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

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Dear Sirs/Mesdames:

**National Instrument 45-106 "Prospectus and Registration Exemptions" ("NI 45-106") and Ontario Securities Commission Rule 45-501 "Ontario Prospectus and Registration Exemptions" ("OSC Rule 45-501")**

We are pleased to provide the Canadian Securities Administrators ("CSA") and the Ontario Securities Commission ("OSC") with our comments on the above noted National Instrument and OSC Rule.

While we are generally pleased to see a consolidated version of the prospectus and registration exemptions applicable across the country, we strongly urge the CSA not to view the publication of these Instruments as the culmination of its regulatory agenda in respect of registration and prospectus exemptions. We strongly support finalizing this project by moving to one single, harmonized regime for registration and prospectus exemptions across the country. Until such time, there will continue to be traps for the unwary who seek to access the private placement regime in Canada. By way of example, in the definition of accredited investor, paragraph n, in NI 45-106, an investment fund that has distributed its securities only to accredited investors or in minimum amounts, is included in the definition. However, in Ontario, OSC Rule 45-501 is continuing the exemption for trades by mutual funds to corporate-sponsored plans. There is thus broader leeway for investment funds in Ontario than is obvious from the definition of accredited investor in NI 45-106.

**NI 45-106**

**Section 1.1 – Definition of "accredited investor" – clause (q) and Ontario exception**

Except in Ontario, a person acting on behalf of a fully managed account who is registered or authorized to carry on business as an adviser under securities legislation of a foreign jurisdiction will be an accredited investor. We do not understand the policy rationale behind the OSC's position that it "has not concluded that the registration requirements in all foreign jurisdictions are appropriate for the Ontario market". The OSC has already determined that it is appropriate for international advisers to advise a restricted list of permitted clients. Accordingly, it is then inconsistent for the OSC to determine that these permitted clients are prohibited from taking advantage of an exemption for international advisers in respect of their fully managed accounts. If the OSC is concerned with advisers domiciled in particular jurisdictions, the definition, as applicable in Ontario, could include advisers registered in particular jurisdictions such as the United States and the United Kingdom.

**Section 2.17 – Trades under a take-over bid or issuer bid**

We suggest that section 2.17 be expanded to also include the trades currently covered by section 72(1)(j) in addition to covering the trades currently set forth in subsection 72(1)(k) of the *Securities Act* (Ontario) (the "Act").

**Section 2.18 – Investment fund reinvestment and Section 2.19 – Additional investment in investment funds**

The proposed exemptions for investment fund reinvestment and additional investment in investment funds are too restrictive and do not take into account multi-class and multi-series funds. We do not understand the CSA's policy rationale for requiring that the

additional investment or reinvestment of distributions be in the same class or series of an investment fund. We believe that an investor should be able to take advantage of these exemptions if the units being purchased are those of an investment fund that has the same portfolio assets as those attributed to securities currently held by the investor. This would provide flexibility to investors, without permitting them to reinvest or make additional investments in another investment portfolio of the same fund, for example a fund with multiple classes each representing a different portfolio of investments. It would permit investors to switch between classes or series without having to satisfy the minimum investment amount at the time of the switch and permit them to direct that reinvestments of distributions be directed into a different class or series of the same fund.

**Section 2.4 – Private Issuer Exemption**

Proposed NI 45-106 will re-introduce the private issuer exemption into Ontario and remove the existing closely held issuer exemption. A major criticism of the previous private company exemption was that it was very difficult to determine who was (and who was not) a member of the "public". We believe that the specified list of "non-public" purchasers under the proposed private issuer exemption will be very helpful in eliminating this uncertainty. Although there may still be occasions where it will be necessary to determine whether or not a purchaser is a member of the public under paragraph 2.4(1)(k), we suspect that most purchasers under this exemption will fall into one of the specified paragraphs 2.4(1)(a) through (j) of the Proposed Rule. This will facilitate certainty.

We note that the definition of "private issuer" is restricted to issuers who, *inter alia*, have distributed securities "only to persons described in section 2.4(1)". While this category of persons is broad and helpfully includes accredited investors, it does not include purchasers who have previously purchased under the existing closely held issuer exemption in Ontario. There will be many Ontario issuers who have used the (soon to be revoked) closely held issuer exemption and issued securities to purchasers who do not fit into paragraphs (a) through (j) of subsection 2.4(1) and who are arguably "members of the public". These issuers will be, by definition, excluded from relying on the private issuer exemption going forward and they will no longer be able to use the closely held issuer exemption. We suggest that an additional paragraph should be added to subsection 2.4(1) to include purchasers who have previously purchased under the closely held issuer exemption. Alternatively, the definition of private issuer should be amended to include issuers who have distributed securities "only to persons described in section 2.4(1) or to purchasers under the previous closely held issuer exemption". This would allow such issuers to continue to use the private issuer exemption (which is notionally replacing the closely held issuer exemption) without having to determine whether the purchasers under the previous closely held issuer exemption were (or were not) members of the public.

