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Submitted via e-mail to comments@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

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Superintendent of Securities, Yukon
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* relating to Reports of Exempt Distribution

Dear Sirs/Mesdames:

We are writing to you in response to the request of the Canadian Securities Administrators (the "**CSA**") for comments (the "**Request for Comments**") on the proposed amendments to National Instrument 45-106 *Prospectus Exemptions* published on June 8, 2017 (the "**Proposed Amendments**") that would amend the report of exempt distribution set out in Form 45-106F1 *Report of Exempt Distribution* (the "**Report**"). This comment letter is submitted jointly by Blake, Cassels & Graydon LLP, Davies Ward Phillips & Vineberg LLP, McCarthy Tétrault LLP, Osler, Hoskin & Harcourt LLP and Stikeman Elliott LLP.

We are very supportive of the Proposed Amendments and of the CSA's efforts to address some of the concerns identified by market participants regarding the changes made to the Report effective June 30, 2016 (the "**2016 Amendments**"). We believe the Proposed Amendments will reduce the compliance burden on issuers and underwriters and, therefore, will facilitate more efficient capital raising in the Canadian exempt market, particularly in the context of extending U.S. and other global securities offerings to eligible investors in Canada.

In particular, we are especially supportive of the proposed change to Schedule 1 permitting filers to indicate that a non-individual purchaser relying on the "accredited investor" exemption is a "permitted client", without identifying the specific subparagraph of the accredited investor exemption applicable to that purchaser. We believe that this change will greatly reduce one of

the most significant compliance burdens introduced by the 2016 Amendments, without unduly interfering with the CSA's ability to collect information about the Canadian exempt market and its participants.

Our comments in this letter are generally intended to clarify the intent of the Proposed Amendments, and to propose certain additional changes to the Report which we believe will further reduce the compliance burden on market participants while still permitting the CSA to achieve its regulatory objectives.

Part I – Clarifying Changes

Item 10 – Certification Wording

The proposed revised certification wording contained in the Proposed Amendments is a significant improvement over the existing wording in that it expressly recognizes the existence of a due diligence defence and it contains a knowledge qualifier.

We would propose the following further changes which we believe are fully consistent with the objectives of the Proposed Amendments:

> "By completing the information below, I certify, on behalf of the issuer/underwriter/investment fund manager filing this report (and not in my personal capacity), to the securities regulatory authority or regulator, as applicable, that I have reviewed this report and to my knowledge, having ~~exercised reasonable diligence~~ made reasonable inquiries with respect to information outside my personal knowledge, the information provided in this report is true and, to the extent required, complete."

The first change further clarifies that the certifying individual is acting solely in his or her capacity as a representative of the entity filing the Report, and not in a personal capacity.

The second change recognizes that the individual signing the certificate in the Report is unlikely to have personal knowledge of much of the information called for by the Report, and that there should not be any expectation that the individual signatory conduct any independent due diligence investigation regarding the information required to complete the Report, other than making reasonable inquiries of others. For example, if the Report is being signed on behalf of the issuer, the signatory may have no means of obtaining any information regarding the purchasers of the securities other than by making reasonable inquiries of the underwriters involved. Conversely, if the Report is being signed on behalf of an underwriter, the signatory may have no means of obtaining any information regarding the issuer required by the Report other than by making reasonable inquiries of the issuer, or other individuals within the underwriter's organization who have participated in due diligence investigations of the issuer.

Item 10 – Delegation

Currently, Item 10 of the Report requires that an officer or director of the issuer or underwriter sign the certification appearing in Item 10, and prohibits the delegation of the signing of that

certification statement to an individual preparing the Report on behalf of the issuer or underwriter.

We are very appreciative of the CSA's recognition of the practical difficulties presented by the current certification requirements and prohibition of delegation. However, we believe that further clarification is necessary regarding what is intended by the proposed change. The CSA has stated in the Request for Comments that the amendment is intended to "permit authorized agents to sign the certification". The instructions to Item 10 further state that delegation may only be to "an agent that has been authorized by an officer or director of the issuer or underwriter to prepare and certify the report on behalf of the issuer or underwriter."

