

**CSA Notice and Request for Comment**  
**Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* relating to Syndicated Mortgages**  
**and**  
**Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions***

**March 8, 2018**

**Introduction**

The Canadian Securities Administrators (the **CSA** or **we**) are publishing for a 90-day comment period proposed amendments (the **Proposed Amendments**) to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) related to syndicated mortgages.

The Proposed Amendments are set out in Annexes A and C of this notice. Related changes to Companion Policy 45-106CP *Prospectus Exemptions* (the **Proposed Changes**) are set out in Annex B. This notice will also be available on the following websites of CSA jurisdictions:

nssc.novascotia.ca  
www.albertasecurities.com  
www.bpsc.bc.ca  
www.fcaa.gov.sk.ca  
www.fcnb.ca  
www.lautorite.qc.ca  
www.mbsecurities.ca  
www.osc.gov.on.ca

**Substance and Purpose**

The Proposed Amendments include changes to the prospectus and registration exemptions available for the distribution of syndicated mortgages. A syndicated mortgage is a mortgage in which two or more persons participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage.

In particular, the Proposed Amendments:

- Remove the prospectus and registration exemptions under sections 2.36 of NI 45-106 and 8.12 of NI 31-103 respectively for the distribution of syndicated mortgages in the CSA jurisdictions where the exemptions are available.
- Introduce additional requirements to the offering memorandum exemption under section 2.9 of NI 45-106 (the **OM Exemption**) that apply when the exemption is used to distribute syndicated mortgages.
- Amend the private issuer prospectus exemption under section 2.4 of NI 45-106 (the **Private Issuer Exemption**) so that it is not available for the distribution of syndicated mortgages.

The Proposed Changes provide guidance regarding the new requirements introduced by the Proposed Amendments and regarding the determination of the issuer of a syndicated mortgage.

The purpose of the Proposed Amendments is to introduce additional investor protections related to the distribution of syndicated mortgages and to increase harmonization regarding the regulatory framework for syndicated mortgages across all CSA jurisdictions.

### **Background**

All CSA jurisdictions currently have prospectus and registration exemptions for securities that are mortgages (the **Mortgage Exemptions**) if they are sold by a mortgage broker licensed in the Canadian jurisdiction where the property is located. The rationale for the Mortgage Exemptions is that an alternative regulatory regime applies to the distribution of mortgages.

In Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, the Mortgage Exemptions are not available for syndicated mortgages.

There has been a significant increase in the offering of syndicated mortgages in connection with real estate developments in certain jurisdictions. These offerings potentially raise investor protection concerns, particularly when sold to retail investors, because they may:

- be used to raise seed financing for real estate developments, such as the costs of initial design proposals and start-up expenses;
- be sold based on projected values of a completed development;
- not be fully secured by a charge against real property, since the amount of the loan may significantly exceed the current fair value of the land;
- be subordinate to future financings, such as construction financing, which may be substantial and effectively render the investment more similar in risk to an equity investment rather than a fixed income investment;
- be offered by issuers with no source of income, rendering the payment of ongoing interest dependent on future financing or reserves from the principal advanced; and
- be subject to the risk of delay and increased costs inherent to real estate development.

## Summary of the Proposed Amendments

### *Changes to the Mortgage Exemptions*

Consistent with the current approach in Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, the Proposed Amendments, together with related legislative amendments in Ontario, would remove the Mortgage Exemptions for syndicated mortgages in Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Yukon.

Alternative prospectus exemptions would be required for the distribution of syndicated mortgages in all CSA jurisdictions. If we make the Proposed Amendments, we expect that syndicated mortgages will most likely be offered primarily under the accredited investor exemption under section 2.3 of NI 45-106 (the **AI Exemption**), the OM Exemption or the family, friends and business associates exemption under section 2.5 of NI 45-106 (the **FFBA Exemption**), although other prospectus exemptions may be available.

In those jurisdictions where the Mortgage Exemptions currently apply to syndicated mortgages, market participants that are in the business of trading syndicated mortgages would be required to consider whether the registration requirement applies to them. Since entities involved in financing real estate developments tend to engage in repeated financing activities, we expect that some of these firms will be required to become registered as a dealer or to rely on a registration exemption. In Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Yukon, the amendment to the registration exemption will be made effective one year later than the change to the prospectus exemption to allow time for market participants to register as required.

