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VIA EMAIL

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marches financiers
Office of the Superintendent of Securities, Service NL
Financial and Consumer Services Commission, New Brunswick
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Officer of the Yukon Superintendent of Securities
Northwest Territories Office of the Superintendent of Securities
Nunavut Securities Office

Attention:

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Steven Weimer, Manager, Compliance, Data & Risk, Corporate Finance - Compliance, Data & Risk
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The Secretary
Ontario Securities Commission comments@osc.gov.on.ca

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Dear Sirs/Mesdames:

RE: Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* relating to the Offering Memorandum Prospectus Exemption

I am delighted to provide you with comments on the proposed amendments to NI 45-106 relating to the OM Exemption issued by the Canadian Securities Administrators on September 17, 2020.

By way of background, I have practised corporate securities law in Ontario since my call to the Ontario bar in 1999. My practice focuses on all aspects of corporate securities law with a particular emphasis on M&A and corporate finance. My early years of practice were spent at a leading Canadian law firm, and since 2006, I have continued my practice in a boutique corporate securites law setting. I regularly act as external counsel for issuers and dealers operating in the exempt market.

My comments relate to issuers that are collective investment vehicles, and in particular mortgage investment corporations (MICs) and other mortgage investment entities (MIEs), though some of my concerns apply equally to issuers engaged in real estate activities.

General Comments

I have over the years advised and encouraged my MIE and other clients disseminating offering memoranda (whether under the OM Exemption or otherwise) to always consider enhanced disclosure even when it is not technically prescribed. Since its release on April 26, 2012, I have directed my clients to carefully review Multilateral CSA Staff Notice 45-309 *Guidance for Preparing and Filing an Offering Memorandum under NI 45-106* which, as you know, specifically identifies OM deficiencies relating to mortgage investment entities and real estate development entities. I am not sure why the principles outlined in Multilateral CSA Staff Notice 45-309 should not continue to apply and why the robust prescribed supplemental disclosures are being proposed at this time. The new disclosure requirements set out in the proposals impose a disclosure standard that appears to approach the 'full, true and plain disclosure of all material facts' standard applicable to reporting issuers as opposed to the lesser standard of not containing any 'misrepresentation' and providing a reasonable investor with sufficient information to make an informed decision. I worry that these comprehensive supplemental disclosures and their corresponding compliance costs will have a chilling effect on the use of the OM Exemption. This will result in inequities between larger issuers who have the resources to comply with the OM Exemption and smaller issuers who will not and therefore will need to access capital through other channels.

Even prior to your announcement of these proposed supplemental disclosures, it has been my experience that issuers shy away from using the OM Exemption in jurisdictions like Ontario where individual investment limits apply. If the securities regulators in these jurisdictions are adamant that these prescribed disclosures are required in order to provide the appropriate investor safeguards and if those same regulators believe that the OM Exemption should be widely available for use by issuers, large and small, then I would propose that collective investment vehicles and issuers engaged in real estate activities who are willing to spend the time and money to comply with the proposed supplemental disclosures should have their OM Exemption offerings exempted from the individual investment limit restrictions. Insofar as a more stringent disclosure standard is being prescribed, the policy objective in imposing investment limits on individuals subsides.

I am also concerned that by prescribing this level of comprehensive disclosure under the OM Exemption, securities regulators are signalling the type of 'gold standard' disclosures they will expect during compliance reviews in offering memoranda (and other offering materials) disseminated by non-reporting MIE and other issuers under all prospectus exemptions. This would likely have an additional chilling effect on the use of an offering memorandum (whether in conjunction with the OM Exemption or some other prospectus exemption) by smaller issuers, who will eventually look to solicit by way of term sheet only, ultimately resulting in less disclosure to prospective investors.

Specific Comments

1. Proposed clause 1.2.1 of Form 45-106F2 provides, in part, that if a significant amount of an MIE's business is carried out by another entity that is not a subsidiary of the MIE, then additional disclosure would be required from that other entity, and Schedule 2 of Form 45-106F2 would be prepared as if that other entity were the issuer. For most MIEs with externalized management, this would result in increased compliance costs and regulatory burdens imposed on the MIE issuer. I recognize that to a certain extent it is the business expertise of an MIE's manager that is being offered to investors, and for that reason, I agree that an offering memorandum should include robust disclosure relating to the MIE's manager including disclosure relating to the material terms of its management agreement with the MIE issuer, as well as detailed disclosure about the MIE issuer's investment objectives and strategies, and how the MIE's manager plans to meet those objectives. Section 3.1 (compensation and securities held), section 3.2 (management bios), section 3.3 (regulatory disclosure) and section 3.4 (loans disclosure) should apply to the directors and executive officers of any MIE manager (if not also directors and executive officers of the MIE issuer) if that MIE manager essentially operates the MIE issuer's business. I also agree that any risk factors that affect an MIE's manager who effectively runs the MIE issuer's business should also be disclosed clearly and prominently.

   I disagree, however, with taking this any further and treating the MIE's manager as the issuer for purposes of the offering. Requiring audited financial statements from not only the MIE issuer (which financial statements would in any event refer to related party transactions and the role of the MIE's manager) but also from the MIE's manager results in increased regulatory burdens and significant compliance costs that are in my view not warranted and may even confuse prospective investors. I would also imagine that many MIE issuers would be reluctant to proceed under the OM Exemption if its manager was required to disclose its financial statements particularly where that MIE's manager is involved (as they often are) in other business activities besides the MIE's business. For those that still wish to use the OM Exemption, I would anticipate many MIE issuers taking steps to seek to avoid this financial statement disclosure requirement by either internalizing management or creating special purpose management companies.

2. The requirement to amend the offering memorandum to include a 6 month interim financial report results in significant but unnecessary additional compliance costs. For continuous distributions, there is already a requirement to amend an offering memorandum to the extent there are material developments affecting the issuer and its business. In my experience acting for several MICs over the years, there are often no material developments that occur during the year, and requiring all MIEs to amend their offering memoranda every six months, whether or not those reports would illustrate any material changes, is a regulatory burden that should not be imposed.

3. The requirement to provide portfolio performance data for the issuer's portfolio in Section 4 of Schedule 2 requires further clarification at least as it pertains to MIEs. While the extent to which an MIE issuer's mortgage portfolio is impaired or in default is important disclosure for prospective investors (and is proposed to be required in clause 3(3) 'Portfolio Summary' of Schedule 2), MIE investors are ultimately interested in target and historical yields on their equity investments. The amendments should make clear that the required performance data as it pertains to a mortgage lending business relates to historical dividends or other distributions paid on an investor's equity investment. I also query, depending on the nature of the performance data required, whether the 10 year period might be too long a period, and if formulating historical data for several years back might be overly cumbersome for some existing issuers.

I wish to thank you for considering my comments above and I would be pleased to respond to any questions or concerns you may have. I can be reached at steve@acuitylaw.ca or 1.416.409.5493.

Yours very truly,

STEVE COHEN LAW PROFESSIONAL CORPORATION

Per: "*Steve Cohen*"

Steve Cohen, LL.B, LL.M