Consider the following example. Dealer X, a U.S. investment bank, routinely sells securities of non-Canadian issuers to Canadian institutional investors that are permitted clients, and is required to file a Report for each such sale. Dealer X has engaged Firm Y, a Canadian law firm, to assist it in preparing and filing the required Reports. We are concerned that the proposed amended wording in Item 10 is ambiguous regarding:

- In the box titled "Name of issuer/underwriter/investment fund manager/agent", is the name to be inserted Dealer X (as underwriter), or Firm Y (as agent), or both?

- Are the "full legal name" boxes to be completed with the name of the officer or director of Dealer X who has delegated the certification, or the name of the lawyer or other individual at Firm Y to whom certification authority has been delegated?

To resolve these ambiguities, we would recommend that the second paragraph in Item 10 of the Report be deleted entirely and replaced as follows:

> The certification below may be signed by any officer, director, partner, employee or other representative (a "Certifying Individual") of a law firm, service provider or other authorized agent of the issuer or underwriter filing the report (a "Filing Agent"), provided that the Filing Agent has been given authorization to certify this report by a director or officer of the issuer or underwriter required to file this report (the "Filer"). If this report is being certified by a Filing Agent: (i) provide both the name of the Filer and the name of the Filing Agent in the first box below; and (ii) complete all other boxes with the applicable information for, and signature of, the Certifying Individual.

Purchasers Located Outside of Canada

There is considerable confusion among practitioners, and we believe also among CSA members, regarding when non-Canadian purchasers must be included in the disclosure in Item 7 of the Report and listed in Schedule 1 of the Report, and when they do not.

It is our understanding that the Report requires including disclosure of sales to purchasers outside Canada in both Item 7 and Schedule 1 if, and only if, a Canadian prospectus exemption which requires the filing of a Report is being relied upon to make the distribution from a province of Canada to purchasers outside Canada. For example, an issuer headquartered in British Columbia relying on the accredited investor exemption to make a distribution to a purchaser in British

Columbia, a purchaser in Ontario and a purchaser in the United States would report all three purchasers. On the other hand, an issuer headquartered in Ontario selling securities to a purchaser in Ontario, a purchaser in British Columbia and a purchaser in the United States would only report the Ontario and British Columbia sales, and not the sale in the United States, if the issuer has concluded that the sale to the purchaser in the United States was not subject to the prospectus requirements of Ontario securities laws. See General Instructions, Instruction #2, and Items 7(f) and 7(g) of the Report.

In addition to the confusion we have observed, we believe that the requirement to disclose the names and other information regarding purchasers of securities outside Canada in Schedule 1 of the Report creates an unnecessary and disproportionate burden on Canadian issuers in the relevant provinces conducting certain capital raising activities outside Canada, including broad-based U.S. registered offerings or offerings under Rule 144A which could entail sales to hundreds, if not more, qualified institutional buyers.

We respectfully submit that the CSA should amend the Report so that the inclusion of information regarding purchasers outside Canada in Item 7 and Schedule 1 is not required under any circumstances, no matter which province the issuer is located in, and no matter what the technical analysis may be regarding whether the non-Canadian sales constitute a distribution. One of the key stated regulatory objectives of the Report is to obtain information regarding the Canadian exempt market and exempt market participants. We submit that gathering information regarding the identity of purchasers outside Canada is not in fact necessary to achieve this objective. In that regard, we note that in the recently proposed Ontario Form 72-503F, *Report of Distributions Outside Canada*, there is no requirement to identify the non-Canadian purchasers to which the distribution is made. Alternatively, we submit that the detailed information regarding each specific purchase that is called for in Schedule 1 should not be required for non-Canadian purchasers, and that only the aggregated information called for by Item 7 should be required for reporting distributions outside Canada, preferably with respect to all foreign jurisdictions in the aggregate in Items 7(f), 7(g) and 8(d), rather than for each foreign jurisdiction individually.

