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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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-and-

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Ladies and Gentlemen,

RE: Request for Comment on Proposed Amendments to National Instrument 13-101 *System for Electronic Document Access and Retrieval (SEDAR)* ("**NI 13-101**") and Multilateral Instrument 13-102 *System Fees for SEDAR and NRD* ("**MI 13-102**") dated June 30, 2015

Thank you for the opportunity to comment on the proposed amendments to NI 13-101 and MI 13-102 (the "**Proposed Amendments**").

This letter represents the general comments of certain members of the Financial Products & Services practice group at Stikeman Elliott LLP (and not those of the firm generally or any client of the firm) and are submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

1. Issues with public access to confidential offering documents

While we are generally supportive of the stated policy objective of facilitating data analysis and reducing the administrative burden associated with paper filings, we respectfully submit that public access to confidential and/or sensitive offering documents is not required in order to further these stated objectives. Further, while we acknowledge the potential benefit from a regulatory perspective, we also do not agree that the prejudice potentially suffered by issuers and the resulting loss of financing opportunities to Canadian investors generally would justify the stated policy objectives underlying the Proposed Amendments.

Our primary concern is that the Proposed Amendments would require that any document required to be filed per section 37.2 of the *Securities Regulation* enacted pursuant to the *Securities Act* (Québec) (the "***Securities Regulation***") could be made public at the discretion of the principal regulator. The scope of section 37.2 is broad. It includes "any disclosure document delivered to subscribers [in connection with a distribution made pursuant to an exemption], even if such document is not required by the Act or the Regulations". Therefore, under the Proposed Amendments, any disclosure document, including confidential private placement memoranda, term sheets or investor presentations, provided in connection with a distribution under any prospectus exemption in Québec, although marked "Private" under the Proposed Amendments, could be made public at the discretion of the principal regulator with no notice to the issuer.[1]

This result is very problematic. A confidential offering or private placement offering memorandum, for example, often discloses confidential, proprietary and commercially sensitive financial and strategic information about an issuer. Any public disclosure of such information is likely to be highly prejudicial to the issuer. Further, this is not an occasional occurrence but, based on our experience advising a broad range of Canadian and non-

[11] As contemplated in the Proposed Amendments, the access level for section 37.2 disclosure documents would be set at "Private," which is defined as "initially private, but if/when the principal regulator makes it public, it will display on SEDAR.com within 15 minutes."

Canadian issuers and funds, is true of most confidential offering memoranda. These concerns are especially acute with respect to private issuers and private funds because these issuers have made the strategic decision not to become public issuers, and therefore, are not obligated to make broad-based disclosure of confidential business information under securities legislation. For certain issuers, the ability to retain and protect commercially sensitive, proprietary or otherwise confidential information is a key part of their business strategy and operations. For a private issuer or fund to have to proactively apply for discretionary relief to seek confidential treatment of these types of materials (e.g., under section 296 of the *Securities Act* (Québec)) to guard against a decision to render such materials fully accessible on SEDAR is unduly onerous and would likely lead to the decision by certain private issuers and funds to discontinue offerings into Québec or other jurisdictions for which access to such materials on SEDAR is a risk. The proposed SEDAR access level for these types of materials would, therefore, very likely result in the loss of investment opportunities by investors.

The securities legislation of certain provinces recognizes that the public disclosure of certain information can result in "serious prejudice" to an issuer and contemplates measures to minimize this risk. For example, section 296 of the *Securities Act* (Québec) provides that:

> 296. Any person may have access to all documents required to be filed under this Act or the regulations, except documents filed by a registrant otherwise than pursuant to the requirements prescribed in Title III.
>
> Where the Authority deems that the communication of a document could result in serious prejudice, it may declare the document inaccessible.
>
> This section applies notwithstanding section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).[2] (emphasis added)

The Proposed Amendments would undermine the intent of this provision. Further, in our view, the volume of filings under section 37.2 of the *Securities Regulation* has the potential to be considerable. While we believe, as discussed above, that the most likely result of issuers wanting to avoid SEDAR access to their materials would be to discontinue offerings into Québec, should issuers raise concerns with the *Autorité des marchés financiers* ("**AMF**") under section 296 of the *Securities Act* (Québec) with respect to filed disclosure documents, a high volume of such filings may risk precluding AMF staff from giving due consideration to concerns raised by issuers in connection with such filings. To the extent that issuers do file section 296 applications with respect to materials filed under section 37.2 of the *Securities*

