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March 21, 2005

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
Prince Edward Island Securities Office
Autorité des marchés financiers
Saskatchewan Financial Services Commission
Registrar of Securities, Government of Yukon

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Alberta Securities Commission
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John Stevenson
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Dear Sirs/Mesdames:

Re: BLG Comments on Proposed National Instrument 45-106 *Prospectus and Registration Exemptions,* Proposed National Instrument 45-102 *Resale of Securities* and Proposed OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions*

We are pleased to provide our comments to the members of the Canadian securities administrators (CSA) on proposed National Instrument 45-106 *Prospectus and Registration Exemptions* and its accompanying Forms and Companion Policy (the National Exemption Rule) and proposed National Instrument 45-102 *Resale of Securities* and its Companion Policy (the National Resale Rule). This letter also provides our comments on proposed OSC Rule 45-501 *Ontario Prospectus*

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and Registration Exemptions (the Ontario Exemption Rule). **We ask that this letter be considered as a comment letter on each of these proposed instruments.**

Our comments on the proposed instruments have been compiled with input from many of the lawyers in our Securities and Capital Markets group, including those in the Investment Management group, and therefore reflect a consensus of our views. Our comments do not necessarily reflect the opinions of, or feedback from, our clients and we expect that many of our clients will provide their comments directly to the CSA.

General Comments

We are strong supporters of the National Exemption Rule to the extent that it will consolidate the existing prospectus and registration exemptions in one national instrument and revise those existing exemptions so that they are uniform across Canada. The proposals will be a welcome change to Canadian securities regulation, since significant time and effort must currently be spent to sort out the rules in each province and territory of Canada that apply to a particular exempt securities transaction. The fact that Canada has 13 different regulators and 13 different sets of laws is accentuated when reviewing prospectus and registration exemptions, perhaps more than with any other field of securities regulation. We applaud the CSA for undertaking this important regulatory initiative and for achieving as much uniformity as is evident in the National Exemption Rule.

In particular, we commend the Autorité des marchés financiers for its efforts in rationalizing the exempt distributions regime in Quebec through its support of Bill 72 and its participation in the National Exemption Rule and the National Resale Rule.

However, the new proposals will not achieve as much uniformity as we believe should be possible. As we highlight in this comment letter, local exceptions and differences will continue to exist for reasons that do not appear to reflect regional differences. In our view, these local exceptions and differences will continue the unnecessary regulatory burden on those wishing to conduct a pan-Canadian business and we doubt that these exceptions and differences could be supported on any cost-benefit analysis.

In addition to adopting the National Exemption Rule, we understand that certain provinces and territories will retain or make local exemption rules, although the notice accompanying the National Exemption Rule does not clearly explain what these local exemption rules will contain or where or why these local exemption rules will be necessary. We were alerted to the prospect of local exemption rules by the following sentence in the CSA notice: "Upon final publication of the Instrument and related repeals and consequential amendments, we will publish a third CSA staff Notice that will cite remaining local exemptions for each jurisdiction". We also note that this statement is made again in section 1.5 of the Companion Policy to the National Exemption Rule. It is very difficult to properly comment on the National Exemption Rule without understanding the complete picture of prospectus and registration exemptions across Canada.

We know that the Ontario Securities Commission, for example, does not propose to repeal OSC Rule 45-501 *Exempt Distributions*, but rather will amend and restate this Ontario-only rule as the Ontario Exemption Rule. We urge the individual members of the CSA, including the Ontario

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Securities Commission, to carefully consider whether local exceptions and differences are justified from a cost-benefit perspective, particularly for market participants wishing to do business across Canada. If local exceptions and differences are considered necessary, to the extent that the notice accompanying the National Exemption Rule did not explain the rationale for these exceptions and differences, we would expect that the CSA would allow market participants to comment on these exceptions and differences before adopting them.

