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RE: Commentary for Proposed Amendments to National Instrument 45-106 *Prospectus and Registration Exemptions* Relating to the Offering Memorandum Exemption (Alberta, New Brunswick, Saskatchewan and Quebec) and Introduction of Offering Memorandum Exemption (Ontario)

Dear Mesdames:

Please accept this letter on behalf of Raintree Financial Solutions ("**Raintree**") in response to the Canadian Securities Administrators' ("**CSA**") and Ontario Securities Commission's ("**OSC**") respective amendment proposals to the offering memorandum ("**OM**") exemption (the "**OM Exemption**") under s. 2.9 of National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**").

Background

Raintree Financial Solutions ("**Raintree**") is an Exempt Market Dealer headquartered in Edmonton, Alberta, registered and operating in Alberta, British Columbia, Manitoba, Ontario and Saskatchewan. We are a wholly independent dealer without proprietary or in-house investment products, and have over 85 licensed dealing representatives operating across the jurisdictions where we are registered, including the four "western" provinces that utilize the current OM Exemption.

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The OM Exemption is the primary prospectus exemption that Raintree utilizes. Our guiding purpose is to allow average Canadian's to invest in alternative investments (primarily private securities), and do so in a way that facilitates greater information transfer than is typically found through the accredited investor, family and friends, or minimum amount prospectus exemptions found in NI 45-106. We prefer the OM Exemption and will encourage accredited investors to invest under an OM (where available) so that they are afforded the advantage of the increased disclosure, audited financial statements, a 2-day rescission period and a statutory cause of action against certain persons who signed the OM.

As an investment class, we believe that private capital is unique from so-called traditional investments such as publicly traded stocks, mutual funds, bonds and GICs. There are many reasons for this uniqueness. Subject always to the terms of the investment itself, private capital can be innovative, project-based, secured against real assets, uncorrelated with public market fluctuations, and demonstrate significant alignment with investor interests. Just as with other investment classes, there are also risks with private capital; however risks are what make each investment class unique, driving the need for asset class diversification. For example, the lack of traditional liquidity that is often cited as a downside of private capital investing can be attractive if used responsibly due to the fact that low liquidity can mitigate against the negative behavioural finance response of liquidating investments based on market volatility and fear. Conversely, holding too many illiquid investments (including non-exempt market illiquid investments) could harm an investor if that investor needs immediate liquidity due to an unforeseen life event. The principles of balance and diversification are more important than ever.

As proper investment diversification becomes more and more important to Canadian investors seeking to build independent portfolios with limited risk overlap, private capital obtained through prospectus exemptions will become more and more important as a tool for investors to obtain the type of diversification they seek. In our opinion, the key to achieving this objective for investors is to ensure that they are receiving sound and conflict-free guidance when making their investing decisions, regardless of whether that decision is made in the "exempt market" or in the office of an in-house dealer at a major financial institution.

In 2009, National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") was enacted to help achieve this goal. NI 31-103 created the registration category of the Exempt Market Dealer ("**EMD**") and forced accountability onto companies and individuals that were in the business of trading prospectus exempt securities. It was a good thing. We commend CSA members for their foresight in bringing this new regulatory regime into existence and their subsequent commitment to guiding it through its infancy with the myriad policy statements, guidance pieces and regulator-driven webinars. Nonetheless, we find it concerning that just as this infancy is coming to an end, regulatory reform under NI 45-106 (external to registrant oversight regulation) is being proposed that could undo the years of hard work. We believe that the existing regulatory framework surrounding an EMD protects investors better than ever before and we continue as an industry to track towards even better investor protection tomorrow.

Institutions and high net worth investors have been shifting their investment portfolios to alternative asset classes for over 30 years now. Broadly, this includes real estate, private equity, direct commodities and real (absolute) return investments. OMs allow average Canadians to access the alternative investment category

responsibly. By placing Know-Your-Client ("**KYC**"), Know-Your-Product ("**KYP**") and suitability obligations on EMDs (or IIROC and MFDA firms) and their dealing representatives (or associated advisors), investment decisions are scrutinized and the clients are treated "fairly, honestly and in good faith" under a statutory duty of care. Dealing representatives are obligated to highlight areas of risk in investing in a private security. Raintree's representatives are educated on how to explain all risks of an investment, not just those related to lower reporting standards and lack of liquidity. With NI 31-103, the CSA created a regime where registrants were required to do what's "right" for their clients. If carried into force as proposed, the OM Exemption cap amendments of NI 45-106, would undermine this regime and shift towards a mentality of limiting investor autonomy in order to control the risk of them doing something "wrong" to themselves.