However, if the CSA considers the burdens potentially imposed by the requirement to include specific information regarding non-Canadian purchasers in Schedule 1 to be justified by an appropriate investor protection or other regulatory objective, we suggest the following clarifying revisions:

- *General Instructions, Instruction #2 – Issuers located outside of Canada.* We suggest that the instruction be revised as follows:

  > "<u>Information with respect to a distribution being made to purchasers outside Canada, and with respect to purchasers outside of Canada, is required to be included in the responses to Item 7 and Schedule 1 if, and only if, the sales to those purchasers outside Canada constitute an "outbound" distribution made in reliance on a prospectus exemption that requires the filing of this report.</u> If an issuer located outside of Canada determines that a distribution has taken place in a jurisdiction of Canada, include information about purchasers ~~resident~~ in that jurisdiction only."

- *Item 7(f) – Summary of the distribution by jurisdiction and exemption*. We recommend revising the first sentence of the introductory language as follows:

  "State the total amount of securities sold ~~distributed~~ and the number of purchasers for each jurisdiction of Canada ~~and foreign jurisdiction~~ where a purchaser ~~resides~~ is located and for each exemption relied on in Canada for that distribution. Also include the total amount of securities sold and the number of purchasers for each foreign jurisdiction if, and only if, the sales to purchasers in that foreign jurisdiction constitute an "outbound" distribution made in reliance on a prospectus exemption that requires the filing of this report."

- *Item 7(g) – Net proceeds to the investment fund by jurisdiction*. We recommend revising the first sentence of the introductory language as follows:

  "If the issuer is an investment fund, provide the net proceeds to the investment fund for each jurisdiction of Canada ~~and foreign jurisdiction~~ where a purchaser ~~resides~~ is located. Also include the total amount of securities sold and the number of purchasers for each foreign jurisdiction if, and only if, the sales to purchasers in that foreign jurisdiction constitute an "outbound" distribution made in reliance on a prospectus exemption that requires the filing of this report."

- *Item 8(d) – Compensation Details*. We recommend revising the first sentence as follows:

  "Provide details of all compensation paid, or to be paid, to the person identified in Item 8(a) in connection with the distribution to purchasers in Canada. Also include the details of all compensation paid, or to be paid, in connection with the distribution to purchasers in each foreign jurisdiction if, and only if, the sales to purchasers in that foreign jurisdiction constitute an "outbound" distribution made in reliance on a prospectus exemption that requires the filing of this report."

Issuer Information

Co-Issuers and Financing Subsidiaries

Many foreign offerings of debt securities are structured as offerings by multiple co-issuers who are each legally the issuer of a single security. Further, many domestic and foreign offerings of debt securities are structured as an offering by a non-operating financing subsidiary of the issuer where investors rely on the credit of a guarantee from the parent, or other credit supporter, that is not legally the issuer of the security.

We believe that this results in a number of unintended consequences which are not in keeping with the regulatory objectives of the Report:

- Duplicative Reporting – Where two or more co-issuers are offering the same security, the current rules can be interpreted to require a separate Report to be filed by each co-issuer for the same distribution of the same securities. While we understand that some market participants have concluded that this was not the intended result and have reported distributions by co-issuers on a different basis, absent a clarification other market

participants are likely to continue to file multiple reports for each issuer. We submit that this is an undesirable result as it will improperly skew the data that the CSA has stated that it is trying to collect through the Report process, as the amounts raised through exempt distributions will be overstated when the data from filed Reports is aggregated for analysis. We also do not believe that it was the CSA's intention to impose a significantly greater reporting obligation (or, for that matter, fee payment obligation) on transactions that happen to involve securities which are issued by multiple legal entities.

