

March 8, 2013

John Stevenson
Secretary
Ontario Securities Commission
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Dear Sir:

Re: Response to OSC Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions*

The Portfolio Management Association of Canada (PMAC), through its Industry, Regulation and Tax Committee, is pleased to have the opportunity to submit the following comments regarding OSC Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions* (the "Consultation Paper") which sets out concept ideas for new capital raising prospectus exemptions in Ontario, which have been developed as part of the Ontario Securities Commission's (OSC) broadened exempt market review.

As background, PMAC represents investment management firms registered to do business in Canada as portfolio managers. We have over 170 members from across Canada that are comprised of both large and small firms managing total assets in excess of \$800 billion (excluding mutual funds assets) for institutional and private client portfolios. Our mission is to advocate the highest standards of unbiased portfolio management in the interest of the investors served by Members. For more information about PMAC and our mandate, please visit our website at www.portfoliomanagement.org.

General Comments

The exempt market in Ontario is a significant market and we support the OSC's review of capital raising exemptions as both a timely and necessary initiative. One of our overriding concerns in this consultation is the fact that several of the capital raising exemptions available in other jurisdictions in Canada are not currently available in Ontario. As a preliminary comment, we believe that the OSC should prioritize working with its Canadian Securities Administrators (CSA) colleagues to harmonize the exemptions that are currently available only to individuals in certain jurisdictions. Regulatory cooperation and coordination of capital raising exemptions and harmonization of these exemptions across all jurisdictions in Canada should be a priority for the OSC and the CSA.

We would like to reiterate the comments we made in our submission in response to CSA Staff Consultation Note 45-401 *Review of Minimum Amount and Accredited Investor Exemptions – Public Consultation* (the "AI Consultation")¹. First, we urge the OSC to work with the CSA to harmonize National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) to provide regulatory consistency across Canada. Second, we believe that any changes to the current form of these exemptions should also factor in that investors should have access to a broad range of investment choices and professional investment advice. Finally, without qualitative and quantitative data to support maintaining these exemptions in their current form (and Ontario carve-outs) or to support making any changes (adding new exemptions) it is difficult to understand exactly where issues arise, if any, with the current form of the exemptions in NI 45-106.

We acknowledge the balance the OSC must achieve in meeting its investor protection mandate as well as fostering capital raising activities and the ability for Ontario investors to access the market in an equal and efficient manner. Harmonization of NI 45-106, generally, would promote further efficiency in Canadian capital markets to the benefit of investors, registrants and foster confidence in our markets.

We note that we will not be responding to every consultation question included in the Consultation Paper. Accordingly, we propose to cover issues in the Consultation Paper more broadly and provide some general comments and recommendations on the proposals set out in the Consultation Paper.

Summary of Recommendations

Set out below is a summary of our key recommendations:

1. The managed account exemption should be expanded in Ontario to permit purchases of securities of investment funds. We strongly believe this exemption should be harmonized across Canada.
2. We recommend the OSC prioritize the implementation of one harmonized offering memorandum (OM) exemption that is applicable in all CSA jurisdictions. We do not support the adoption of a different OM exemption in Ontario to what is currently available in other jurisdictions.
3. We are supportive of a broadened form of exemption based on specific sophistication with a focus on educational criteria.
4. The OSC should not move forward with a crowdfunding exemption at this time given the enormous regulatory complexities involved. It should instead focus its efforts on the other exemptions covered in the Consultation Paper (i.e. the OM exemption and managed account exemption) and in the interim, continue monitoring the crowdfunding developments in other jurisdictions before further work is done in this area.
5. We are supportive of efforts to streamline and coordinate electronic reporting of information required in reliance of exemptions. However, we believe the focus should be on efficient data collection as opposed to mandating that additional data be provided by registrants.

¹ See PMAC submission dated February 9, 2012 available at: http://www.osc.gov.on.ca/en/SecuritiesLaw_com_20120229_45-401_walmsleyk.htm

Exemption Based on Registrant Advice

We will focus our comments on this area exclusively on the managed account exemption.

Managed Account Exemption

As communicated in our submission on the AI Consultation, we believe a key area for harmonization is the managed account exemption in Ontario and that a registered portfolio manager acting on behalf of a fully managed account in Ontario should qualify as the accredited investor when purchasing securities of an investment fund. The practice of allowing portfolio managers to act as an accredited investor for their clients for investments in investment funds (for example, such as pooled funds) should be consistent across Canada. It remains unclear as to why the OSC continues to have policy concerns, particularly, where there is no justifiable difference in the context of investment funds to have a different exemption available in some jurisdictions and not others. The Consultation Paper does not provide any evidence to support Ontario's concerns with removing the carve out for investment fund securities with reference to the Ontario market vs. the rest of Canada. Allowing reliance on this exemption in Ontario for the distribution of securities of investment funds is fully consistent with a portfolio manager's overriding fiduciary duty to act in a client's best interest.