[2] Section 140(2) of the *Securities Act* (Ontario) similarly provides that:

> Despite subsection (1), the Commission may hold material or any class of material required to be filed by Ontario securities law in confidence so long as the Commission is of the opinion that the material so held discloses intimate financial, personal or other information and that the desirability of avoiding disclosure thereof in the interests of any person or company affected outweighs the desirability of adhering to the principle that material filed with the Commission be available to the public for inspection. (emphasis added)

Regulation, it would be incumbent upon the AMF to give due consideration to all such applications in the absence of a blanket order providing equivalent relief, and therefore, the potentially increased regulatory burden should be considered when weighing the costs and benefits of the Proposed Amendments.

In consideration of the foregoing, it is respectfully submitted that the Proposed Amendments should be modified so that documents required to be filed pursuant to section 37.2 of the *Securities Regulation* are either: (i) not required to be filed on SEDAR; or (ii) if they are required to be filed on SEDAR, they are subject to the "private non-public" access level such that the documents are never displayed on SEDAR.com.

2. Public access to filed documents should be substantially similar across Canada

In devising a filing regime, the participating jurisdictions should consider establishing substantially similar public access rights to filed documents across Canada. In other words, the public access afforded to documents filed pursuant to NI 13-101 should be no greater than the access levels for materials filed on the British Columbia Securities Commission's eServices utility and the Ontario Securities Commission's Electronic Filing Portal. Failing this, issuers may be reluctant to extend an offering into jurisdictions in which there is any risk of confidential filings becoming publicly accessible. For example, other than the confidential portions thereof, Form 45-106F1 *Report of Exempt Distribution* and Form 45-106F6 *British Columbia Report of Exempt Distribution* are publicly filed. However, such documents are not widely publicly accessible, for example, by being posted on SEDAR. The disparity in public access levels may encourage some issuers to limit an offering to jurisdictions that afford more privacy to public filings. We also urge the CSA to consider the additional burden of having different obligations for the same documents in different Canadian jurisdictions. If the Proposed Amendments are adopted, issuers will have multiple filing obligations to satisfy, since filings will be required to be made via SEDAR, the British Columbia Securities Commission's eServices utility and the Ontario Securities Commission's Electronic Filing Portal, and by paper in jurisdictions where, for example, offering memoranda are required to be delivered to regulators. This appears to be at odds with the CSA's stated objective of streamlining post-trade reporting obligations.

3. Implementation should be delayed until the compatibility issues are resolved

The implementation of the Proposed Amendments should be delayed until the SEDAR desktop client software is made compatible with all operating systems including Mac OS and Windows 8 or newer operating systems. Limiting SEDAR access to those who run an older version of Windows on their computers has the potential to cause difficulty to a large number of issuers and their advisors. While we acknowledge that this is not a new problem since reporting issuers must comply with existing SEDAR filing requirements despite the compatibility issues, we urge the CSA not to exacerbate the problem by extending these difficulties more widely to private and/or foreign issuers (as applicable) which are not currently required to be SEDAR filers.

4. Proposed Amendments correctly exempt foreign issuers from SEDAR filings

We agree with the Proposed Amendments in that a foreign issuer should not be required to make electronic filings on SEDAR unless it elects to do so. A foreign issuer generally does not maintain a SEDAR profile and will often market a distribution of securities on a private placement basis in Canada as a supplement to a much larger international offering. With the wrapper relief amendments expected to come into force on September 8, 2015, Canadian securities regulators are focused on streamlining the ability of foreign issuers to make offerings of foreign securities in Canada. We therefore support the continued streamlining of the private placement process in Canada by foreign issuers and support the participating jurisdictions in not increasing the regulatory burden on such issuers by exempting them from this requirement.

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We thank the Canadian Securities Administrators and its participating members for the opportunity to comment on the Proposed Amendments and would be pleased to discuss these issues further.

Submitted on behalf of members of the Financial Products & Services practice group at Stikeman Elliott LLP by,

Alix d'Anglejan-Chatillon *Ramandeep K. Grewal*