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Proposed Amendments to National Instrument 45-106 – *Prospectus and Registration Exemptions*

Dear Sirs/Mesdames:

We are writing to you in response to the request of the Canadian Securities Administrators (the "CSA") for comments on the proposed amendments to National Instrument 45-106 – *Prospectus and Registration Exemptions* ("NI 45-106") published on February 27, 2014 (the "Proposed Amendments"). Our concerns below relate exclusively to the proposed amendments to the reporting requirements set out in the Proposed Amendments.

We regularly advise foreign securities dealers that are engaged in the business of underwriting securities offerings (which may or may not be registered offerings in the United States) regarding compliance with Canadian securities laws whenever those offerings are extended to Canadian investors on a private placement basis. We have serious concerns that the Proposed Amendments will impair the access of sophisticated Canadian investors to investment alternatives and restrict our clients' ability to offer securities to sophisticated Canadian institutional and other accredited investors. More specifically, we are concerned that the proposed changes to Form 45-106F1 – *Report of Exempt Distribution* ("Form 1"), which call for

enhanced post-trade reporting, will require foreign dealers to obtain and disclose information regarding their Canadian clients to which they do not have access, that they have no contractual or legal right to receive and, in any event, would be difficult to obtain within the prescribed 10-day filing deadline. If foreign dealers are unable to comply with their post-trade reporting obligations in Canada, they will no longer be able to extend foreign securities offerings to their Canadian clients. Even if compliance with the new reporting requirements is possible, we fear that foreign dealers will, because of the additional disclosure requirements, be unwilling to extend foreign securities offerings to the dealers' Canadian clients.

Requirement to Identify Each Applicable Paragraph of "Accredited Investor" Definition

Virtually all sales made by our clients into Canada are limited to sophisticated institutional investors and other accredited investors who satisfy one or more of the criteria to qualify as "permitted clients" as defined in National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103"). In all cases, the Canadian purchasers will satisfy one or more of the criteria to qualify as "accredited investors" as defined in NI 45-106.

The customary practice for obtaining confirmation that Canadian investors are "permitted clients" and "accredited investors" is to include a representation to that effect in either a Canadian "wrapper" affixed to the foreign offering document or, if the trade is made in reliance upon an exemption from the requirement to deliver a Canadian-wrapped offering document, in a separate one-time "notice and acknowledgement" delivered by the Canadian purchaser to the applicable dealer.[1]

Currently, Form 1 only requires the issuer or underwriter to disclose generally the applicable prospectus exemption relied upon to make the exempt distribution. If adopted, the Proposed Amendments would require the issuer or underwriter to disclose all applicable paragraphs in the definition of "accredited investor" that the purchaser satisfies. The stated policy rationale for this change is that some individual investors may not understand the risks associated with exempt market investments or may not in fact qualify as accredited investors, and this additional disclosure will assist the CSA in carrying out its compliance and enforcement mandate.

In our view, the policy concerns raised by the CSA do not apply in the context of securities distributed on an a private placement basis to sophisticated Canadian investors that are "permitted clients" for purposes of NI 31-103. As stated by the CSA in the proposed amendments to Section 1.9 of the Companion Policy to NI 45-106, the person relying on a prospectus exemption must take reasonable steps to verify that the exemption is available, and whether or not the steps are reasonable "will depend on the particular facts and circumstances of the investor and the offering".

We agree with this statement. However, in the context of sales to institutional investors such as Canadian financial institutions, pension funds and registered advisers, we submit that it is

[1] The form of "notice and acknowledgement" was prescribed by the "wrapper relief orders" granted by the CSA in 2013. The form did not require the investor to specify which paragraph(s) of the definition of "permitted client" and "accredited investor" were applicable to it.

reasonable to rely on a representation from the prospective purchaser that it is eligible to purchase the securities in reliance on the applicable prospectus exemption. The CSA accepted this reasoning in granting the wrapper relief and allowed the named dealers to distribute foreign securities to "permitted clients" on the basis of the representations contained in the "notice and acknowledgement" prescribed by the relief orders. We see no policy reason to deviate from this accepted practice.

We also see no compelling public interest rationale for requiring dealers to identify every category of "accredited investor" that each Canadian purchaser may satisfy. The person relying on an exemption must take steps to confirm that the exemption is in fact available, but we fail to see how identifying each applicable paragraph in the definition of "accredited investor" assists in that endeavour. We believe it would impose an unnecessary compliance burden on issuers and dealers without any concomitant public interest benefit.

We would therefore propose that the CSA not adopt the requirement to disclose all of the paragraphs of the "accredited investor" definition that are applicable to a Canadian investor. As an alternative, we would submit that the requirement should not apply where (a) the investor is not an individual, or (b) the investor is an individual who is a "permitted client" as defined in NI 31-103.

Requirement to Disclose if Purchaser is an Insider of the Issuer

The Proposed Amendments would require the issuer or underwriter filing the Form 1 to disclose whether a Canadian purchaser is an "insider" of the issuer. In regard to issuances of securities by a foreign issuer, this new requirement will be extremely onerous to comply with in practice, particularly within the 10-day filing deadline.

Our clients offer securities of foreign issuers to sophisticated Canadian investors looking to diversify their portfolios by gaining exposure to foreign markets. The issuers of the securities are often public companies in their home jurisdictions and their securities are often freely tradable on foreign stock exchanges. They are subject to the continuous disclosure obligations imposed upon them by the securities regulatory authorities in those jurisdictions and by the rules of the stock exchanges on which their securities are listed, which vary from jurisdiction to jurisdiction.

Our clients have no contractual or legal right to require Canadian investors to provide this information and, depending on the securities laws that govern the particular issuer, this information may or may not be publicly available in the issuer's home jurisdiction. For example, different jurisdictions have different thresholds for determining what constitutes an "insider" (or the local equivalent thereof) for reporting purposes. Even if this information were publicly available in the foreign jurisdiction, it would require the person filing the Form 1 to become familiar with that jurisdiction's insider reporting rules and to perform searches on unfamiliar public databases. We submit that this would impose an overly onerous compliance burden on foreign dealers that will discourage them from accessing the Canadian capital markets. It is also unclear to us what policy rationale is served by this requirement; if the Canadian purchaser happens to be an insider of a Japanese or a Brazilian public company, we are unsure of how this information assists the CSA in carrying out its compliance and enforcement mandate.

We submit that the requirement to disclose if the Canadian purchaser is an insider of the issuer should not apply where (a) the issuer is incorporated or formed under the laws of any jurisdiction outside of Canada, or (b) the issuer is a reporting issuer in any jurisdiction of Canada, as this information would already be publicly available.

Requirement to Disclose if Purchaser is a Registrant

The Proposed Amendments would require the issuer or underwriter filing the Form 1 to disclose whether a Canadian purchaser is a "registrant". This information would be obtained by performing a search of the CSA website, since our clients would have no other way of confirming this. Given that this information is already available to the CSA and that the person filing the Form 1 would be relying on the accuracy of the CSA's own databases, we do not see why it also needs to be disclosed in the Form 1. We would therefore recommend that this requirement not be included in the Proposed Amendments.

If adopted as presently proposed, we believe the Proposed Amendments will have a very serious chilling effect on foreign private placements in Canada. In many cases, foreign dealers will be unable to comply with the enhanced disclosure obligations in the new Form 1, which means they will not be able to access the Canadian exempt market. This will unfairly exclude Canadian institutional and other sophisticated investors from participating in highly desirable foreign securities offerings. We understand from our clients that access to U.S. and foreign capital markets is crucial to the ability of Canadian institutional investors to properly diversify their portfolios. Foreign capital markets offer Canadian investors access to a broader array of issuers, and exposure to a larger number of industries, than is otherwise available in Canada. We submit that any action that further limits the ability of foreign dealers to offer these investors the products they are seeking is highly detrimental.

We thank you in advance for the opportunity to comment on the Proposed Amendments and we would be pleased to discuss our concerns with you. If you have any questions with regard to this submission, please do not hesitate to contact me by phone at 416.367.7494 or by e-mail at aspadaro@dwpv.com.

Yours very truly,

(signed) Anthony Spadaro

Anthony Spadaro