The collective mandate of the CSA is to protect investors while promoting fair and efficient capital markets. Regulators are charged with striking the right balance between the two competing mandates and we recognize how difficult a task this is. We fear that the proposed amendments to the OM Exemption that would cap investments by eligible investors at $30,000 per year and non-eligible investors at $10,000 per year do not strike the right balance and may actually be against the public interest when applied to deals brokered by market registrants. This letter will endeavour to explain why we believe this is the case, and why we think that if the CSA wishes to enact investor protection mechanisms in the exempt market it should either (a) not cap registrant dealerships, but cap individual issuers on a "per issuer" basis when transacting without a registrant, or (b) not cap registrant dealerships and only allow the OM exemption to be relied upon by investors in trades facilitated by a registrant.

Supported Amendment Proposals: OM Marketing Materials and Financial Statement Disclosure

Rather than focus solely on the proposed amendments to NI 45-106 that we oppose, we felt that it was important to also acknowledge certain of the proposed changes to NI 45-106 that we do support.

We are highly supportive of both the prescribed content of an **OM standard term sheet** (as defined in the proposal) and the requirement that written communications other than the OM standard term sheet ("**OM marketing materials**") be incorporated by reference into the OM itself. As OMs become more fulsome in their content, clients become more likely to pursue summaries and presentations to help them understand the investment. By forcing these marketing materials to become part of the OM, clients will be protected from marketing materials that might contain misrepresentations by omission of key risks. As a registrant, we take reasonable steps to ensure that marketing materials are balanced and fair, and this can result in us not using marketing materials that were prepared by investment issuers. If these documents were incorporated into an OM, thereby requiring more balance in their content, it would facilitate getting information into the clients' hands that is both accessible and unbiased. We would, however, suggest that clarifying statements in the OM marketing materials would be needed to ensure that investors are informed that marketing materials, whether or not they form part of an OM, are never a replacement for the full disclosure contained in that OM.

We are very supportive of proposed sections 17.4 through 17.11, relating to the ongoing disclosure by investment issuers that have raised capital under an OM Exemption, although we would prefer this disclosure to be standardized across all jurisdictions for the convenience of these issuers. Raintree

previously implemented an internal policy under which new retail issuers whose securities are distributed by the firm to the public at large through an OM must enter into a selling agreement with Raintree where they are required to provide annual audited financial statements. The difficulty of making this a contractual obligation is that issuers who cease to have an active selling relationship with Raintree have little to no obligation to comply with this requirement unless "specific performance" is threatened as a remedy. We appreciate the CSA introducing regulatory reform that would increase reporting by OM Exemption issuers to their clients, as we find that (as a generality) disclosure is more important to our clients than liquidity, and improving this systemic risk of the exempt market will improve the caliber of security available. We would also ask that the CSA provide clarification statements in the companion policy to NI 45-106 to address situations where the OM Exemption issuer is lending or otherwise advancing distribution proceeds to a related entity. We believe that investor protection will be better served if these entities are also required to report, financially, under proposed sections 17.4 through 17.11.

The Eligible Investor and Non-Eligible Investor Caps

The proposed changes to section 2.9 of NI 45-106 that we are most concerned with involve imposing an investment limit of $30,000 for investments made by eligible investors during a rolling 12-month period (the "**eligible investor cap**") and an investment limit of $10,000 for investments made by non-eligible investors during a rolling 12-month period (the "**non-eligible investor cap**" and collectively with the eligible investor cap, the "**caps**" or "**cap system**"). This is being proposed in the Provinces of Alberta, Quebec, Saskatchewan and New Brunswick and Ontario. The securities regulators in Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Quebec, Saskatchewan and Yukon already impose an investment limit of $10,000 on the amount that a non-eligible investor may invest with a particular issuer.

The Cap System Assumes that Canadians fit within One of Three Homogenous Cohorts

Under the current OM Exemption definitions found in National Instrument 45-106 (rather than the amended version proposed by the OSC), an individual will typically qualify as an **eligible investor** based on their financial means through a net asset test of $400,000, an individual annual income test of $75,000 or a joint spousal annual income test of $125,000. Anyone who does not qualify for these thresholds will (absent a separate mechanism of qualification) be a **non-eligible investor**. An **accredited investor**, to whom the eligible investor cap wouldn't apply, will typically qualify as an accredited investor through a net asset test of $5,000,000, an individual annual income test of $200,000, a joint spousal annual income test of $300,000, or a financial assets test of $1,000,000 (there is no analogous financial asset test for eligible investors).