### *Changes to the Offering Memorandum Exemption*

The OM Exemption is available for the distribution of syndicated mortgages. The OM Exemption allows for the distribution of securities to retail investors and is premised on adequate disclosure being provided to prospective purchasers.

Projected values of the completed development and the fact that the syndicated mortgage is secured against real property are often emphasized in connection with the marketing of these investments. The protection provided by this security interest depends primarily on the current fair market value of the real property relative to the obligations and any prior ranking charges.

The Proposed Amendments require issuers to deliver an appraisal of the current fair market value of the property subject to the syndicated mortgage to prospective purchasers under the OM Exemption. The appraisal would be prepared by a qualified appraiser who is independent of the issuer. Any other value of the property disclosed by the issuer would be required to have a reasonable basis and the issuer would be required to disclose the material factors and assumptions underlying that value and whether it was prepared by a qualified appraiser who is independent of the issuer.

Consistent with the current approach in British Columbia, the Proposed Amendments also include supplemental disclosure requirements that are tailored to syndicated mortgages,

including disclosure of development risks, prior obligations secured against the real property and the price paid by the developer to acquire the real property. The intention of these amendments is to require adequate information for:

- potential purchasers under the OM Exemption to make an informed investment decision, and
- any registrants involved in the distribution to discharge their obligations to know the product being offered and to conduct a meaningful analysis of the suitability of the investment.

Issuers of syndicated mortgages would be required to meet the requirements of Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers*, as supplemented by proposed Form 45-106F18 *Supplemental Offering Memorandum Disclosure for Syndicated Mortgages*. The new disclosure requirements include information regarding the business and financial position of the borrower under the syndicated mortgage. We expect that the issuer of the syndicated mortgage and the borrower will generally be the same entity. However, in circumstances where the issuer of the syndicated mortgage is not the borrower, its ability to rely on the OM Exemption will be dependent on its ability to provide the required information regarding the borrower and to certify that it does not contain a misrepresentation. We consider information regarding the borrower to be essential, since it is the borrower that will be required to make payments of principal and interest under the syndicated mortgage.

Any mortgage broker involved in the distribution of a syndicated mortgage under the OM Exemption would also be required to provide a certificate that the offering memorandum does not contain a misrepresentation with respect to matters within its knowledge and that the mortgage broker has made best efforts to ensure that matters that are not within its knowledge do not contain a misrepresentation. The certificate requirement for mortgage brokers is modelled on the current requirements that apply in British Columbia. In some jurisdictions, a person that certifies an offering memorandum is subject to the statutory right of action for purchasers if the offering memorandum contains a misrepresentation.

#### *Changes to the Private Issuer Exemption*

The Proposed Amendments would make the Private Issuer Exemption unavailable for the distribution of syndicated mortgages. The Private Issuer Exemption is intended for small businesses to raise capital and we do not believe that it is appropriate for this exemption to be used for products such as syndicated mortgages. We are also concerned with our ability to monitor developments related to syndicated mortgage distributions without adequate reporting through reports of exempt distribution, which are not required under the Private Issuer Exemption. Since the FFBA Exemption and the AI Exemption will be available as alternatives to the Private Issuer Exemption, this proposed amendment should not significantly restrict the range of potential purchasers for syndicated mortgages.

Removing the Private Issuer Exemption for syndicated mortgages would result in more consistent reporting for syndicated mortgage distributions through the report of exempt distribution. The additional reporting would provide us with more information about this market,

enabling us to develop more targeted compliance and investor education programs related to syndicated mortgages.

### **Impact on Investors**

Investors in syndicated mortgages who purchase under the amended OM Exemption would be entitled to enhanced disclosure relating to their investment. We anticipate that this additional disclosure would result in more informed investment decisions and enable registrants involved in the distribution to better fulfil their obligations related to the distribution.

Investors in syndicated mortgages distributed under other prospectus exemptions would benefit from the potential involvement of a registrant in the distribution, in the same manner as for the distribution of other real estate related securities.

### **Anticipated Costs and Benefits of the Proposed Amendments and Proposed Changes**

The Proposed Amendments and Proposed Changes are intended to enhance investor protection, particularly in connection with distributions to retail investors under the OM Exemption.