We note that the OSC has granted exemptive relief from this carve-out since 2007 to accommodate exempt distributions in connection with the provision of portfolio management services to "secondary clients". These "secondary clients" are not accredited investors but are typically accepted because of the relationship between the "secondary client" and the "primary client" who qualified as an accredited investor. The exemptions have been granted in the past in order to accommodate certain clients so that they can access an equivalent level of professional portfolio management services in a cost effective manner (to both the client and the portfolio manager). The OSC will typically consider the following when assessing these exemptive relief applications:

- the length of existence of the adviser;
- the ratio of registered PMs in the firm to separately managed accounts they manage; and
- the overall size of AUMs the advisers manage.

We understand that one of the key policy reasons for this "carve-out" in paragraph (q)(ii) of the definition of "accredited investor" in NI 45-106 is to prevent the avoidance of the rules and regulations that are applicable to funds offered to retail investors by distributing funds to them via fully managed accounts. We understand that another concern the OSC has is that a portfolio manager has so many managed accounts that there is no true client relationship and therefore an increased risk of sales of securities of investment funds that may be inappropriate for the client.

In a recent survey completed by 135 PMAC Members that was conducted in preparation for our submission to the CSA on Dispute Resolution, we found the following²:

- Private client AUM totaled \$77 billion (representing an estimated 46% of the Canadian private client market)
 - Average AUM per client of \$1.2 million
 - Separating out firms with private client assets in excess of 75% of firm AUM resulted in an average AUM per client of \$964,000
- On average, when all firms are included (including dealer affiliated firms), private client advisors deal with 58 clients

² Ibid at 1 (see Investor Economics Report included in PMAC submission on dispute resolution).

- On average, private client advisors at firms with private client assets in excess of 75% of firm, managed relationships with 86 clients

The majority of responding firms (66%) had less than 250 private clients per firm. Almost 30% have a minimum account size of \$1million while 37% have a minimum account range of \$500, 000 to \$1million. Most firms (109) employ fewer than 10 registered advisors. This data clearly shows that portfolio managers generally have fewer clients who have sizable portfolios. In our view, this data clearly indicates that portfolio managers generally have few clients per registered adviser and have large average portfolio sizes per client. Accordingly, the concerns raised relating to the number of clients managed by a portfolio manager and the misuse of the managed account exemption are not substantiated.

We recommend that Ontario remove this carve out for the following reasons:

1. ***Fiduciary duty*** -- Portfolio managers owe their clients a fiduciary duty. Under this duty of loyalty to their clients, portfolio managers must act with reasonable care and exercise prudent judgment, act for the benefit of their clients and place their client's interests before their employer's or their own interest.³ By preventing a portfolio manager in a discretionary managed account context from purchasing securities of an investment fund for a client who is not an accredited investor is contrary to the principle of a fiduciary duty. The managed account exemption is only used where you have an advisor that owes a fiduciary duty to the client hired to provide discretionary investment management services, and is exercising its authority under a written contract to invest the client in the fund (which is permissible in all other provinces). We believe this framework offers sufficient protection to investors.
2. ***Portfolio manager / client relationship*** -- Portfolio managers who offer discretionary managed account services to clients are hired for their expertise and advice. Portfolio managers differ from mass-market or retail investment managers because they manage larger amounts of money for fewer clients. Portfolio managers' clients have a unique investor profile. They are typically high net worth private clients who are sophisticated or accredited investors and/or institutional investors. Prohibiting advisors to invest in securities of investment funds for their clients is contrary to this contractual relationship and logically inconsistent with the managed account concept. In addition, portfolio managers are subject to KYC and suitability obligation in NI 31-103. Like other provinces, portfolio managers in Ontario have the proficiency, registration status and requirements, financial strength and human resources to support and properly service such accounts. We believe that the enhanced requirements built into NI 31-103 regarding the regulation of portfolio managers addresses the investor protection concerns that Ontario may have.
3. ***Ontario investors are being disadvantaged*** -- Allowing portfolio managers under the managed account exemption to invest in securities of investment funds for their clients is beneficial for investors because of investment diversification without the requisite reliance on the \$150K minimum amount exemption for these types of investments. We would argue that restricting a portfolio managers ability to diversify client accounts forces a higher risk concentration to the detriment of investors.
4. ***Need for harmonization*** -- Maintaining the carve-out for investment funds in Ontario continues to be problematic for our Members' who have clients across Canada. This is both an operational issue and a business impact issue. Investors in Ontario are being disadvantaged in their investment opportunities as compared to