- Inaccurate and Incomplete Issuer Information – We believe that the type of issuer information that the CSA would actually like to collect in Item 5, for the purpose of its analysis and regulation of the exempt market, is the same type of information that investors would rely upon when making their investment decision. For example, assume that Manufacturing Company X creates Finance Subsidiary Y, which then issues securities fully and unconditionally guaranteed by Manufacturing Company X. The offering memorandum on which Canadian investors will base their investment decision will describe the business and affairs of Manufacturing Company X, and investors will be relying on the credit of Manufacturing Company X. In completing the Report, however, the information called for will be information regarding Finance Subsidiary Y, as the issuer of the security. The CSA would therefore receive:

    - A NAICS industry code applicable to the non-operating finance subsidiary, rather than the parent manufacturing company's industry;

    - The number of employees of the finance subsidiary (often zero), rather than the number of employees involved in the parent's operating business; and

    - Information regarding the reporting issuer status, CUSIP number and stock exchange listings for the finance subsidiary, rather than the manufacturing company itself.

  We believe that the CSA would actually prefer to gather information regarding the legal entity, or group of legal entities, that investors consider important for the purposes of making their investment decision, rather than the entity that is technically the "issuer" based on the legal structure used.

In order to resolve uncertainty regarding the basis for reporting issuer information in these types of situations, and provide more useful data to the CSA regarding the Canadian exempt market, we propose introducing the concept of a "Primary Issuer" for purposes of the Report.

The instructions to Item 3 of the Report could be revised to provide as follows:

> "*Provide the following information about the issuer, or if the issuer is an investment fund, about the fund*. If the security has more than one issuer, the term "Primary Issuer" means the one issuer or guarantor of the security that you believe investors would most likely consider to be of greatest importance to them in making their investment decision. If the security is issued by a finance subsidiary of a parent providing a guarantee, the term "Primary Issuer" means the parent guarantor. If the security is issued by any other

> financing vehicle that does not conduct an operating business, the term "Primary Issuer" means the entity that operates or will operate the business that will employ the proceeds of the offering. In all other cases, the term "Primary Issuer" means the issuer. Provide the full legal name, previous full legal name, website and legal entity identifier of the Primary Issuer in your responses to Item 3, but also include under "Full legal name" the names of any issuer or co-issuer of the security other than the Primary Issuer."

Other references to the "issuer" in Item 3 would then be changed to references to the "Primary Issuer".

The following could be added to the instructions to Item 5:

> "***If the issuer is an investment fund, do not complete Item 5. Proceed to Item 6.*** Provide the following information with respect to the Primary Issuer identified in Item 3. When responding to Item 5(b) and Item 5(h), provide your response on the basis of the number of employees and size of assets in the aggregate for the Primary Issuer and any co-issuers or guarantors, or on such other basis as such information has been disclosed to investors."

Other references to the "issuer" in Item 5 would then be changed to references to the "Primary Issuer".

Additional Recommendations Regarding Issuer Information Disclosure

- *Item 5(a) – Primary industry*. It has become apparent since the adoption of the 2016 Amendments that the identification of a NAICS industry code for a particular issuer is more art than science, and that reasonable people may disagree on the particular code that is most closely applicable to a specific issuer. Given the concerns that have been expressed regarding certification requirements, we suggest revising the instructions as follows:

  > "Provide the ~~issuer's~~ North American Industry Classification Standard (NAICS) code (6 digits only) that in your best judgment most closely corresponds to the Primary Issuer's primary business activity."

- *Items 5(g) and 6(e) – Public listing status/Public listing status of the investment fund*

  - *CUSIP number.* Many issuers have multiple CUSIP numbers. We believe that the CUSIP number the CSA wishes filers to disclose in these sections is not the CUSIP number (if any) for the particular distribution described in the Report (as this information is addressed separately in Item 7 – *Information About the Distribution*) but rather the CUSIP number (if any) for the issuer's "primary" exchange-listed securities (i.e., its common shares). Please consider adding a clarifying instruction to this effect. Please also note that many CUSIP numbers contain letters of the alphabet, and ensure that the field provided for the response will accept all alphanumeric characters.