The disparity between the financial thresholds created by each of these definitions creates a very manufactured method of determining investor sophistication, risk tolerance and investment need based solely on financial means. Under the proposed cap system, all Canadians would be lumped homogenously into one of three cohorts: non-eligible investors, eligible investors and accredited investors. Worse still is the presumption that these investors would be treated equitably by having one rule apply to each group *en masse*, notwithstanding the inevitable differences between the individuals within them. The differences are

more than financial in nature, as we will discuss below, but even looking solely at the breadth of each financial criterion within each group it appears we can see the risk of homogenizing investors.

Under the cap system, an individual making $10,000 per year or owning $5,000 in net assets would have the same investment cap as someone making $74,000 per year or owning $390,000 in net assets (non-eligible investor cap: $10,000 investible under any OM per 12-month period); an individual making $80,000 per year or owning $410,000 in net assets would have the same investment cap as someone making $195,000 per year or owning $4,500,000 in net assets (eligible investor cap: $30,000 investible under any offering memorandum per 12-month period). These are individual income variances of up to $125,000 and individual asset variances of up to $4,600,000. It should go without saying that an individual on the lower end of each spectrum is inherently different than an individual on the higher end of each spectrum, and that each of their lives would be impacted in dramatically different ways by investing $30,000 in private capital investments.

Diagrams 1 through 4, below, explore the financial test ranges for each of a non-eligible investor, an eligible investor and an accredited investor:

