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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers du Québec
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Legal Registry Division, Department of Justice, Government of Nunavit
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Government of Yukon

March 16, 2005

Dear Sirs / Madams

SUBJECT: Comments regarding the Draft NI 45 – 106

PRECIS

The proposed Prospectus and Registration Exemptions as they relate to Investment Funds are not clear. The three main exemptions available to arm's length investors are: Accredited Investor (the "RICH") can invest a fund's set minimum amount – generally \$5,000; the Minimum Amount Investment (the "POOR") must invest a minimum amount of \$150,000; and for those that receive an Offering Memorandum (the "LITERATE") can invest a fund's set minimum amount.

The desire to harmonize the Prospectus and Registration Exemptions is a laudable endeavour considering the diversity of the 13 regulatory bodies in terms of their capital raising interests and their regulatory mind set. To have one document that sets out each jurisdiction's exemptions is of tremendous benefit to the Canadian securities industry and it is hoped that this process continues.

BACKGROUND

My purpose in providing comment on the proposed NI 45-106 follows from the fact that the current Canadian regulatory regime forces an investment fund that might otherwise offer its securities by way of a prospectus into the Prospectus and Registration Exemptions regime. For investment funds that fall outside NI 81-102 and NI81-104, a receipted prospectus is not an alternative and therefore the funds may decide as a second best to use an Offering Memorandum as a disclosure document.

An example of how a fund could fall outside NI81-102 can be typified when a fund's investment policy creates a portfolio that falls adrift of section 2.6. As a specific instance a fund that uses leverage, may be in line with the leverage policy of the IDA, but it will be outside the mandate for investing as set out in section 2.6, which allows a zero tolerance for leverage. Further, as the investment fund does not invest using derivatives, it can not be classified as a commodity pool.

DRAFT POLICY

In the **Section 2.9 Offering Memorandum** certain members of the CSA are allowing potential investors to invest if the potential investor is willing to sign a "Risk Acknowledgement Form" acknowledging the risk of investing in those securities so offered. The use of this exemption seems to bridge the gap between the Accredited Investor Exemption and the Minimum Purchase Exemption by allowing a potential investor to invest the fund's set minimum amount.

The Offering Memorandum exemption can be used in some jurisdictions without limitations (Section 2.9(1)), in other jurisdictions up to \$10,000 without an eligibility advisor and over that amount with the assistance of an eligibility advisor (Section 2.9(2)) and in other jurisdictions not at all (Ontario and Yukon). However, Section 2.9 (2) specifically excludes investment funds, excepting section 2.9(2) (d) investment funds.

The fact that some jurisdictions are willing to allow the Offering Memorandum exemption but specifically carve out investment funds seems to warrant further explanation.

- Why is the Offering Memorandum Exemption not available in some jurisdictions?
- Why is an investor explicitly excluded from using this exemption for the purchase of an investment fund in some jurisdictions?
- Should a proverbial securities lawyer, or other investor, that earns less than \$200,000 or has less than \$1,000,000 in assets be prohibited from purchasing units of an investment fund, unless that investor is willing to invest an amount that is greater than 75% of their annual income or greater than 15% of their asset base?
- If investment funds are not to be allowed the use of the Offering Memorandum Exemption, and if full, true and plain disclosure is a preferable avenue; should not the mutual fund / commodity pool regime be expanded in conjunction with this policy?
- To date, do any investment funds reside within the constraints of Section 2.9(2)(d)?

Companion Policy

3.9 (2) Can this section be written without the use of a double negative and an exception?

Closing

The benefit of having all of the Prospectus and Registration Exemption policies of each of the 13 regulatory bodies merged into one policy is of tremendous benefit to the investment community. To specifically carve out investment funds from the Offering Memorandum Exemption is perplexing and I would be interested in the reason for the carve out.

Thank you for the opportunity to comment on this draft policy.

Yours truly

Andrew Parkinson
Managing Director
Van Arbor Asset Management Ltd.