We also strongly recommend that all prospectus and registration exemptions be included in the National Exemption Rule, rather than in separate local or national rules, in order to make it easier to know what the rules are, which should lead to better compliance. For example, we recommend that the specialized prospectus and registration exemptions proposed in CSA Notice 81-405 in May 2004 (but which have not been finalized) regarding mutual funds that are issued to member-directed capital accumulation plans be incorporated into the National Exemption Rule. We note that you asked for feedback on this issue in the notice accompanying the National Exemption Rule. However, we believe that before those May 2004 exemptions can be included in the National Exemption Rule, they must be amended in ways that are described in two comment letters—one submitted jointly by the Association of Canadian Pension Management (ACPM) and the Pension Investment Association of Canada and dated August 10, 2004 (in response to the May 2004 request for comments) and the other that will be sent by ACPM to the CSA in March 2005 (in response to the request for comments on the National Exemption Rule). The Pension group of Borden Ladner Gervais LLP assisted the pension associations in preparing those submissions and we strongly endorse their proposals. If the pension associations' submissions are accepted by the CSA, changes to both the National Exemption Rule and the Ontario Exemption Rule will be necessary. As drafted, neither rule appears to reflect the initiative of the Joint Forum of Financial Market Regulators regarding CAP Guidelines and we urge the CSA to rationalize these rules in the ways outlined in the comment letters referred to above.

Specific Comments on NI 45-106

Accredited Investor Exemption

We strongly support the largely uniform categories of accredited investor provided for in the National Exemption Rule.

In particular, we commend the Ontario Securities Commission for removing its restrictions regarding "fully managed accounts" investing in investment funds. In our view, this change is long overdue, although given the OSC's earlier opposition to making this change, we believe market participants would have benefited from an explanation of why this change is being proposed at this time.

We note that the fully managed account branch of the accredited investor definition requires the person acting on behalf of the account to be registered as an adviser under the securities legislation of a jurisdiction of Canada or, except in Ontario, a foreign jurisdiction. The accompanying notice does not explain why Ontario takes a different position from the other regulators in Canada. We suggest that there should not be a policy reason to prevent accounts fully managed by an investment adviser registered outside Canada from purchasing securities issued in a private placement. In fact, we suggest that, at least in Ontario, a purchase of securities by these accounts

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would constitute a distribution outside the province and, therefore, governed by Interpretation Note 1. That is, an issuer and a purchaser in these circumstances do not need to find a prospectus exemption, but merely ensure that securities come to rest outside Ontario. Therefore, we would suggest that either Ontario should drop its exception or the Companion Policy should clarify that a trade to an account managed by a foreign registered portfolio manager would not constitute a distribution in Ontario, or elsewhere in Canada, if the other jurisdictions agree.

We also agree with the removal of what are now clauses (p) through (s) of the definition of "accredited investor" in OSC Rule 45-501 in favour of putting them in a separate exemption. We believe that a person or company should be either an accredited investor for all issuers or not at all.

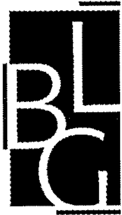
Private Issuer Exemption

We note that, in Ontario, the proposed private issuer exemption has been reintroduced to replace the current closely-held issuer exemption created by OSC Rule 45-501. As you know, the current closely-held issuer exemption replaced Ontario's former private issuer exemption. The closely-held issuer exemption was intended to establish bright line tests to determine when that exemption would be available, given the difficulties with the private issuer or private company exemptions in determining who would be a "member of the public". However, the closely-held issuer exemption proved to be less flexible than the private issuer exemption and difficulties with its use became apparent. Therefore, we support the reintroduction of the private issuer exemption. We also support the listing of specific types of potential investors in a private issuer via clauses (a) to (j) of section 2.4(1). Determining whether a person falls within one of those clauses will avoid the difficult determination of whether that person is a member of the public.

Offering Memorandum Exemption

As stated above, we believe that the CSA should accept a uniform approach to prospectus and registration exemptions. We note that there are three approaches to the offering memorandum exemption: one very liberal (the B.C. approach), one more restricted version (the Alberta approach) and the Ontario approach, where no exemption will exist. We believe that the CSA should examine and explain to market participants the experience of those jurisdictions where the offering memorandum exemption has been in place for several years. This information would help both regulators and market participants in determining the appropriate national approach.

Overall, we believe that the offering memorandum exemption could be very useful for small issuers that wish to raise money in a cost-efficient way. However, we are concerned that the B.C. approach is so wide open that it would be attractive for many significant issuers (including conventional mutual funds) to use the exemption and by-pass the prospectus regulatory process in circumstances where they would be perfectly able to comply. In using this exemption an issuer would avoid review of, and the regulation that would apply to, the offering and the issuer's operations by securities regulators and the accompanying regulatory burdens (including the delays inherent in prospectus reviews) in exchange for the requirement that investors sign a standard form risk acknowledgement statement. This exemption may also be an avenue for unscrupulous issuers to raise money from unsuspecting investors. Even if this exemption has not been abused to date, it could become the case if other jurisdictions adopted the B.C. approach.