Diagram 1: Annual Net Income Test Range

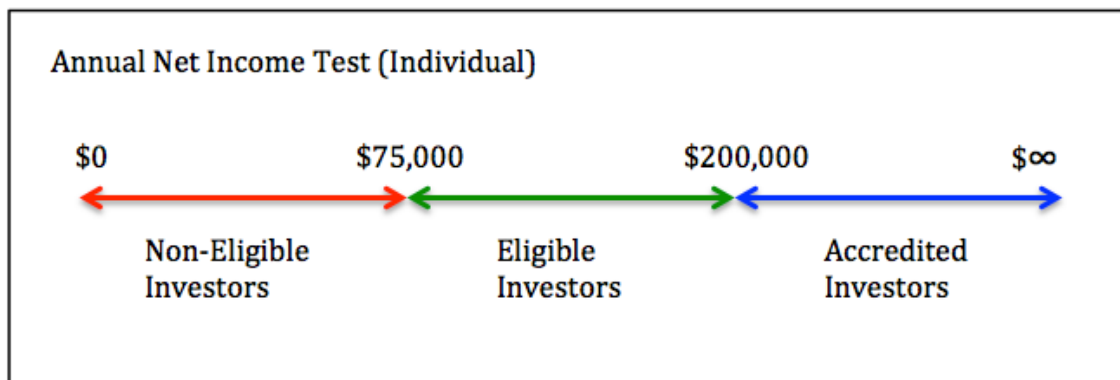


Diagram 2: Annual Joint Income Test Range

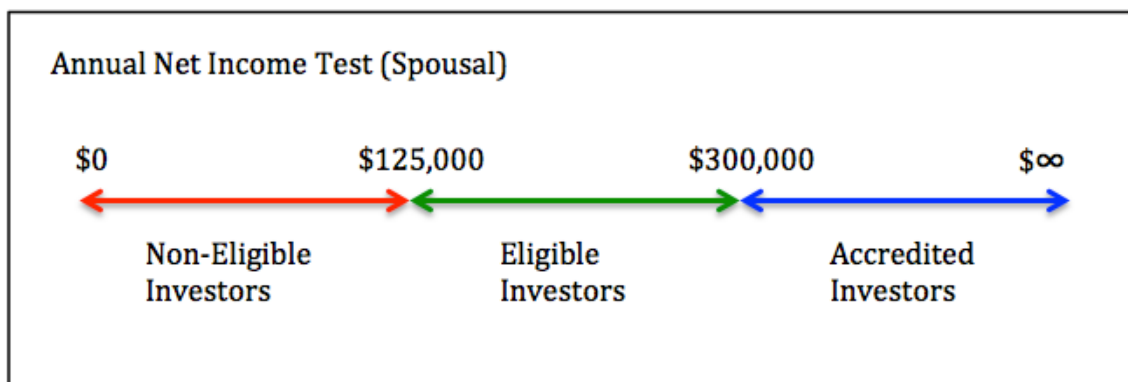


Diagram 3: Net Asset Test Range

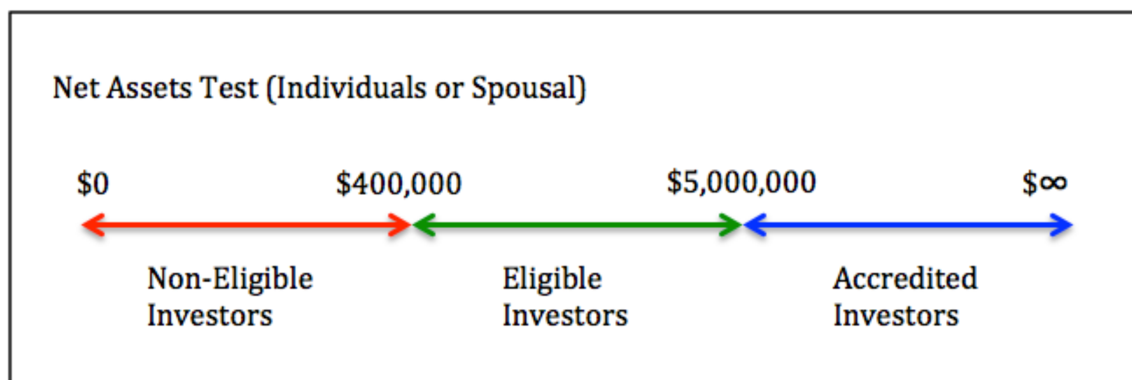
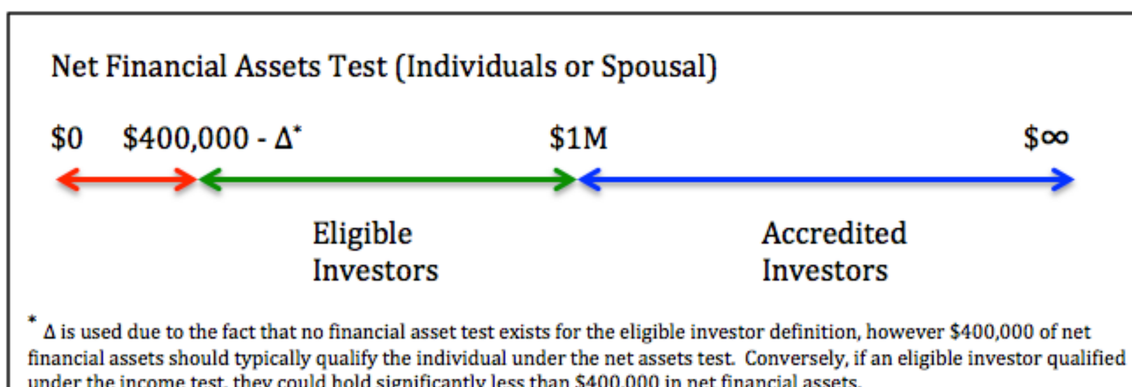


Diagram 4: Net Financial Asset Test Range



To better demonstrate how broad these ranges are, we have calculated the number and percentage of individuals that qualify as eligible investors based only on the individual annual income test by relying upon 2011 data taken from Statistics Canada for each of Ontario, Alberta, Quebec, Saskatchewan and New Brunswick. This data is presented in Table 1, below, and has been calculated to exclude individuals that have graduated to the category of accredited investor (also based solely upon their individual annual income). It is very important to recognize that these figures do not show the total number of eligible investors in Canada or each respective province, as they do not include the joint income test, net asset test or net financial assets test. It is anticipated that the total number of eligible investors would be substantially higher than the figures presented in Table 1. This is only presented to show the total number of individuals in Canada that are being treated as homogenous with the cap system based on a single financial criteria.

Table 1: Number of Eligible Investors in 2011 Based On Individual Annual Income[1]

	Number of Eligible Investors (#)	Percent of Eligible Investors (%)	Number of Accredited Investors (#)	Percent of Accredited Investors (%)
Alberta	**475,780**	**17.5%**	**62,740**	**2.3%**
New Brunswick	**46,240**	**7.9%**	**2,750**	**0.5%**
Ontario	**1,203,470**	**12.4%**	**122,190**	**1.3%**
Quebec	**508,250**	**8.2%**	**47,770**	**0.8%**
Saskatchewan	**106,400**	**13.7%**	**6,650**	**0.9%**
Canada	**2,936,540**	**11.5%**	**289,050**	**1.1%**

Source: Statistics Canada, CANSIM, table 111-0008.

