DAVIES

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**BY E-MAIL**

To:

Alberta Securities Commission
Autorité des marchés financiers
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission (New Brunswick)
Manitoba Securities Commission
Nova Scotia Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

c/o:

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Dear Sirs/Mesdames:

**Proposed Amendments to National Instrument 13-101 - System for Electronic Document Analysis and Retrieval (SEDAR) and Multilateral Instrument 13-102 - System Fees for SEDAR and NRD**

We are writing to you in response to the request of the Canadian Securities Administrators (the "CSA") for comments in respect of the proposed amendments (the "Proposed Amendments") to *National Instrument 13-101 - System for Electronic Document Analysis and Retrieval (SEDAR)* and *Multilateral Instrument 13-102 - System Fees for SEDAR and*

*NRD*, all as published on June 30, 2015. We appreciate the opportunity provided by the CSA to provide comments on these initiatives.

***Additional Regulatory Burden***

The Proposed Amendments will have the effect of requiring issuers that are not reporting issuers in Canada and that rely on certain exemptions from the requirement to deliver a prospectus to investors (including the "accredited investor" exemption) to create a SEDAR profile and to post their reports of exempt trade on SEDAR. This would result in, among others, issuers that issue securities exclusively to accredited investors to expend additional time and expense in creating a SEDAR profile, even if the issuance of securities by such issuer is an isolated event.

We do not see the utility of such issuers being required to create and maintain a SEDAR profile solely for the purpose of filing reports of exempt trade. At best, the proposed additional requirement represents an additional cost of doing business to issuers that issue securities on a regular basis in the exempt market in Canada. At worst, the proposed additional requirement will result in sensitive information of the issuer (such as the number of securities issued, the price at which such securities are issued and the location of the issuer's investors) becoming too easily accessible to the issuer's competitors or the issuer deciding to forego Canada as a viable market in which to raise funds on an exempt basis compared to other jurisdictions.

***Potential Disclosure of Sensitive Information***

Based on our review of the Proposed Amendments, it is unclear whether issuers that are required to file an offering memorandum even if they are relying on an exemption other than Section 2.9 of *National Instrument 45-106 – Prospectus Exemptions* would be required to file their offering memoranda as "public" documents on SEDAR. In our view, it is important that any offering memoranda be kept "private" regardless of the prospectus exemption being relied on by the issuer. If an issuer is required to file its offering memoranda as public documents, a simple search on SEDAR could give competitors of the issuer access to highly-sensitive and confidential information regarding the issuer's past financial performance, the identity of the issuer's key persons and anchor investors, the issuer's investment strategy and the geographical breakdown of the issuer's investors. In private equity markets, for example, where investors regularly except to receive an offering memorandum, the requirement that offering memoranda be made public may significantly impact the ability of private equity fund issuers to raise funds, as the issuers may be prevented from including material information regarding their portfolio companies in their offering memoranda due to confidentiality obligations.

An offering memorandum of an issuer that operates solely in the exempt market space should not be easily accessible by other market participants, even if it is filed with one of

the provincial or territorial securities regulatory authorities.[1] To impose such a disclosure requirement will not aid the effective functioning of the capital markets in Canada but could instead disincentivize issuers from delivering offering memoranda to prospective investors when they are relying on the accredited investor exemption. In other words, the Proposed Amendments could be to the detriment of investors in the exempt market space.

Further, the requirement that offering memoranda of exempt market issuers be made publicly available seems inconsistent with the public policy basis for the existence of the exempt market. The ability of a limited subset of investors to make investments on a prospectus exempt basis is premised on the basis that such investors, whether due to their level of association with the issuer or their financial wherewithal, do not require the same level of regulatory protection as investors participating in prospectus offerings. It seems inconsistent with this premise to require that offering memoranda be publicly disclosed in the same manner as prospectuses. In addition, imposing this disclosure requirement could cause confusion amongst investors, who may believe they are entitled to the same rights and protections as investors that purchase securities that are qualified by a prospectus due to the public nature of the documents.

***Efficiency Concerns***

We understand that the CSA wishes to provide for a better system for filing reports of exempt trade that will enable the CSA to analyze the information in the reports and to decrease the administrative burden of handling the filings. In our view, this goal can be achieved without requiring issuers to create a SEDAR profile in order to file a report of exempt trade. For example, under the current rules in Ontario and British Columbia, issuers are required to file electronic reports of exempt trade but such reports are not required to be filed on SEDAR.

The current approach in Ontario and British Columbia seems sensible and appropriate to us, as it strikes the right balance between confidentiality concerns and regulatory oversight of the exempt market. The current approach could be further improved by creating a more uniform reporting regime and permitting issuers to file reports of exempt trade only in their principal jurisdiction, rather than requiring reports to be filed in each jurisdiction where trades are made. In this regard, we understand that the CSA has published a request for comments, dated August 13, 2015, regarding the introduction of a new harmonized report of exempt distribution. We appreciate the CSA's initiative to create a uniform report of exempt trade across the country. Our specific comments regarding the August 13, 2015 notice will be provided separately.

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[1] We understand that under the current regime, the provincial securities regulatory authorities do not post offering memoranda that are filed with them on their website or make offering memoranda that are filed with them available to the public. In our view, this is the appropriate approach and should not change as a result of the Proposed Amendments.

We note that the Proposed Amendments do not fully coordinate the reporting regime for reports of exempt trades, because the existing regimes in Ontario and British Columbia (which require the electronic delivery of documents through the Ontario and British Columbia portals) will continue in effect. Therefore, notwithstanding that the CSA desires to improve the system for reporting exempt trades, issuers will continue to be subject to a fragmented approach across Canada. In this regard, the Proposed Amendments appear to offer limited improvements from an efficiency perspective, as issuers will continue to be required to file their reports of exempt trade in different ways depending on the location of their investors and the regulatory regime applicable in each province or territory.

We would be pleased to discuss our concerns with you.

Yours very truly,

*(signed) Brooke Jamison*

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