Accordingly, we recommend that the Alberta approach rather than the B.C. approach be adopted nationally for two principal reasons: (i) the amount that an investor could lose would be limited and (ii) investors would have to have significant assets in order to qualify as an "eligible investor". Regardless of the final decision of the CSA, for the reasons discussed above, we believe that it is essential that the approach be taken in a uniform manner across the country.

As a drafting matter, we are confused by clause (d)(ii) of the Alberta approach. This exemption is limited to, in the case of mutual funds, one that is a reporting issuer and, in Manitoba, Quebec and Saskatchewan, an issuer listed for trading on an exchange or quoted on an over-the-counter-market. Very few mutual funds are traded in the secondary market, so it is unclear why this restriction is being imposed in those three provinces.

Minimum Purchase Exemption

We endorse the CSA's decision to establish one uniform minimum amount for this exemption and the OSC's decision to reintroduce this exemption. We have three comments on this section:

1. The requirement to pay the minimum amount "in cash at the time of the trade" does not appear to permit any time for settlement. Accordingly, we suggest the following phrase be adopted: "in cash at the time of the settlement of the trade".

2. The investment management industry has long requested that the exemptive provisions allow for "sprinkling" of minimum amounts among several pooled funds, provided those pooled funds are managed by the same portfolio manager. Although the changes to the fully managed account category of accredited investor will allow managers of fully managed accounts to allocate invested dollars among pooled funds, we recommend that the minimum amount exemption also provide that the minimum investment may be allocated among different investment funds within a family of funds.

3. We also suggest it should be permissible for related accounts to invest $150,000. For example, if two spouses invested $150,000 between them, that should be sufficient to entitle them to use this exemption. Similarly, an individual and his or her RRSP, a parent (or parents) and children who share the same residence and/or "in trust for" accounts should be permitted to be considered as one investor for this purpose.

Take-Over Bids and Issuer Bids

We understand that section 2.16 of the National Exemption Rule is meant to provide exemptions for both the trade by a security holder to a bidder and securities issued by the bidder (although in the case of a trade by a security holder under an issuer bid, this duplicates section 2.15). To clarify, we would suggest adding the words "by or to the bidder" after the word "security" in section 2.16(1). We understand that the current exemption is interpreted to provide an exemption for securities issued by a bidder to its financial adviser upon a successful acquisition on the basis that the securities are being issued "in connection with" a bid. If this is intended, the wording should be broadened and this concept referred to in the Companion Policy.

Section 2.17 would provide, for example, an exemption in Alberta to permit an Ontario security holder to trade its securities to an Alberta bidder, but in Ontario it does not provide an exemption

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for the issuance of securities by the Alberta bidder to the Ontario security holder. This oversight should be remedied. We suggest: "The dealer registration requirement does not apply to a trade in a security by or to the bidder in connection with a transaction that would have been a take-over bid or an issuer bid in the local jurisdiction if the security holder were in such jurisdiction.

Additional Investment Exemption

The "additional investment in investment funds" exemption is unnecessarily limited to trades in additional securities of the same class or series of the same investment fund and would not allow for "sprinkling" of additional investments across different investment funds or aggregation of the initial $150,000 in several related investment funds. The effect of this is unnecessarily to prevent investors from diversifying their investments. The investment management industry has long asked for this change, and we urge the CSA to consider allowing this form of "sprinkling".

It is becoming common practice for investment funds to offer their securities in more than one class and/or more than one series, for example to accommodate differing fee structures depending on the nature of the investor or the size of the investment. In such cases the pool of assets, from which such classes and series derive their value is the same and therefore the investment is the same regardless of which class and series an investor has purchased at any time. In these circumstances, we submit there is no policy reason not to allow a subsequent purchase of securities or an automatic reinvestment of distributions, in securities of a different class or series to have the benefit of an exemption, so long as the investor holds securities of the same issuer (without regard to the class and series of such securities) with a purchase price or current net asset value of at least $150,000.

