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Via email to:

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

c/o

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Me Anne-Marie Beaudoin
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Dear Sirs/Mesdammes

Re: Batchter Wasserman / TELB Investments Ltd Comments on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions

It is with great pleasure that we provide our responses and input to proposed changes on this very important topic. The proposed changes address a very risky and problematic area of private lending (risky, speculative real estate developments) but by defining lending simply by the number of lenders, also eliminates an important contributor to the economy (every day low risk mortgages with multiple lenders), having a very negative, if not a devastating, effect on families, small businesses and average individuals. We submit that syndicated mortgages, identical to standard qualifying mortgages in every way other than the number of lenders, be treated in the same manner from a public protection perspective. Our comments are based on our review of the proposed amendments, our attendance at presentations by the OSC and over 40 years of experience providing syndicated mortgages to families, individuals and businesses.

General Comments

Private lending plays an important role in the health of the economy and in many cases is a key support for the middle class, helping to fill in gaps left by the specific income based regulations on institutional lending. Many, if not most private mortgages can be characterized as 'People helping People'. Individuals, with money to invest, help people buy or keep their homes, help people buy real estate or strengthen their business assets when traditional banks turn them down. This is an important and vibrant part of our economy and essential for growth in our economy.

With the recent addition of more stringent testing requirements of banks, many people will not be able to renew their mortgages and will face losing their homes, a catastrophic event for many. It is the private lending market that will be able to help these people, filling in the gaps left by bank regulation. These mortgages can be a single lender, a group of lenders or can be supported from a fund invested in by multiple lenders, but they are characterized as primarily first or second mortgages and total LTV is usually no more than 80% of assessed current value. These mortgages are low risk, honest agreements that likely would have been taken by banks under previous, less stringent regulation.

All seagulls are birds, but not all birds are seagulls.

Private lending encompasses a broad spectrum of practices that range from the type of mortgages described above to large, risky real estate developments where the assessed value is based on a future 'vision', much higher than the current and recoverable value of the assets involved. In these risky scenarios, many things can happen which may leave investors with no chance of recovering even their initial investment. These risky kinds of investments are very different from the majority of private mortgages and need more regulation and investor protection and truly should not even be called 'mortgages' because they are so different.

In the CSA proposed amendments, the CSA clearly identifies the key risks associated with these large development projects and defines them in specific, measurable terms. Instead of identifying those risky investments with the specific measurable characteristics that they have identified and defined, they have simply applied the proposed controls to all private lending with two or more lenders, eliminating a whole class of important, if not vital lending taking place in our communities today. The CSA needs to recognize that the type of lending they wish to control is characterized not by the number of lenders (syndication) but by the specific risk characteristics that the CSA themselves have identified.

Concern:

1. Low risk single lender mortgages keep their exemption status and continue as usual. Low risk mortgages identical to the single lender mortgages, but with two or more contributing lenders lose exemption status and face higher costs and restrictions.

The net effect is that investment will be limited to large investors only and smaller investors will now be excluded, reducing the availability of capital for investment, reducing the

availability of mortgages to those that need them and reducing opportunities for middle class investors to achieve higher returns.

Proposal:

1. **High risk, speculative mortgages require more regulation and investor protection, but defining them based on the number of investors is ineffective and misleading and unrelated to the CSA's own reasons for the amendments.** They should be defined based on the CSA's own defined and measurable criteria:
 - a. *(If to)* be used to raise seed financing for real estate developments, such as the costs of initial design proposals and start-up expenses;
 - b. *(If to)* be sold based on projected values of a completed development;
 - c. *(If to)* not be fully secured by a charge against real property, since the amount of the loan may significantly exceed the current fair value of the land;
 - d. *(If to)* be subordinate to future financings, such as construction financing, which may be substantial and effectively render the investment more similar in risk to an equity investment rather than a fixed income investment;
 - e. *(If to)* be offered by issuers with no source of income, rendering the payment of ongoing interest dependent on future financing or reserves from the principal advanced; and
 - f. *(If to)* be subject to the risk of delay and increased costs inherent to real estate development.
2. **Low risk, equity secured first and second mortgages with LTV under 80% should continue to be exempt, regardless of the number of investors.** The definition of qualifying mortgages should be expanded to include mortgages that fit the criteria, but have multiple lenders. Syndicated mortgages have been characterized as complex and so should not be traded under qualifying mortgage exemption. We respectfully submit that syndicated mortgages are not complex and that investors readily and easily understand them. A syndicated mortgage is nothing more than a mortgage where 2 or more persons participate as lenders instead of a single person. Interest and repayment terms are the same as a standard mortgage. They are secured against real property and are generally not considered speculative. Arguably, investments in syndicated mortgages are superior to standard mortgages because they facilitate diversification of the investor's mortgage portfolio risk profile, allowing smaller investments in mortgages from a larger number of borrowers. We respectfully submit that syndicated mortgages and standard mortgages be classed based on their risk profile, and treated in the same manner from a public protection perspective, regardless of the number of lenders.

Administration and Management of Syndicated Mortgages (General Comment)

We agree with the added controls for the administration of mortgages, particularly for syndicated mortgages. We would like to see additional requirements added for mortgage administration of syndicated mortgages ensuring better protection for investors and borrowers.