  - *Exchange name.* We suggest the following amendments to the wording:

> "If the issuer/investment fund is publicly listed, provide the name of the exchange on which the issuer/investment fund's equity securities primarily trade. If only debt securities of the issuer trade on an exchange, name any exchange on which they trade..."

- *Item 5(h) – Size of issuer's assets.* The filer is required to disclose the size of the issuer's assets for its most recent financial year-end. We would suggest that this be revised to allow the filer to provide the required information based on the most recently available (annual or interim) financial statements. We also suggest referring to the "Primary Issuer" rather than the "issuer", for the reasons discussed above.

- *Item 8(a) – Name of person compensated and registration status.* We understand law firm practice varies with respect to whether to check "no" or "yes" to the question, "indicate whether the person compensated is a registrant" when the person compensated is an international dealer. Technically, an international dealer is not a registrant, and some firms will check "no". However, unless the "yes" box is checked, the field in which the NRD number may be entered does not appear and cannot be entered, even though international dealers do have NRD numbers. We suggest changing "Indicate whether the person compensated is a registrant." to "Indicate whether the person compensated has an NRD number."

Part II – Further Recommended Changes to the Report to Reduce Compliance Burden

The scope of required disclosure in the Report was significantly expanded by the 2016 Amendments. While we recognize that the CSA has a legitimate regulatory objective in monitoring compliance with the prospectus exemptions and other requirements of the exempt market, and in collecting information relevant to rule and policy development initiatives, we continue to believe that some of the required disclosure may be unnecessary for those objectives and unduly burdensome for market participants. We note that the time, effort and cost of preparing and filing the Report after the 2016 Amendments came into force has increased significantly. We recommend that the CSA reconsider the extent of the need for some of the required disclosure, in the light of seeking an appropriate balance between the twin objectives of investor protection and market efficiency. In particular:

- *Item 5(a) – Primary industry – NAICS industry code.* As noted earlier, there are many different codes that could apply to a particular issuer, as the determination requires the exercise of judgment. We therefore question the utility of collecting this information, as it is likely that people exercising different judgment will report companies that are in fact in the same industry under different codes, and may in fact report the same issuer under different industry codes.

- *Items 5(e) and 6(c) – Date of formation and financial year-end / Date of formation and financial year end of investment fund.* The exact month and date of formation, which otherwise generally is not required disclosure for a non-reporting issuer, is often very difficult to obtain. For issuers whose date of formation is more than, say, one year before the distribution date, we respectfully submit that requiring provision of only the year of formation would suffice for information gathering purposes.

- *Item 9(c)* and *Paragraph (c) of Schedule 2 – Residential address of each individual.* It is unclear why residential information is required for any individual. Moreover, the purpose of providing information regarding the directors and executive officers of a promoter or control person is not clear. Where an issuer does not have available the residential addresses of its directors, that information cannot necessarily be obtained within the mandated time frame. For example, directors of a non-public issuer could hold their positions as representatives of venture capital firms and the issuer would use only business contact information to communicate with them. There are also privacy issues in certain jurisdictions with disclosing residential addresses. Consequently, we suggest eliminating the requirement to provide residential addresses for any of the listed individuals or, alternatively, stating that such addresses must only be disclosed if available and that they need not be disclosed if any applicable privacy laws prohibit such disclosure.

- *Paragraph b)3. of Schedule 1.* We suggest that secondary given names should only be required to the extent that they are applicable and available.

We wish to thank the CSA for its efforts in developing the Proposed Amendments, and providing us with the opportunity to provide our comments for your consideration. We believe that the Proposed Amendments will be of significant benefit to Canadian capital markets participants, and especially those participating in the extension of U.S. and other global securities offerings to eligible investors in Canada.

If you have any questions regarding this comment letter, please do not hesitate to contact any one of the individuals listed below.

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