The proposed amendments to the OM Exemption are intended to enhance the ability of investors to understand the risks related to investing in syndicated mortgages and the extent to which the security interest in the property subject to the syndicated mortgage provides meaningful protection in the event of a default under the syndicated mortgage. The additional disclosure proposed under the OM Exemption is also intended to assist registrants in discharging their obligations to their clients.

The Proposed Amendments would also result in greater harmonization regarding the regulation of syndicated mortgages.

The costs associated with the Proposed Amendments and Proposed Changes may include the costs of:

- obtaining a property appraisal and providing supplemental disclosure for distribution under the OM Exemption;
- filing of reports of exempt distribution for the distribution of syndicated mortgages that could otherwise have been made in reliance on the Private Issuer Exemption; and
- registering as an exempt market dealer and ongoing compliance for market participants in jurisdictions where syndicated mortgages may currently be offered in reliance on the Mortgage Exemptions.

With the exception of the costs of registration and compliance, we do not expect these costs to be significant. For firms that are currently in the business of trading in syndicated mortgages and are licensed under mortgage broker legislation, the transition to registration as an exempt market dealer could potentially involve significant costs. These firms would be subject to new requirements and would be required to adopt new policies and procedures. We are proposing that the changes to the registration exemption for mortgages will take effect one year later than the other Proposed Amendments to minimize the immediate impact on these firms.

We consider that the costs associated with the Proposed Amendments and the Proposed Changes are proportionate to the benefits of increased investor protection.

### **Alternatives Considered**

We have not considered any alternatives to the Proposed Amendments related to the Mortgage Exemptions or the OM Exemption. We consider the additional investor protections related to the distribution of syndicated mortgages included in the Proposed Amendments to be necessary.

As an alternative to removing the Private Issuer Exemption for syndicated mortgages, we considered requiring an issuer distributing syndicated mortgages under that exemption to file a report of exempt distribution. However, because the AI Exemption and FFBA Exemption would allow for the distribution of syndicated mortgages to substantially the same potential purchasers as the Private Issuer Exemption, we did not think that alternative was preferable. Further, adding a reporting requirement to the Private Issuer Exemption would require additional changes to the form of report of exempt distribution and system changes to the electronic filing systems in certain jurisdictions, which could result in additional costs and complexity for market participants.

### **Local Matters**

Annex D is being published in any local jurisdiction that is proposing related changes to local securities laws, including local notices or other policy instruments in that jurisdictions. It may also include additional information that is relevant to that jurisdiction only.

### **Request for Comments**

We welcome your comments on the Proposed Amendments and Proposed Changes.

In addition, we would appreciate comments regarding the following questions:

#### *Appraisals*

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?

#### *Mortgage broker requirements*

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.
3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

*Exclusion of syndicated mortgages from the Private Issuer Exemption*

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

*Alternative prospectus exemptions*

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?
6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission Rule 45-501 *Mortgages*?
7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

Please submit your comments in writing on or before June 6, 2018. If you are not sending your comments by email, please send a CD containing the submissions (in Microsoft Word format).

Address your submission to all of the CSA as follows:

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

Deliver your comments only to the addresses below. Your comments will be distributed to the other CSA jurisdictions.

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-593-2318  
[comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

M<sup>e</sup> Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square-Victoria, 22<sup>e</sup> étage  
C.P. 246, tour de la Bourse  
Montréal (Québec) H4Z 1G3  
Fax : 514-864-6381  
[consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at [www.albertasecurities.com](http://www.albertasecurities.com), the Autorité des marchés financiers at [www.lautorite.qc.ca](http://www.lautorite.qc.ca) and the Ontario Securities Commission at [www.osc.gov.on.ca](http://www.osc.gov.on.ca). Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

### **Contents of Annexes**

Annex A – Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions*

Annex B – Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions*

Annex C – Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions And Ongoing Registrant Obligations*

Annex D – Local Matters

## Questions

Please refer your questions to any of the following:

### *Ontario Securities Commission*

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Adam Braun  
Legal Counsel, Compliance and Registrant Regulation  
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### *Alberta Securities Commission*

Lanion Beck  
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### *Autorité des marchés financiers*

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### *British Columbia Securities Commission*