³ See CFA Institute Code of Ethics & Standards of Professional Conduct at: <http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx>. See CFA Institute Standards of Practice Handbook, pages 83 – 113 for guidance on complying with the duty to clients standard (loyalty, prudence and care), <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2010.n2.1>.

investors in the rest of the country. Portfolio managers are consequently, employing different investment strategies on a jurisdictional basis as a result. We do not believe there is a public interest in maintaining this carve out. Regulatory cooperation and coordination of all capital raising exemptions and the harmonization of these exemptions across all jurisdictions in Canada is in everyone's interest.

5. **No systemic risk identified** -- To our knowledge, there is no evidence in any of the other provinces to suggest that there has been ongoing risks or systemic risks with allowing units of funds to be purchased using the managed account exemption over the last several years. In fact, we would suggest that the OSC has already acknowledged this as it has "softened" its policy rationale for the carve-out since granting numerous exemptive relief orders over the last 6 years. In our view, the changing marketplace, the implementation of NI 31-103 and significant strides in improving investor awareness has led to the realization that the investor protection concerns the OSC initially identified at the time of inception of NI 45-106 are significantly different today.

We recommend that NI 45-106 be amended to allow fully managed accounts in Ontario to qualify as "accredited investors" for purchases of securities in investments funds. This would be consistent with allowing for investor choice while still ensuring investor protection as a registrant continues to be required as part of the transaction (a portfolio manager has a fiduciary duty, KYC and suitability obligations along with liability). We believe the harmonization of the managed account exemption is long overdue.

OM Exemption

We support the adoption of OM exemption in Ontario as Ontario is currently the only Canadian province without an OM exemption. We believe that this exemption, in particular, should be an area of focus and priority for the OSC and should not be tied to a crowdfunding concept proposal. We note, in implementing this exemption in Ontario, the OSC can review the experience of other jurisdictions over several years of activity in order to determine what issues are of most concern and how to address these concerns. While the OSC's proposed OM exemption is similar to the OM exemption currently available in other Canadian jurisdictions, we think the financial thresholds are out of line with the current exemptions included in NI 45-106⁴ and overly restrictive. Moreover, the explanatory commentary in the Consultation Paper does not make reference to any specific evidence to support such restrictive limits.⁵ Having different financial thresholds in various jurisdictions coupled with the fact that some jurisdictions require the involvement of a registrant while others do not, will cause an asymmetry in the investment opportunity of investors, further promote a jurisdictional advantage to certain investors, and create more confusion in the application of the rules.

We recommend that the OSC work with the CSA to develop one harmonized OM exemption in Canada.

⁴ See section 2.9(1) applicable in British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador (the "BC Model") and section 2.9(2) applicable in Alberta, Manitoba, Northwest Territories, Nunavut, Prince Edward Island, Québec, Saskatchewan and Yukon (the "Alberta Model").

⁵ The maximum investment in a single issuer per year by an investor would be \$2,500 in Ontario while in Alberta it is \$10,000 (unless investor is "eligible" where there is then no limit) and in BC, there is no limit. Similarly, the maximum investment per year by an investor would be \$10,000 in Ontario, while Albert and BC impose no limit. Finally, the maximum amount allowed to be raised per year by an issuer would be limited to \$1,500,000 in Ontario, while Albert and BC impose no limit.

Exemption Based on Sophistication

While we support some broadening of exemptions based on additional criteria such as education, for example, we recognize the difficulty in adding criteria with subjective elements, such as work experience. We do believe it is important to facilitate investments by financial professionals (CFAs, etc.) who may not meet the income, financial or net asset tests but still have the proficiency and education level to purchase exempt securities. We recommend that if the OSC were to include such additional criteria either to an existing exemption such as the accredited investor exemption or create a new exemption based on education and experience, it should be subject to meeting objective or bright line tests in order to avoid confusion in interpreting or relying on the exemption.

In our view, the OSC should consider expanding the education criteria to also include Chartered Accountants (CAs)⁶ or the Chartered Professional Accountant designation. Since a CA with industry experience can qualify as a CCO, we believe it is appropriate to allow an individual with this designation to be able to invest under this exemption.

