's assets. It is not clear why this metric is being requested rather than shareholders' equity. We would request clarification as to why this metric is the best measurement of the issuer's size.

(b) Item 5 – Directors, Executive Officers, Control Persons and Promoters of the issuer

I. Keep shareholder information about non-reporting issuers private and confidential

Generally, we believe information about shareholders of non-reporting issuers (*i.e.,* private companies) should remain confidential information of that issuer and should not publicly available unless otherwise required under existing laws. For example, certain Canadian jurisdictions, such as the Province of Alberta, require shareholder information to be publicly filed and available for review. However, certain Canadian jurisdictions, such as the Province of Ontario, do not require the public filing or disclosure of shareholder information for non-reporting issuers. To be consistent, we believe that such shareholder information should not be required to be disclosed at all, or if such disclosure is required, then it should remain private and set out in Schedule I to Form 45-106F1 *(Confidential Director, Executive Officer, Control Person and Promoter Information)* (**Proposed Schedule I**), which is the private part of the Proposed Report.

We also note that the CSA should include a reminder note for issuers that have such requirements to file shareholder information under applicable local laws, that it be updated and consistent with any information requested in the Proposed Report to avoid/reduce the likelihood of having inconsistent information.

II. Control person and promoter disclosure

The definition of *control person*[1] and *promoter*[2] involve legal analysis and the time, money and effort involved in such a determination may outweigh the benefits. Moreover, if such information is required, we believe a control person could be more readily identified by eliminating the disclosure for such persons and instead, requiring disclosure of any individual and/or entity's holdings in excess of 10% of the voting securities of a non-reporting issuer, and again, provided that it is set out in Schedule I which is the private part of the Proposed Report. Insiders of reporting issuers are already required to file and publicly disclose their holdings in excess of 10% or more of an issuer's voting securities on SEDI, so that information is already available to CSA members on the public market side and should not have to be duplicated.

Although this bright-line disclosure about the holdings of a control person and promoter do not exactly capture all aspects of the definition of such terms, we believe it captures sufficient information for an investor to understand voting control which is important as opposed to a title such a 'promoter' which some investors may not understand and is unlikely to impact their investment decision. Moreover, we also understand control person and promoter information are not required disclosure in Form D[3] under Regulation D in the United States which is the equivalent report of trade form in the United States.

[1] For example, section 1 of the *Securities Act* (Ontario) states that "**control person**" means, (a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or company holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or (b) each person or company in a combination of persons or companies, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a combination of persons or companies holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer.

[2] For example, section 1 of the *Securities Act* (Ontario) states that "**promoter**" means, (a) a person or company who, acting alone or in conjunction with one or more other persons, companies or a combination thereof, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of an issuer, or (b) a person or company who, in connection with the founding, organizing or substantial reorganizing of the business of an issuer, directly or indirectly, receives in consideration of services or property, or both services and property, 10 per cent or more of any class of securities of the issuer or 10 per cent or more of the proceeds from the sale of any class of securities of a particular issue, but a person or company who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this definition if such person or company does not otherwise take part in founding, organizing, or substantially reorganizing the business.

[3] See Form D at: https://www.sec.gov/about/forms/formd.pdf

We also note that the Proposed Report requires disclosure of the residential addresses of such control persons and promoters and there is a concern that this information may not be readily available to a selling securityholder or an issuer. Moreover, if a selling securityholder is not an issuer, it is not clear how such a shareholder can obtain such information independently in order to file the Proposed Report. We believe such information is unnecessary and presents an undue disclosure burden on selling securityholders.

(c) Item 7 – Information About the Distribution

Item 7(b) inquires as to a distribution's start date and end date. It is not clear what end date would be used if an offering is in continuous distribution, such as a distribution involving a mortgage investment corporation. We suggest Item 7(b) disclosure should be revised to reflect both continuous and non-continuous offerings.

In addition, we note that indirect offering structures may lead to double counting of the amount of capital raised. For example, consider a trust (*i.e.,* topco) that raises capital and then uses the net proceeds raised to acquire securities of a limited partnership (*i.e.,* bottomco). This is typical in the exempt market where a trust is established for RRSP- eligibility purposes and otherwise as a qualified investment under the *Income Tax Act* (Canada).

We strongly suggest the CSA avoid double counting of capital raised by requesting information about an indirect offering structure and obtaining the particulars of bottomco in topco's report of trade and vice versa.