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*Financial and Consumer Affairs Authority of Saskatchewan*  
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306.798.3381  
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*Financial and Consumer Services Commission (New Brunswick)*  
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*Manitoba Securities Commission*  
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204.945.2561  
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*Nova Scotia Securities Commission*  
H. Jane Anderson  
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## ANNEX A

## PROPOSED AMENDMENTS TO

NATIONAL INSTRUMENT 45-106 *PROSPECTUS EXEMPTIONS*

1. *National Instrument 45-106 Prospectus Exemptions is amended by this Instrument.*

2. *Section 1.1 is amended by adding the following definitions:*

“professional association” means an organization of real property appraisers with its head office in Canada that

- (a) is generally accepted within the Canadian real property appraisal community as a reputable association,
- (b) admits individuals on the basis of their academic qualifications, experience and ethical fitness,
- (c) requires compliance with professional standards of competence and ethics established or endorsed by the organization,
- (d) requires or encourages continuing professional development, and
- (e) has and applies disciplinary powers, including the power to suspend or expel a member regardless of where the member practices or resides;

“qualified appraiser” means an individual who

- (a) regularly performs property appraisals for compensation,
- (b) is a member of a professional association holding the appropriate designation, certification, charter or licence to act as an appraiser for the type of property, and
- (c) is in good standing with the professional association; *and*

“syndicated mortgage” means a mortgage in which two or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage;.

3. *Section 2.4 is amended by:*

(a) *adding “or a syndicated mortgage” after “a short-term securitized product” in subsection (4), and*

(b) *adding the following subsection:*

- (6) Subsection 73.4(2) of the *Securities Act* (Ontario) does not apply to a distribution of a short-term securitized product or a syndicated mortgage..

4. *Section 2.9 is amended by adding the following subsections:*

- (19) For the purposes of subsections (19.1) and (19.3), a qualified appraiser is independent of an issuer of a syndicated mortgage if there is no circumstance that, in the opinion of a reasonable person aware of all of the relevant facts, could interfere with the qualified appraiser's judgment regarding the preparation of an appraisal for a property.
- (19.1) Subsections (1), (2) and (2.1) do not apply to a distribution by an issuer of a syndicated mortgage unless, at the same time or before the issuer delivers an offering memorandum to the purchaser in accordance with subsections (1), (2) or (2.1), the issuer delivers to the purchaser an appraisal of the property subject to the syndicated mortgage that
- (a) is prepared by a qualified appraiser who is independent of the issuer,
  - (b) is prepared in accordance with the applicable professional standards of the professional association of which the qualified appraiser is a member,
  - (c) provides the fair market value of the property subject to the syndicated mortgage, without taking into account any proposed improvements or proposed development, and
  - (d) is prepared with an effective date that is within 12 months preceding the date that the appraisal is delivered to the purchaser.
- (19.2) An issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) must not disclose any value of the property subject to the syndicated mortgage, other than the fair market value disclosed in the appraisal required under subsection (19.1), unless the issuer has a reasonable basis for that value.
- (19.3) If an issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) discloses any value of the property subject to the syndicated mortgage, other than the fair market value disclosed in the appraisal required under subsection (19.1), the issuer must state
- (a) with equal or greater prominence the fair market value disclosed in the appraisal required under subsection (19.1),
  - (b) the material factors or assumptions used to develop the value, and
  - (c) whether or not the value was prepared by a qualified appraiser who is independent of the issuer.

(19.4) The issuer of a syndicated mortgage distributed in reliance on the exemption described in subsection (1), (2) or (2.1) must file with the securities regulatory authority a copy of the appraisal required under subsection (19.1) on or before the 10<sup>th</sup> day after the distribution of the syndicated mortgage..

5. ***Section 2.36 is amended by:***

- (a) ***repealing subsection (1),***
- (b) ***replacing “Except in Ontario, and subject” in subsection (2) with “Subject”, and***
- (c) ***replacing “In Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, subsection (2)” in subsection (3) with “Subsection (2)”.***

6. ***Section 6.4 is amended by adding the following subsection:***

- (3) Despite subsections (1) and (2), if the security distributed under section 2.9 [*Offering memorandum*] is a syndicated mortgage, the required form of offering memorandum is Form 45-106F2 supplemented by Form 45-106F18..

7. ***The following form is added after Form 45-106F17:***

**Form 45-106F18**

***Supplemental Offering Memorandum Disclosure for Syndicated Mortgages***

***INSTRUCTIONS:***

- 1. *Integrate the following disclosure into your offering memorandum for a distribution of a syndicated mortgage.*
- 2. *You do not need to follow the order of items in this form. Information required in this form that has already been disclosed in response to the requirements of Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers need not be repeated.*
- 3. *You do not need to respond to any item in this form that is inapplicable.*
- 4. *Certain items of this form require disclosure about the issuer of a syndicated mortgage or the borrower under a syndicated mortgage. In general, the borrower will also be the issuer of the syndicated mortgage. In these circumstances, the terms “issuer” and “borrower” are interchangeable and there is no requirement to duplicate information.*

*There may be circumstances where the borrower is not the issuer of a syndicated mortgage, such as where a mortgage is syndicated by the original lender to add lenders. In these circumstances, the issuer is required to provide all disclosure required under Form 45-106F2 and this form as the issuer of the security being distributed. This form also requires information about the borrower under the syndicated mortgage, because*

*the borrower is the person obligated to pay the principal and interest under the syndicated mortgage.*

*5. In this form, the distribution of a syndicated mortgage may also be referred to as the “offering”. The lenders or investors in a syndicated mortgage may also be referred to in this form as the “purchasers”.*

*6. References to the “principal holder” of a person mean each person who, directly or indirectly, beneficially owns or controls 10% or more of any class of voting securities of the person. If a principal holder is not an individual, also provide the information required for the principal holder for any person that, directly or indirectly, beneficially owns or controls more than 50% of the voting rights of the principal holder.*

*7. When the term “related party” is used in this form, it has the meaning set out in the General Instructions to Form 45-106F2.*

### **Item 1 – Description of the Offering**

(1) Describe what kind of investment is being offered and the legal rights of the purchaser, including, but not limited to, details of the following:

- (a) the nature of the investment, i.e., whether it is a participation in a mortgage, an assignment of a participation in a mortgage, a mortgage unit or some other direct or indirect interest or participation in a mortgage over real property and the legal rights of the purchaser attaching to the investment;
- (b) the rights of the purchaser on default by the borrower and the rights of the purchaser to share in the proceeds of any recovery from the borrower, in particular the purchaser’s voting rights and whether the purchaser has the right to institute individual legal action against the borrower and, if not, the person or persons who may institute or coordinate the institution of legal action against the borrower; and
- (c) if the issuer of the syndicated mortgage is not the borrower under the syndicated mortgage, the rights of the purchaser against the issuer of the syndicated mortgage.

(2) Describe the project and the plans for the use of the funds.

### **Item 2 – Raising of Funds**

(1) If the funds to be raised through the offering are required to be raised in stages, disclose the period over which the funds will be raised and the criteria to determine when they will be raised.

(2) If there are any arrangements under which any part of the funds raised will only become available to the borrower if certain conditions are fulfilled, describe those conditions and the procedure for the return of funds to the purchaser if the conditions are not met and any deduction or penalty imposed on the borrower or any other person for

not meeting the conditions. Give details of the arrangements made for, and the persons responsible for, the supervision of the trust or escrow account or the investment of unreleased funds, and the investment policy to be followed.

### Item 3 – Other Risk Factors Specific to Syndicated Mortgages

(1) State in bold:

**Investments in syndicated mortgages are speculative and involve a high degree of risk. Purchasers should be aware that this investment has not only the usual risks associated with the financial ability of the borrower to make repayments but also risks associated with financing real estate and risks associated with syndication.**

(2) If the syndicated mortgage includes a personal covenant, guarantee or other financial commitment, state in bold:

**The ability of the person providing the personal covenant, guarantee or other financial commitment to perform under the personal covenant, guarantee or other financial commitment will depend on the financial strength of the person. There is no assurance that the person will have the financial ability to be able to satisfy their obligations under the personal covenant, guarantee or other financial commitment and therefore you may not receive any return from your investment, including any initial amount invested.**

(3) Disclose the risk factors that make the offering a risk or speculation.

#### *INSTRUCTIONS:*

*Risk factors may include, but are not limited to*

- *the reliance on the ability of the borrower to make payments under the mortgage,*
- *the financial strength of any person offering a personal covenant, guarantee or financial commitment,*
- *the ability to raise further funds as progress in development or construction takes place,*
- *changes in land value,*
- *unanticipated construction and development costs,*
- *the ability to recover one's investment in the event of foreclosure,*
- *whether there are other encumbrances on the mortgaged property and their relative priority,*
- *the level of ranking of the syndicated mortgage in relation to other mortgages and other encumbrances,*
- *the conflicts of interest between the borrower and the mortgage broker,*
- *the mortgage broker's efforts, ability and experience,*
- *inadequate insurance coverage,*
- *inability to change the trustee (if any), and*

- *the restrictions imposed by securities legislation on the resale of the syndicated mortgage.*

#### **Item 4 – Administration Agreement**

(1) Disclose whether there is an administration agreement requiring the purchaser to pay fees or expenses for the administration of the syndicated mortgage to any person, such as a mortgage broker or a related party. Disclose all fees and expenses to be charged to the purchaser and how they are to be calculated. Also disclose the specific responsibilities of all parties to the administration agreement, including

- the collection responsibility for payments due under the syndicated mortgage,
- the commencement of legal action on default,
- the follow-up on insurance expirations or cancellations, and
- all other matters of administration to be provided by the person administering the syndicated mortgage.

(2) State:

Copies of the administration agreement are available on request from the borrower or any mortgage broker involved in the distribution.

#### **Item 5 – Trust Agreement**

Disclose whether there is any trust or other agreement that provides for any person to make advances of the funds to the borrower and to distribute the proceeds of repayments made by the borrower. Disclose the material terms of any agreement, in particular,

- whether the purchaser is required to grant a power of attorney to the trustee and the terms of that power of attorney,
- all fees and expenses to be charged to the purchaser, and
- the specific responsibilities of all parties to the agreement, including
  - the opening of a trust account into which all investment proceeds must be paid until advanced to the borrower and into which all proceeds received in repayment of the syndicated mortgage must be paid before distribution to the purchasers,
  - the means by which the syndicated mortgage will be repaid, and
  - the mechanism for replacing the trustee and the procedure for dispute resolution.

#### **Item 6 – Property Subject to Mortgage**

Describe the details of the property subject to the mortgage, including

- the address and legal description,
- the past, current and intended use,
- any proposed improvements,

- the date of acquisition of the property and the purchase price paid,
- the details, including the purchase price, of any other transactions involving the property known to the borrower, any related party of the borrower or any of their respective partners, directors, officers or principal holders,
- if the borrower is not the issuer of the syndicated mortgage, the details, including the purchase price, of any other transactions involving the property known to the issuer, any related party of the issuer or any of their respective partners, directors, officers or principal holders,
- any contractual arrangements relating to the property,
- any insurance policies applicable to the property and their status,
- any claims or litigation,
- any known contamination or environmental concerns, and
- any other material facts.

### **Item 7 – Details of the Syndicated Mortgage**

(1) Describe the details of the syndicated mortgage, including

- the material terms of the syndicated mortgage, including the principal amount, term, amortization period, interest rate, maturity date, any prepayment entitlement and the ranking of the syndicated mortgage (i.e., first, second, etc.),
- the material terms and relative priority of any other mortgages and other encumbrances on the mortgaged property,
- the loan-to-value ratio of the property, calculated on an aggregate basis using the loan value of the syndicated mortgage and all other mortgages or encumbrances with priority over the syndicated mortgage and the appraised value of the property described under item 8,
- the aggregate dollar amount of the funds being raised under the offering,
- the status of the syndicated mortgage, including whether there are any arrears and, if so, the amount and due dates of outstanding payments, if advances have already been made to the borrower and interests in the syndicated mortgage are subsequently sold to purchasers,
- the means by which the repayments by the borrower will be distributed and the procedure for establishing the proportion to which each purchaser is entitled to share in the distribution, and
- the source of funds that the borrower will use to pay interest on the syndicated mortgage, including any reserve accounts or other fund maintained by the borrower or any other person.

(2) Attach a copy of any commitment letter, or other commitment document, in which the mortgage broker or other person sets out the terms of the commitment to advance funds to the borrower.