Concern:

1. A key difference between a single lender mortgage and a syndicated mortgage is that when there are multiple investors, you have multiple people, each with the ability to trigger a power of sale, even for an easily rectifiable default such as an insurance policy expiring or a single bounced cheque. The extreme of this is where some investors get paid while other cheques bounce, some investors pay attention while others do not. This type of scenario can happen when the broker of a mortgage simply collects a set of post dated cheques from the borrower for each lender, essentially walking away from the issue and potentially leaving the lenders pitted against each other. This scenario is bad management, bad for lenders and borrowers alike and bad for the industry. Among the stakeholders of a mortgage, the Administrator is the one that is equipped, positioned and qualified to monitor and act on behalf of and in the best interests of investors and protect the borrower from multiple uncoordinated actions..

Proposal:

1. **Require Mortgage Administrators to be the single payee of a mortgage by a borrower,** responsible for the timely posting of payments and distributions, acting on behalf of all lenders on a mortgage as a group when dealing with defaults or any other issues as they arise, making decisions on notifications, remedies and actions. The role of the administrator should be clearly defined in the Administration Agreement with disclosure/reporting requirements to both lenders and borrowers clearly defined.

Responses to questions:

Our primary concern is that the proposed amendments characterize all syndicated mortgages as high risk speculative investments and we submit that this is not the case. The questions below assume that all syndicated loans will require at least an Offering Memorandum and accompanying registrations. We put forward that this requirement should not be required for syndicated mortgages that can be described as identical in every respect to qualifying standard single lender mortgages other than multiple lenders being involved.

Appraisals

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?
Response: No, up to date appraisals (no less than 6 months old) by registered and accredited appraisers should always be required for all classes of mortgages. Individual sales can be subject to special circumstances and conditions, non-arm's length and may not represent an accurate market value for the property.

Mortgage broker requirements

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.

Response: Throughout the mortgage 'creation' process, people make representations. Borrowers make representations and provide documentation to that effect. Appraisers make representations based on their knowledge and training. Brokers work hard to gather all the information that they can and present as clear a view to the lender as possible. Assume all of these people are making best efforts to provide the clearest and most accurate representation of the deal to the lender, but there are no guarantees. A certification by a broker would likely be more misleading than helpful as it could be interpreted as a guarantee, which is improper. What would make more sense is to prescribe the due diligence required for a property, defining the sources and accreditation requirements (such as appraisers) and having the broker certify that those due diligence requirements have been met.

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Response: No, certification by a broker could be interpreted as a guarantee, which a broker is prohibited to do by law. It also adds a largely redundant layer of liability to the broker's job, a liability that is already there. On the other hand, specific requirements for due diligence would be a positive step, accompanied by a representation of best efforts by the broker to ensure that all information presented to a lender is accurate and comprehensive.

To clarify this question, standard mortgages (under 80% LTV of accredited appraisal value) for residential, commercial, building lots, etc. should be exempt from the OM requirement as are single lender qualifying mortgages.

Exclusion of syndicated mortgages from the Private Issuer Exemption

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

Response: Yes, with standard mortgages under 80% LTV, where a mortgage meets every criteria that a Qualifying Mortgage does, other than having multiple lenders vs. a single lender. In these cases there is no difference between a syndicated mortgage and a single lender mortgage. This should be expanded beyond residential only though, to include Commercial, industrial, multi-residential apartment buildings, building lots, etc.

Alternative prospectus exemptions

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?

Response: Yes, by classing syndicated mortgages based on the measurable risk factors (as defined by the OSC) and not by the number of lenders, most syndicated mortgages would fall into exemption categories. The increased regulation requirements should be reserved for large, risky, speculative developments that the OSC has so clearly defined and leave the normal, functioning and important lending that happens every day (and just happens to have multiple lenders) well enough alone.

6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 *Mortgages*?

Response: Yes, the British Columbia exemption appears to understand that there is little difference between a standard residential mortgage with one lender vs. a standard residential mortgage with multiple lenders but it should be expanded to allow for other types of real properties when the collateral is sufficient such as commercial, multi-residential apartment buildings, building lots, industrial, etc. The key determinants should not be if there are multiple or if the property is commercial, the key determinants for the exemption should be based on the specific risk factors already identified by the OSC.

7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

Response: The exemption should be provided based on measurable risk factors (as identified by the OSC). By basing eligibility on risk factors, single lender and syndicated exempt investments should

go beyond only residential and include commercial, industrial, multi-residential apartment buildings, building lots, construction projects, etc. When an individual or a business has an idea to make life better for themselves or grow and innovate, if they have the necessary collateral to protect investors, they should have the right to make those dreams come true, and normal every day investors should have the right to help them do it.

In summary, our primary concern is that a uniform approach to the regulation of all syndicated mortgages is adopted by the Ontario Securities Commission and the Ministry of Finance. We respectfully submit that investments in syndicated mortgages are not all the same, that the presence of multiple lenders does represent high risk in and of itself and that these mortgages should receive the same treatment as standard qualifying mortgages if they meet the same criteria as those qualifying mortgages, other than having more than 1 lender.

We thank you for the opportunity to provide these comments. Please do not hesitate to contact the undersigned should you have any questions.

Yours truly,
BATCHER, WASSERMAN,

Per:



T. BATCHER. (TB/jc)

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