While we support some broadened form of exemption based on specific sophistication, in our view, the proposed required combination of work experience and education would still only allow investments by a restricted pool of investors and existing exemptions for employees etc. may likely already cover those who would qualify. We recommend that there be no requirement to obtain relevant work experience as there may be difficulty in determining what may be "relevant" and this will broaden the availability of this exemption. For instance, the CSA recently released CSA Staff Notice 31-332 *Relevant Investment Management Experience for Advising Representatives and Associate Advising Representatives of Portfolio Managers*⁷ to provide guidance on what regulators consider "relevant investment management experience". In all cases in this notice, the applicant's educational qualifications met NI 31-103 requirements and the only question was whether the applicant had relevant investment management experience. To avoid this type of ambiguity, we recommend the exemption only include specific education criteria.

Crowdfunding

We understand the OSC's interest in considering an exemption that would permit capital raising through crowdfunding given the proliferation of various structures and mediums that have evolved in this area around the world in recent years. There is certainly no denying the importance of small business growth both domestically and internationally. However, we believe it is premature to explore this exemption as we don't believe it is the right time to move forward with this given that our members believe priority should be given to expanding and harmonizing existing exemptions in NI 45-106.⁸ We do however, believe, that some of the objectives the OSC has in exploring a crowdfunding exemption could be achieved by expanding other existing exemptions that are already available to investors in other jurisdictions such as the family, friends and business associates exemption. We understand that typically the first phase of investors involved in a crowdfunding financing are made up of individuals in the family, friends and business associates categories. While we appreciate that the OSC has concerns with the potential limitless number of individuals

⁶ The Canadian Institute of Chartered Accountants (CICA), the national association for CAs in Canada, and CMA Canada, which oversees the CMA designation, have announced they will launch a new combined CPA Canada oversight body as of January 1, 2013. The creation of a national CPA organization is the first step in a proposal to merge CAs and CMAs throughout Canada and create a new Chartered Professional Accountant designation. See Joint Communication of CICA and CMA at: http://cpacanada.ca/wp-content/uploads/2013/01/Formation_of_CPA_Canada_EN.pdf

⁷ See: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20130117_31-332_investment-management-experience.htm, published on January 17, 2013.

⁸ While we acknowledge that the introduction of crowdfunding may play a role in facilitating entrepreneurs and start up businesses to raise capital, this proposed exemption is not viewed as being of value to our members and we believe usage would be very limited.

captured by this exemption (since Facebook, LinkedIn and other social media sites have arguably expanded the network of "close personal friend" available), we would recommend exploring whether this exemption could address some of the motivations for implementing a crowdfunding exemption in Ontario.

Finally, given that the OSC's concept proposal encompasses many of the elements of the crowdfunding exemption in the JOBS Act and that this exemption in the U.S. is still under consideration, we recommend the OSC focus its efforts on the other exemptions covered in the Consultation Paper and instead continue monitoring the crowdfunding developments in other jurisdictions before further work is done in this area.

Need for Additional Exempt Market Data

We agree that data on exempt market activity is necessary to inform any decisions about regulatory changes or policy initiatives relating to the exempt market. Generally, we are supportive of the OSC's efforts in this area and believe there should be an increased focus on leveraging the technological processes available in collecting this data. We also think this process needs to be centralized with other reporting. We query whether there is a need for additional data as we believe the information already being reported should be sufficient to understand the activity in the exempt market. The OSC should further explore any request for further information with industry participants through focused consultations. Finally, in our view, the reporting process should be automated and made more efficient and we would support any moves in this direction.

Conclusion

PMAC has long advocated for a consistent set of regulations applicable to market participants operating nationally and for the equal opportunity of investments to investors across Canada. In our view, inconsistent rules and exemptions create unnecessary costs as registrants conduct business in various jurisdictions and cause unequal investing opportunities for Canadian investors. In many cases, these costs are indirectly passed on to investors. In recognizing the ever-growing trend of market participants operating nationally, a consistent set of exemptions is of growing importance.

In summary, PMAC endorses the efforts of the OSC to undertake a focused review of the exempt market in Ontario and to make any necessary and appropriate changes, including broadening some of the current exemptions available. We would be pleased to participate in any further consultation process the OSC undertakes or to assist with any further requests for data collection from our membership. If you have any questions regarding our submission, please do not hesitate to contact Katie Walmsley (kwalmsley@portfoliomanagement.org) at (416) 504-7018 or Julie Cordeiro at (416) 504-1118 ext 202.

Yours truly;

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA



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