**Section 2.34 – Underwriter Exemption**

We note that underwriters will not be entitled to purchase securities as underwriters pursuant to a prospectus exemption except under section 2.34. Accordingly, the resale of such securities must be made pursuant to a prospectus or another exemption. There should be no reason why underwriters can only resell securities through a prospectus or another exemption rather than take down any unsold securities as principal and then reselling them under Multilateral Instrument 45-102 once the 4-month restricted period has expired. We submit that there is no harm to the marketplace and no abuse of the resale provisions as long as the underwriters are required to hold as principal for the 4-month period and the other requirements of Multilateral Instrument 45-102 are met. Once the underwriter determines that the distribution has been completed and takes down the securities as principal, the underwriter should be in no worse a position than any other accredited investor who purchases as principal.

**Form 45-106F1**

The proposed Form 45-106F1 requires more information than the existing form 45-501F1 in that it requires disclosure of purchasers in all foreign jurisdictions, in addition to the local jurisdiction. We expect that this requirement will be unwieldy and impractical, particularly where the Canadian private placement is a component of a public offering in the United States or elsewhere, and may also deter some foreign investors who will not want these details filed with a Canadian securities regulator. The practice in Ontario has been to file the Form 45-501F1 with a list of Ontario resident purchasers only. Purchasers in other Canadian provinces are disclosed in the equivalent forms filed in such provinces. There is no current requirement in Ontario to disclose the identity, let alone the address and phone number, of non-Canadian purchasers (unless such purchasers become insiders or file section 101 reports). While it may be reasonable to require disclosure of these details for Canadian purchasers, we submit that there is no need for issuers to file these details for non-Canadian purchasers.

**OSC Rule 45-501**

As a general matter, we strongly urge the OSC to work towards uniformity on a national level by eliminating the universal registration requirements found only in Ontario and Newfoundland.

Additionally, we strongly urge the OSC to eliminate the exceptions the OSC is including in the definition of "accredited investor" so that there is a common definition of "accredited investor" across the country. This is one of, if not the, most important private placement exemptions in the country and we do not believe there is any strong policy justification for continuing local exceptions to this definition.

**Section 3.2 – Trades in mutual fund securities to corporate sponsored plans**

We appreciate that the OSC has proposed the inclusion in Section 3.2 of OSC Rule 45-501 of the prospectus exemptions for trades in mutual fund securities to corporate sponsored plans and the related registration exemptions in Sections 4.1(d) and (e) of OSC Rule 45-501. These exemptions are currently found in OSC Rule 32-503. The exemptions are widely utilized for the issuance of securities of pooled funds and other privately offered funds to pensions plans and other capital accumulation plans and are often the only available exemptions in particular circumstances. We strongly urge the CSA to consider including these exemptions in NI 45-106 so that they are available for the benefit of participants in capital accumulation plans established in all jurisdictions of Canada. We note that our concerns about the availability of these exemptions outside of Ontario are not addressed by the proposed exemptions for the trades of mutual fund securities to capital accumulation plans set out in CSA Notice 81-405 - Proposed Exemptions for Certain Capital Accumulation Plans as they are not as broad as the exemptions for trades in mutual fund securities to corporate sponsored plans described above. Among other issues, CSA Notice 81-405 contemplates that, for the exemptions to be used, the mutual fund must comply with the investment restrictions in National Instrument 81-102.

**Statutory Rights of Action**

We note that the proposed revision to Rule 45-501 contemplates that the statutory rights of action referred to in section 130.1 of the Act will not apply in respect of an offering memorandum delivered to certain sophisticated entities such as Canadian financial institutions, certain banks and their subsidiaries. While these entities are undoubtedly sophisticated enough to not require statutory rights of action, we suspect that such investors will still insist on having the same rights as other (non-financial institution) investors participating in the same offering. For example, in an offering where there both are non-financial institution investors (who will receive statutory rights) and financial institution investors (who will not be entitled to such statutory rights), we suspect that the financial institutions will negotiate for equivalent contractual rights in order to be placed on the same footing and eliminate any discrepancy as to the rights of various investors. Accordingly, we question the merits of either denying such investors the statutory rights that other investors will receive automatically or effectively reintroducing the requirement to grant contractual rights of action.

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We are pleased to have had the opportunity to comment on the above-noted instruments. If you have any questions or comments please feel free to phone Janet Salter at (416) 862-5886.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP