

Effective May 31, 2014

Mr. Richard Gilhooley
British Columbia Securities Commission
PO Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, British Columbia, V7Y 1L2

and to all of the Other Canadian Securities Administrator listed in Schedule "A" to this letter

Dear Mesdames/Sirs:

Re: Review of Minimum Amount and Accredited Investor Exemptions

This letter is in response to the Request for Comments 2014/14 concerning possible changes to the accredited investor exemption (the "**AI Exemption**") and the \$150,000 minimum amount exemption (the "**MA Exemption**") found in National Instrument 45-106 Prospectus and Registration Exemptions ("**NI 45-106**").

General Discussion

In the context of this discussion we work with many issuer clients at different stages in their life cycle – from enterprise formation through to investor exit. We also assist in financial and strategic disposition transactions, as well as family, seed, angel and venture round investments – sometimes for the issuer and sometimes for the investors.

Every year Victoria and Vancouver Island spawn many new businesses – as well as traditional financial service, real estate based, aquaculture, marine, forestry and customary business sectors, the IT, knowledge based and high-tech sectors are very active. In these latter sectors there is a tension between retaining the enterprise, economic benefits, employment and spin-off opportunities within Canada and the pull of out-of-country migration most usually to the USA – primarily the Pacific coastal states. We are also seeing migration to other parts of the USA. It is not unusual for us to address with our clients at the enterprise formation stage whether their capital raising should take place in Canada or in the USA. For those with scalable expectations it is almost certain that there will be later rounds of investment – super angels or venture capital – which will bring almost irresistible pressure to relocate to the United States.

In addition, our clients must consider the limited size of the pool of potential MA Exemption and AI Exemption investors who are readily accessible from the West Coast. Our lines of communication and access to capital are probably more north-south than east-west. This means that our issuer clients and their investors must consider the impact of the rules for capital formation not only in Canada but also in the USA. This analysis continues even though we are seeing a more liberal approach in other parts of

Canada with the possible opening up of the offering memorandum based exemptions and equity crowd-funding.

As we act for investors who qualify under the MA and AI Exemptions we are also aware of their issues, which include:

- (a) that the compliance costs imposed on issuers regulated under securities laws compared to those on unregulated investments (primarily investment real estate) represents erosion in the effective use of invested capital;
- (b) that the public market place has not provided their return on investment expectations;
- (c) the wish for portfolio diversification into the same alternative investments as are available to institutional investors; and
- (d) the opportunity to make greater returns by investing outside of Canada – including into vehicles that migrate for access to larger capital pools.

It is in this context that we join in the discussion – well aware that in addition to the consumer protection aspects of Canadian securities laws there is also the need to ensure a dynamic, expanding economy with appropriately structured and regulated capital markets. Based on our experiences since the introduction of NI 45-106 we have not seen examples of mischief that warrant the proposed changes.

Rather, we have seen in the past year, at least in the context of Risk Acknowledgements, results that counter the anticipated expectations and reflect the creativity of defense counsel. We recommend that all Risk Acknowledgements be changed to ensure that they do not amount to a waiver of reliance on disclosed information and the remedies that should be otherwise available for breaches of the issuer's obligations not to misrepresent.

The majority of our issuer clients are not reporting issuers and they rely on prospectus and registration exemptions to raise capital for essentially their entire life cycle.

Our clients generally use the private issuer exemption found in NI 45-106 until they no longer qualify for that exemption, after which they use the family, friends and business associates exemption, the AI Exemption, the MA Exemption and, in some cases, the offering memorandum exemption. The AI Exemption and the MA Exemption are both integral to our clients' capital raising efforts and are heavily relied upon. Consequently, in considering any changes to the AI Exemption and the MA Exemption, we are mindful that any changes should make it easier for our clients to access capital, and not further restrict their access to such capital. We are of the view that if our issuer clients cannot locate sufficient funding in Canada using available prospectus exemptions, they will be forced to move directly to the US capital market.

The majority of investors whom we see in our practice, and who invest in reliance on the AI Exemption or the MA Exemption (or as an accredited investor under the private issuer exemption) are individuals rather than corporate or institutional investors. To the extent that they are corporate entities, they are often family holding companies or family investment companies.

The AI Exemption is particularly important to our clients.

In our experience an investor relying on the MA Exemption is usually knowledgeable and experienced, easily and willingly makes and risks a \$150,000 investment, but does not qualify under the AI Exemption net income or financial asset tests. This is often the investor cohort where (in our particular market) we find angel investors.

Although we practice law solely in the province of British Columbia, our clients regularly seek investors in Alberta and Ontario, and to a lesser extent in other provinces and territories of Canada.

Specific Comments on Proposals Concerning the AI and MA Exemptions and Suggested Alternative Approaches

1. A new risk acknowledgement form is proposed for individual accredited investors that describes, in plain language, the categories of individual accredited investor, and the protections an investor will not receive by purchasing under the AI exemption;

Our recent experiences suggest that this approach would not protect AI investors.

We have seen in recent civil litigation in British Columbia that the Risk Acknowledgement is being used as a liability shield by issuers. The Risk Acknowledgement is tendered as a statement that the investor would make an investment no matter what the disclosure.

We have seen where a Risk Acknowledgement delivered by an investor under an Offering Memorandum distribution has been introduced against that investor when seeking remedies for distributions that do not comply with any of the provisions of NI 45-106 and have been accepted in evidence as setting out the risk tolerance of the investor.

The result is a transfer of negotiating weight from an injured investor to a non-complying issuer with a consequential reduction in recovery.

We suggest that the provisions of s 140.3 of the Act be extended to all distribution and to extend the provisions of s 50(1) (d) and (e) to all distributions. A statutorily based private right of action will empower wronged investors to effect appropriate and responsive remedies for the damages they incur from deficiencies in disclosure materials. We fail to see why misrepresentation protection should be limited to prescribed disclosures and secondary market

circumstances when the greatest vulnerability for investors rests within the exempt capital marketplace.

2. *Restricting the MA exemption to distributions to non-individual investors.*

In our view, the MA Exemption is a valuable adjunct to the non-reporting issuers' portfolio of capital raising tools.

It is premised on the capacity of the investors to analyze the investment decision using their resources and to make the risk analysis about the ability to withstand financial loss. Most investors relying on this exemption will do their own due diligence and obtain information about the investment and the issuer prior to completing an investment of this amount. We suggest that sophistication is more an investment analysis process that can occur either as a result of the investor's past experience or the use of personal and trusted advisors. In itself "sophistication" should not be a prerequisite for use of this exemption. It would be very restrictive to define "sophistication" in some manner, or require a certain type of education. Indeed, education does not guarantee sophistication.

If the investor has access to the requisite information, then we see no reason for the distinction between individual and non-individual investors. That analysis is carried out by individuals whether for their own account or on behalf and for the benefit of a non-individual investor which they control. Why should individuals who have \$4,999,999 of net assets be required to make their decisions through an intermediary entity unless that suits their needs – where a family holding company with say significantly fewer net assets but the capacity to make the MA investment be free to do so.

We cannot find the reasoned basis for the proposed change.

In our view any constraint on the freedom of an investor to contract should not be greater than that needed to remedy real and specific concerns with the operation of the marketplace. Access to the necessary information to make an appropriate investment decision should underpin securities regulation.

The MA Exemption and the AI Exemption should both be premised on the capacity of an investor to acquire accurate and sufficient information to make an informed investment decision. The chosen remedy for any deficiency in information to make a knowledgeable investment decision should be specific disclosure without misrepresentations.

In our experience, both exemptions are appropriate for investors who have sufficient resources to conduct due diligence when making their investment decisions and who do not need the protection of detailed disclosure such as that found in a prospectus or offering memorandum. Certainly, the negotiation of term sheets, share rights, subscription agreements, investor rights

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agreements and shareholders' agreements that often accompany these exemptions indicates a level of investor knowledge that goes beyond the information disclosed in prospectus or offering memoranda or through the efforts of registrants. These investors also have the financial resources to determine whether or not they can withstand the possible financial loss.

We are of the view that introducing additional requirements would unnecessarily complicate qualification and change the nature of these exemptions, which work well in their current form.

We suggest again that requiring non-fraudulent disclosure and providing expanded private remedies would provide the necessary counterbalances and be more likely to protect the investors under each of these exemptions.

Please contact us if you have any questions about our comments or wish to discuss any of the above points with us. Thank you for your consideration.

Yours truly,

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Per:

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SCHEDULE "A"
CANADIAN SECURITIES ADMINISTRATORS

Alberta Securities Commission
Autorité des marchés financiers
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission, New Brunswick
Financial Services Regulation Div. Newfoundland and Labrador
Northwest Territories Securities Office
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
PEI Securities Office, Office of the Attorney General
The Manitoba Securities Commission