The data show that there is a material number of investors within each of these jurisdictions who are eligible investors based solely on their individual income. In Alberta, 17.5% of the province's total population are being treated as a homogenous cohort under the proposal, needing identical investment protection under the eligible investor cap, simply because they make between $75,000 and $200,000 per year. The cap system suggests that if 17.5% of the Alberta population were to make the exact same investment decision (to invest $30,000 every 12 months into private capital), then the dual CSA mandates of investor protection and fostering a fair and efficient capital market would be reasonably met.

Based on Raintree's experience with Canadian investors, we disagree that they can be treated analogously to one another based on broad financial tests. Consider, for example, a 72-year old, retiree who is actively living with chronic obstructive pulmonary disorder and has a high likelihood of needing liquid capital reserves in the future to pay the costs of medical care. If this individual had amassed $400,000 through a mortgage-free home, but otherwise had little in the way of financial assets, the cap system affords her the same investing opportunities in private capital as a single, 45-year old commercial realtor with no children or health issues who owns nearly $800,000 of assets and reasonably expects to earn $175,000 in the next year. As an EMD, Raintree would be obligated to perform KYC reviews of these clients before determining whether or not an investment was suitable for them. Although there is never enough information in a single sentence to properly know a client, we would submit that for the example above, it would be unsuitable for the first

[1] Although this table reports to have calculated the number of eligible investors and accredited investors based on individual (non-joint) income, it does not calculate whether or not these individuals earned this income range "in each of the 2 most recent calendar years and who reasonably expect to exceed that net income level in the current calendar year", as is required under the NI 45-106 definitions, and therefore may be subject to an incalculable variance.

individual to invest $30,000 per year in private capital, while the second individual it is probably being unfairly limited in her ability to diversify into private capital assets in excess of $30,000.

The Cap System Categorizes Investors Through a "Tick the Box" Approach

In our examples, above, both individuals were considered eligible investors despite the fact that they had very different financial means. However, it was their non-financial characteristics that most differentiated them from each other as investors. This is a well-established concept for registrants. IIROC and MFDA members have had to evaluate clients on a more intimate basis than by simply 'weighing their wallets' (i.e., making decisions solely based on income or assets), and since the implementation of NI 31-103, the same standard has applied to EMDs. Canadian securities regulators have published detailed regulations setting out the qualifications and ongoing registration and compliance requirements involving various registrants, particularly dealers that are licensed to carry on the business of dealing securities to the Canadian public.

One of the cornerstones of registration is the requirement of these dealers to ensure that a particular trade made by an investor is a "suitable" investment for them. This involves first understanding the investment product being sold (*i.e.,* the "KYP" obligation) and then understanding detailed information about the individual investor including, among other things, their investment profile, needs and appetite for investment risk (*i.e.,* the "KYC" obligation) and then comparing the KYP and KYC information to ensure that the right investment is being paired with the right investor and hence suitable. These three concepts (KYC, KYP and suitability) form the crux of what an independent EMD like Raintree does for its clients. They are the manifestation of the obligation to treat ones clients "fairly, honestly and in good faith".

The concept of suitability is admittedly more difficult to explain in a single sentence than the "bright line" definitions that are found in NI 45-106. It takes a level of professional judgment and expertise to exercise suitability properly, which is why there is a registration regime under NI 31-103 that demands, among other things, proficiency requirements, policy mandates, supervision requirements and insurance/bonding. The privilege of "being in the business of dealing securities" now comes with the responsibility of doing it in a way that serves rather than exploits the Canadian investing public. This is where the NI 31-103 registrant regime shows its superiority to a cap system: by granting appropriate consideration to the uniqueness of each investor and their personal circumstances, together with the uniqueness of each private capital investment opportunity made available to those investors. It is respectfully our opinion that investor protection and fair and efficient capital markets cannot be achieved through rules alone, they need the involvement of industry professionals to act, in the words of the Companion Policy to NI 31-103, "*as gatekeepers of the integrity of the capital markets*".