As a drafting point, we would suggest deleting the words "that initially acquired securities as principal for an acquisition cost of not less than $150,000 paid in cash at the time of the trade". We suggest that it should not matter how the security holder acquired the securities of the investment fund that have the value of $150,000 as required in clause (b). For example, if an investor was an accredited investor and acquired securities over time that have a current net asset value of in excess of $150,000, and the investor ceases to be an accredited investor, he or she should nonetheless be allowed to purchase more securities in that investment fund.

Ordering of Exemptions

We realize that some attempt has been made to group similar exemptions together. However, we think that this grouping can be improved and doing so would assist the ease of interpretation and use of the National Exemption Rule. For example, those exemptions that are subject to a seasoning period should be grouped together in a Division separate from those that are subject to a restricted period on resale. Therefore, for example, we would suggest interchanging sections 2.3 and 2.4, moving sections 2.15 to 2.17 ahead of section 2.12, moving section 2.19 after 2.21 and moving section 2.31 after 2.32. We would also add a new Division 6: Exempt Securities, which would cover sections 2.35 to 2.42, and a new Division 7: Removal of Exemptions, which would include section 2.44. We suggest moving section 2.43 either to Division 2: Transaction Exemptions to the first part of Division 5: Miscellaneous Exemptions, which title we suggest be changed to "Miscellaneous Exempt Trades".

Removal of Exemptions for Market Intermediaries

The OSC does not propose to change the universal registration regime in Ontario, but does not otherwise discuss why this regime continues to be important for the Ontario capital markets. This regime is also part of the securities legislation of Newfoundland and Labrador, but the notice accompanying the National Exemption Rule does not explain whether this regime will continue in this province. We believe that the universal registration regime in these two provinces creates an unwarranted regulatory burden and we urge the OSC and the Securities Commission of Newfoundland and Labrador to discontinue it.

Adviser Registration Exemption

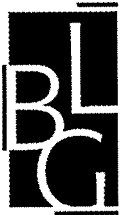
The OSC currently provides exemptions from adviser registration for foreign advisers and sub-advisers under OSC Rule 35-502 *Non Resident Advisers.* No other province or territory in Canada has adopted a similar rule, yet other members of the CSA routinely apply similar regulatory rationale to foreign advisers and sub-advisers and routinely grant relief on the same basis as in OSC Rule 35-502, on an *ad hoc* basis. We recommend that this exemptive relief should be provided for in the National Exemption Rule in the interests of national uniformity and in order to provide for greater clarity of the regime as it applies to advisers wishing to do business in the other provinces and territories.

We understand that certain lawyers take the view that the provision in the Companion Policy to Multilateral Instrument 45-103, which is the equivalent of section 1.7 of the Companion Policy to the National Exemption Rule, has the effect of preventing a seller or its agent in connection with a trade that is exempt from the dealer registration requirements from giving advice that would be incidental to the trade. That is, the seller or its agent could say: "Buy this security", but they could not say: "You *should* buy this security". We believe that section 1.7 of the Companion Policy is meant to provide that those persons providing investment advice generally regarding trades or securities that are exempt from the dealer registration are not, because of the exemptions applicable to the trades or securities, also exempt from the requirement to be registered as advisers. For example, a person giving advice solely to accredited investors is not exempt from the adviser registration requirements. This provision should not, we suggest, be interpreted to prevent an unregistered dealer from providing the same type of advice with respect to an exempt trade that a registered dealer could give in connection with a trade. Accordingly, we suggest that an exemption be added as follows: "The adviser registration requirement does not apply to a person if the advice given is incidental to a trade that is exempt from the dealer registration requirement."

Reporting Requirements

We have several comments on the reporting requirements of Part 6 of the National Exemption Rule:

1. Although we acknowledge that the filing of reports on a private placement has been required for decades, we question the continued need for this. Securities issued under many other exemptions do not require such a report. It is unclear what the distinction is. If there is any purpose, it is as a declaration by the seller that it is relying on the exemption. We believe that the same result, at a far reduced compliance cost for issuers, could be



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obtained through a requirement that all issuers issuing securities under the National Exemption Rule be required to maintain records of such issuance, including evidence of compliance with the Rule, for a specified period.