(d) Guidance on Where the Proposed Report must be Filed

Section 2 of the Instructions to the Proposed Report (*Determining jurisdiction of distribution*) states that a distribution may occur in more than one jurisdiction which may require a Report of Trade to be filed in two jurisdictions.

The guidance states, among other things, the following (the **Proposed Guidance Excerpt**):

> *"A distribution by an issuer in Ontario may or may not be a distribution in Ontario that gives rise to the requirement to file a report. Whether a distribution occurs in Ontario will depend on whether, in light of relevant connecting factors including the likelihood that the securities will come to rest in Ontario, there is a sufficient connection between the distribution and the province. …"*

The court decision in Crow et al. v. Ontario Securities Commission set out a substantial connection test of whether an issuer is subject to the securities laws of that jurisdiction. In contrast, OSC Interpretation Note 1 Distributions of Securities Outside Ontario (March 25,

1983)[4] (**OSC Interpretation Note 1**) suggests a regime where an issuer/selling securityholder could implement certain restrictions and take various precautions, such as adding a legend to share certificates that states the securities are not qualified for sale in Ontario and may not be offered or sold directly or indirectly in Ontario, so the securities do not come to rest in Ontario, such that the local securities laws of the jurisdiction where that issuer/selling securityholder has a substantial connection would not apply; only the securities laws where the purchaser is resident.

It is respectfully submitted that the two concepts are conflated in the Proposed Guidance Excerpt. Accordingly, we respectfully request that the OSC explicitly state whether an issuer can rely on OSC Interpretation Note 1 despite the Crowe decision, which will help clarify the present confusion in the Ontario marketplace and as set out in the Proposed Guidance Excerpt.

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?*

If the CSA seeks to obtain this information to assess which exemptions are being relied upon by small, medium-sized and large issuers, as per Statistics Canada metrics used in the Proposed Report, then such information is helpful. However, some issuers want their number of employees to remain confidential, accordingly, consideration should be give to setting out such confidential information in Schedule I which is the private part of the Proposed Report.

Also, guidance should be included on whether the number of employees only includes full and not part-time employees or all employees of any type. Moreover, some firms, issuers in particular, often have a large number of independent contractors/agents and it is unclear whether they would be reported or not. Explicit guidance on these points would be appreciated.

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*

[4] See https://www.osc.gov.on.ca/en/SecuritiesLaw_dnn_19830325_former-osc-policy-1-5.htm

We have no objection with the use of NAICS codes to identify an issuer's primary industry.

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.*

If such information is readily and publicly available elsewhere, then these foreign public issuers and issuers distributing eligible foreign securities should be required to either: 1) set out, or provide a link to, where such information is readily available or 2) if the local regime in the foreign jurisdiction does not require such disclosure, to provide a statement to that effect. We agree that imposing such additional disclosure that is not required in a foreign jurisdiction may result in such foreign issuers not offering their securities into Canada and that could potentially deny investors certain investment opportunities.

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?*

Please see our response above in Question #2(b)(II) – *Control person and promoter disclosure*.

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?*

We believe requiring the residential address of directors, executive officers, control persons and promoters of certain non-reporting issuers is unnecessary and the requirements should be more limited. CSA members and others can obtain information about officers and directors, and in certain jurisdictions, shareholder information, if required, by reviewing corporate records that are publicly filed and available from various Government agencies.

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?*

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

Our comments about the public disclosure of certain information involving non-reporting issuers has been discussed above and we have assumed that the information required in Schedule I and Schedule II would remain confidential.

We have no objection with the publication of a firm NRD number.

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 believe there should be a separate Report of Trade for investment fund issuers and non-investment fund issuers since combining the two into one form creates a longer more complicated form. Two separate Report of Trade forms would allow an investment fund or a non-investment fund, depending on the entity filing the report, to more easily complete and focus on all items required by such a report than trying to ascertain which part of the form does not apply to it.

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 have no objection to the proposed change.

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 agree providing templates in Excel format would be helpful since this data is already complied by many issuers in an Excel format.

* * *

We thank for considering our submissions and we would be pleased to respond to any questions or meet with you to discuss our comments.

Regards,

"Brian Koscak"

PCMA Vice Chair

"Geoffrey Ritchie"

PCMA Executive Director