Unlike the eligible investor cap, which focuses solely on the economic means of an investor to determine the level of protection that they are to be afforded, the concept of suitability (via KYC) will consider any number of different variables, including age, occupation, stability of employment, number (and age) of dependents, health issues, upcoming or recurring financial obligations, availability of liquid capital reserves, pending or possible needs for immediate liquidity, risk appetite, investment objectives, etc.

The CSA has already said this best. The Companion Policy to NI 31-103 states that in order for a registrant to perform a suitability assessment on a transaction, *"…the registrant should have a comprehensive understanding of the client's investment needs and objectives, including: the client's time horizon for their investments*, *overall financial circumstances, including net worth, income, current investment holdings and employment status, and risk tolerance for various types of securities and investment portfolios, taking into account the client's investment knowledge…*"

CSA Staff Notice 31-336 *Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations* (**CSA Staff Notice 31-336**) further states that, "*a meaningful suitability assessment is required. Assessing suitability is more than a mechanical fact-finding or "tick the box" exercise. It requires meaningful dialogue with the client to obtain a solid understanding of the client's investment needs and objectives, and to explain how a proposed investment strategy is suitable for the client in light of the client's investment needs and objectives*."

We believe that a cap system risks a reversion to this "tick the box" mentality. The pronouncements above from the Canadian securities regulators clearly state that protecting investors requires more than economic analysis. Each investor is unique and has different investment needs and objectives. The imposition of a cap system gives undue and exclusive weight to a single economic factor relative to the many financial and non-financial factors a registrant needs to consider when assessing suitability.

Since the proposed rules apply equally to deals processed through a registrant dealer as to those processed without, the cap system also suggests that the CSA believes a registrant is fully capable of undertaking a suitability analysis for amounts up to $10,000 for non-eligible investors and $30,000 for eligible investors, but thereafter becomes unable to do so for any further amount. If the concepts of KYC, KYP and suitability demonstrably fail after $30,000 of investment capital has been raised from an eligible investor within a 12-month period we have not seen evidence to demonstrate this, and further note that no such limitations have been placed upon other dealer registrants such as IIROC or MFDA members.

Rather than undermine the registrant suitability model by introducing a "tick the box" cap system, we believe that an even greater commitment should be made to the current regime. If CSA members are concerned with current practices involving suitability assessments by registrants, then additional guidance, outreach programs or other education initiatives should be undertaken. To go a step further, we would encourage CSA members to take enforcement action against registrants if they consistently fail in their suitability assessment obligations after receiving guidance on the appropriate standard to be upheld, so long as this standard was enforced equally among all registrant categories.

Private Capital Investors are Opportunistic, not Linear Investors: 12-month Caps Don't Work

OM investors do not follow the "per month" or "per year" investment models that are seen in the public stock and mutual fund markets. With more traditional investments such as these, individuals often systematically place fixed portions of their savings or earnings into GICs, indexes, exchange traded funds or mutual funds,

where the investment opportunity remains relatively unchanged over long periods of time ("**Linear Investing**"). Private capital investments offering by way of an OM are often project or venture-based, and are acquired during a much shorter private placement stage rather than through long periods of trading ("**Opportunistic Investing**").

The project and venture-based nature of prospectus exempt capital, together with its traditional illiquidity, creates three distinct stages for the investment: (a) a capital raising period (when the investor is given an opportunity to acquire a particular private investment); (b) a hold period (during which the investor holds the investment while the issuer operates their business venture and applicable income is paid to the investor); and (c) an exit (at which point the project is concluded and original investment capital is returned to the investor together with any growth of the investment principal). The stage-based nature of private capital (which makes many investments distinct from traditional public markets and mutual funds) necessitates the Opportunistic Investing approach under which individuals will select suitable investments under the direction of a dealing representative and place larger, suitable, lump sum and infrequent investments. Once these investments have been placed, the investor will wait for either an exit period or a subsequent influx of capital rather than placing repeat investments in the same fund as is would be seen with Linear Investing models.

A commonly seen example is an eligible investor that places $100,000 in prospectus exempt securities through an OM Exemption in a single year and is then inactive in private capital for between two to three years while those initial investments mature towards an exit. Once those investments exit, presuming that the individual earned "X" on their original investment, they will then invest $100,000 + X in a single year into several suitable investments and restart the waiting period. When this occurs, the investor gets "lumpy" influxes of investable assets in excess of the $30,000 eligible investor cap and would be forced under the cap system to place those assets into traditional capital markets.