2. If the CSA do not accept our first comment on this issue, we urge the CSA to reconsider the requirement to provide names and personal information of purchasers of securities issued under exemptions to be provided to the securities regulatory authorities. With the advent of privacy laws, we do not see the continued regulatory need for publicly naming purchasers of exempt securities. Even if the CSA are unwilling to go as far as we suggest in our comment above, we recommend that the National Exemption Rule be amended to require issuers to maintain this information in their own books and records only, such that this information is no longer required to be filed with the securities regulatory authorities. This is consistent with what the OSC had implemented in the original version of OSC Rule 45-501F1 that came into force in December 1998.

3. If the CSA continue to collect these reports, we suggest that the individual members of the CSA need not continue to publish summaries of them. These reports should not be considered to give notice to the public of any private placement. There is no need to give such notice for non-reporting issuers. For reporting issuers, that issue should be dealt with under a reporting issuer's timely and continuous disclosure obligations.

4. Section 6.1 of the National Exemption Rule provides that the issuer must file a report in the "local jurisdiction in which the distribution takes place". In light of Section 1.4 of the Companion Policy to the National Exemption Rule (which we discuss separately under "Compliance with the Laws of More than one Jurisdiction"), it is not clear where an issuer must file a report of an exempt distribution. The Companion Policy implies that two reports are required; a conclusion with which we disagree. Accordingly, we suggest that, in accordance with accepted practice, the CSA clarify that the report need be filed only in the jurisdiction where the purchaser is located.

Compliance with the Laws of More than One Jurisdiction

Section 1.4 of the Companion Policy to the National Exemption Rule reminds issuers that a trade can occur in more than one jurisdiction and gives an example that a trade from a person in Ontario to a purchaser in Alberta may be considered to occur in both jurisdictions. Although we agree that this statement is consistent with the jurisprudence, we do not believe that there is any policy reason to take the position that there must be compliance with the legislation of both the jurisdiction of the issuer and that of the purchaser. As the purpose of the legislation is to protect investors, we suggest that there should be dealer registration and prospectus exemptions in the jurisdiction of the seller, if a trade is made in compliance with the laws of the jurisdiction of the purchaser. We further suggest that this principle should also apply when the investor is in a foreign jurisdiction. This approach is consistent with the OSC's Interpretation Note 1.

Responsibility for Compliance

Section 1.9 of the Companion Policy to the National Exemption Rule states that "an issuer should request that the purchaser provide details on how they fit within the accredited investor definition".

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We recommend that this wording be changed to read: "An issuer should request that the purchaser indicate within which branch of the accredited investor definition the purchaser fits". This change would make it clear that it is adequate to follow the current practice of requiring the investor to initial or check a box opposite one of the clauses that make up the definition.

Specific Comments on the National Resale Rule

Resale by Promoters in Ontario

Proposed section 2.15 of the National Resale Rule would impose control block type resale restrictions in Ontario on promoters who acquired their securities under certain exemptions. We recommend that this section not be adopted for the following reasons. First, as described throughout this letter, we believe that the laws across the country should be uniform. Second, we note that the exemptions referred to in Appendix G are all exemptions set out in former versions of OSC Rule 45-501. Presumably then (there is no discussion in the Notice of why this section is being proposed), the section is meant to keep the status quo, such as under section 6.1 of the current OSC Rule 45-501, but the OSC has decided that going forward there is no need for the added restrictions on resale for promoters. We agree with the OSC that it is preferable not to maintain the concept of section 6.1, but we do not understand the need to maintain the status quo for those who may have previously acquired securities with the expectation that they would be subject to control block type restrictions. If the OSC is satisfied that there is not a sufficient policy reason to impose these additional restrictions on promoters in the future, it should be satisfied that there is not a sufficient policy reason to continue to impose them on promoters who acquired securities in the past.

Additional Regulatory Initiatives

The CSA indicate in the notice accompanying the National Exemption Rule that the proposed exemption regime is aligned with the CSA's policy initiative to revamp and harmonize the registration categories and requirements across Canada. We urge the CSA to undertake this latter project in keeping with the overall spirit of the National Exemption Rule—to regulate on a **uniform** basis across Canada, with a minimum of opt-outs or local variations. In particular, we do not see the need for any local variations or opt-outs with the registration regime.

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We hope that our comments will be considered as constructive by the CSA. Please contact either Paul Findlay at 416-367-6191 or Rebecca Cowdery at 416-367-6340 if you wish to discuss our comments with us.

Yours very truly

"Borden Ladner Gervais LLP"

Securities and Capital Markets Group
Borden Ladner Gervais LLP