The CSA recognized in CSA Notice and Request for Comment: *Proposed Amendments to National Instrument 23-101 Trading Rules* that innovation and healthy competition in the capital markets are factors that must be considered with proposed regulations given their important role in facilitating fairness and efficiency. Forcing suitable capital to vacate the private markets for traditional investment classes limits both competition and innovation. The cap system is catered to Linear Investing and could dissuade Canadians from opportunistically participating in innovative project-based investments that are otherwise right for their diversified investment portfolio. By forcing traditional investment behaviours into the private markets, investors may also be encouraged to make rushed investment decisions in order to acquire to the maximum of their cap amount within a given 12-month period. This further undermines the benefits of an Opportunistic Investing model.

The Cap System May Discourage Issuers from Working with Registrants

The registration regime in Canada does not require all securities deals to flow through a registrant. Under NI 31-103, only persons who are viewed as being in the business of dealing securities are required to register. An issuer that sells securities under the OM Exemption and is not required to be registered as a dealer has

no KYP, KYC or suitability obligation and could sell investments of up to $30,000 to a single eligible investor. As shown in our earlier examples, this may not be suitable for every investor, and the cap system would leave these vulnerable investors completely unprotected.

In contrast, a registrant would have to discharge their suitability obligation through appropriate KYC and KYP knowledge, regardless of whether or not the eligible investor cap were in place. This creates a nuanced regime where registrants with proficiencies and expertise in facilitating suitable investments are at a competitive disadvantage to issuers who determine themselves not to be dealing securities for a business purpose. The cap system standard would be $30,000 for unregistered persons and "$30,000 or less" for registrants, creating an incentive for issuers to avoid working with a registered dealer in order to maximize their access to an investors wallet share.

Accordingly, we believe the eligible investor cap would not be in the public interest for eligible investors and risks fostering unsuitable investments promoted by non-registered issuers. It may also promote unregistered dealing activities by issuers in circumstances where they should be registered but avoid registration since they do not want to be subject to a suitability obligation. We think that regulation should herd investors towards the "*gatekeepers of the integrity of the capital market*", not away from them. The markets should be steered by regulation towards existing regulatory regimes that protect investors rather than create incentives for them to avoid regulation in exchange for a "tick the box" methodology that homogenizes the Canadian public's investment needs.

The Cap System Would be Difficult to Monitor

Although we have spent the bulk of this letter touting the comparative benefits of NI 31-103 and its related-instrument registrant oversight regime, we also feel that the cap system will be difficult to monitor and enforce in its own right.

It is important to clarify that the caps would be calculated based on the total amount invested by an individual relying on the OM Exemption <u>during the applicable period</u>, and is not dependent on the particular issuer with whom that individual invests (which is how the current ceiling on non-eligible investors is set for certain jurisdictions). By having the cap be calculated irrespective of the issuer, the cap system becomes conditional upon the information controlled by the investor rather than information controlled by the issuer. This is potentially problematic because the responsibility to ensure compliance with the caps ultimately rests with the issuer or, where applicable a registered dealer.

In a situation where an individual purposely exceeded the eligible investor cap, but where issuers and registrants reasonably relied on that eligible investor's self-certification of compliance cap, we are curious as to the enforcement steps that would be taken by the regulators. For greater clarity, this would involve situations where individuals have already invested to the eligible investor cap within a given 12-month period, but nonetheless represent to a subsequent issuer that they had not reached their investment limit and thereby succeed in investing more than would be permitted under the proposed regulations. Would a transaction such as this have to be unwound, since compliance with the OM Exemption is the responsibility

of the issuer? What if an issuer does not have readily liquid funds to return to an eligible investor at the time that the deficiency was discovered?

Unwinding transactions could inadvertently hurt every other investor with that issuer because the management team would be forced to withdraw capital that may have already been relied upon for the stated business purposes of the investment. Issuers could ostensibly pursue civil remedies against an investor for making misrepresentations, but it would be difficult to do this without first suffering damages that would be borne by the existing investors while the fund itself waited to (hopefully) make good on its claim.

Alternatively, securities regulators could elect not to pursue an unwinding of the transaction so as to protect the other investors with the issuer, but this creates a regime where eligible investors are permitted to "opt in" to the cap system by the honesty of their own self-certification. If individuals are permitted to decide whether or not they want to be affected by the eligible investor cap there is essentially no cap at all.

Proposed Options for Consideration

We are supportive of the Canadian securities regulators' collective mandate to protect investors. The CSA should be commended for exploring new ways to ensure that the Canadian private capital markets are flourishing without disproportionately putting the public at risk. The CSA should further be commended for reaching out to the industry *en masse* for input on the proposed eligible investor cap. Although we share an objective of investor protection, our concern is that the eligible investor cap, as currently proposed under the OM Exemption, will have unintended and negative effects on investors and other capital market participants. We recognize there is rarely a perfect solution involving such matters, but believe there may be a better way to protect investor while still promoting fair and efficient capital markets.

For that reason, we would propose any of the three options be considered in *lieu* of the current cap system proposal:

1. *No cap system when registrants are involved, but directly cap issuer groups that do not use registrants*

We respectfully submit that an eligible investor cap: (a) should not apply when a registrant, such as a exempt market dealer or investment dealer, is involved in an offering of securities under the OM Exemption (*i.e.,* a brokered private placement); but (b) it should apply when an issuer is raising capital under the OM Exemption without a registrant (*i.e.,* a non-brokered private placement).

An arbitrary $30,000 cap is less effective at protecting eligible investors than the concept of suitability as performed by a registrant. "Suitability" under NI 31-103 and as clarified under CSA Staff Notice 31-336 and other publications, is a malleable concept that allows it to be tailored to the specific facts and circumstances of each eligible investor.KYC, KYP and risk mitigation strategies (such as promoted investment diversification) are imposed on registrants and should be encouraged and promoted by Canadian securities regulators. If a registrant fails in their duties to reasonably protect investors as a gatekeeper of the capital

markets, then Canadian securities regulators have a full menu of remedies at their disposal including taking enforcement action against a particular registrant.

To the extent that the CSA believes in the significant work that it and many industry participants have already dedicated to registration reform and the responsibilities of registrants, we submit that this would be a practical solution that has the investors' interests at heart.

It is further respectfully submitted that a cap limit should nonetheless apply when a dealer is not involved, on a per issuer group basis and not as an aggregate limitation involving all issuers. This already applies in part to non-eligible investors in certain jurisdictions and could be extended to eligible investors. An aggregate limit per issuer group during an applicable period would promote diversification of investments when a registrant is not there to encourage diversification under suitability obligations, and deal with some of the concerns identified above in a more graduated manner.

2. *No cap system when registrants are involved and only allow the OM exemption to be relied upon by investors in trades facilitated by a registrant*

The OM is a very informative document, but as issuers place greater amounts of information into them, they become more like prospectuses and more difficult for the average person to review and understand. The OM exemption is founded on its ability to provide potential investors with greater transparency into the issuer's business, and we believe that it is a better prospectus exemption than the other available options for this very reason. Nonetheless, it may be difficult for persons not trained to read and understand an OM to communicate it's content to investors, particularly since most offering memoranda are drafted by legal counsel to the issuer and legal counsel may not subsequently be available to translate its contents.

As part of its KYP obligations, a registrant is required to understand an investment opportunity before recommending it to their client. It is possible that non-registrant issuers using the OM Exemption were putting investors at risk by not properly explaining the content and risk to their investors, and we would inquire as to whether or not this was the reason for the cap system being proposed in NI 45-106 (an issuer-facing regulation) rather than NI 31-103 (a registrant-facing regulation).

The OM Exemption provides a unique opportunity to Canadian investors, allowing them to obtain greater asset class diversification and participate in innovative investment ventures – so long as it is done suitably. If the CSA were to require all OM exemptions to be facilitated through a registrant, they would be ensuring that investor protection mechanisms of NI 31-103 are granted to investors by a gatekeeper of the capital markets. Not only does this give each eligible investor and non-eligible investor more protection than a cap system, it also channels this to investing to a heavily regulated channel that we believe affords the CSA more oversight and enforcement remedies due to the regulatory regime that has already been put in place.

We thank the CSA for this opportunity to comment, and would welcome any further questions or opportunity to participate in new regulatory proposals. We also sincerely hope that the cap system not be implemented in NI 45-106 without significant consideration of alternative proposals.

Sincerely,
Raintree Financial Solutions[2]

"*Philip du Heaume*"

Per:
Phil du Heaume, VP Legal & Compliance

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[2] Portions of this letter were taken, with permission, from an as yet unpublished paper co-authored between Philip du Heaume, VP of Legal and Compliance with Raintree Financial Solutions and Brian Koscak, Partner with Cassels Brock & Blackwell LLP and chair of the Private Capital Markets Association of Canada.