### **Item 8 – Appraisal**

Describe the most recent appraisal of the value of the land and existing improvements, including all assumptions and qualifications and the date of the appraisal prepared by a qualified appraiser in accordance with subsection 2.9(19.1) of National Instrument 45-106 *Prospectus Exemptions*.

Provide details of the most recent assessment of the land, including existing improvements by any provincial or municipal assessment authority.

### **Item 9 – Exemptions**

Disclose any statutory or discretionary exemption from the registration requirement that is being relied upon by any person involved in the offering of the syndicated mortgage.

### **Item 10 – Guarantees or Other Similar Financial Commitments**

- (1) Summarize, in plain language, the key terms of any personal covenant, guarantee or other financial commitment provided in connection with the syndicated mortgage. Explain how the personal covenant, guarantee or financial commitment works and state:

Copies of the personal covenant, guarantee or other financial commitment are available on request from the borrower or any mortgage broker involved in the distribution.

- (2) Disclose the financial position and business experience of the person providing any personal covenant, guarantee or other financial commitment.
- (3) Indicate whether the purchasers will be entitled to ongoing disclosure of the financial position of the person providing any personal covenant, guarantee or other financial commitment during the period of the personal covenant, guarantee or commitment, and the nature, verification, timing and frequency of any disclosure that will be provided to purchasers.

### **Item 11 – Organization of Mortgage Broker**

State the laws under which the mortgage broker is organized and the date of formation of the mortgage broker.

### **Item 12 – Borrower Information**

If the borrower is not the issuer of the syndicated mortgage, include the disclosure required under items 2, 3, 4 and 12 of Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* as if the borrower were the issuer of the syndicated mortgage.

**Item 13 – Developer**

If the property subject to the syndicated mortgage is being developed, state the laws under which the developer is organized and the date of formation of the developer. Describe the business of the developer and any prior experience of the developer in similar projects.

**Item 14 – Mortgage Broker, Partners, Directors, Officers and Principal Holders**

(1) Disclose the name, municipality of residence and principal occupation for the last 5 years of the mortgage broker, if the mortgage broker is an individual, or of the partners, directors, officers and any principal holders, if the mortgage broker is not an individual.

(2) Disclose any penalty or sanction, including the reason for it and whether it is currently in effect, that has been in effect during the last 10 years, or any cease trade order that has been in effect for a period of more than 30 consecutive days during the past 10 years against

- the mortgage broker,
- a director, executive officer or control person of the mortgage broker, or
- any issuer of which a person referred to above was a director, executive officer or control person at the time.

(3) Disclose any declaration of bankruptcy, voluntary assignment in bankruptcy, proposal under any bankruptcy or insolvency legislation, proceedings, arrangement or compromise with creditors or appointment of a receiver, receiver manager or trustee to hold assets, that has been in effect during the last 10 years with regard to

- the mortgage broker,
- a director, executive officer or control person of the mortgage broker, or
- any issuer of which a person referred to above was a director, executive officer or control person at that time.

**Item 15 – Developer, Partners, Directors, Officers and Principal Holders**

Disclose the information required by item 14 in respect of the mortgage broker for the developer and, if the developer is not an individual, its partners, directors, officers and principal holders.

**Item 16 – Conflicts of Interest**

(1) State the name of the mortgage broker, any relationship between the mortgage broker and the borrower or issuer, particulars of any agency or similar agreement and the remuneration, if any, that purchasers will pay to the mortgage broker in connection with the offering.

(2) Describe any existing or potential conflicts of interest that could reasonably be expected to affect the purchaser's investment decision among any of

- the borrower,
- the issuer,
- the mortgage broker,
- any partners, directors, officers and principal holders of the borrower, issuer, mortgage broker or developer, or
- the trustee and any person providing goods or services to the borrower, issuer, mortgage broker or developer in connection with the syndicated mortgage.

(3) Describe any direct or indirect interest of the mortgage broker, developer or related parties in the property, mortgage or business of the borrower, issuer or trustee.

#### **Item 17 – Material Agreements**

(1) To the extent not already disclosed elsewhere in the offering memorandum, give particulars of every material agreement relating to the offering of the syndicated mortgage entered into or to be entered into by the borrower, issuer or the mortgage broker or any of the affiliates of the borrower, issuer or mortgage broker, within the 2 years preceding the date of the offering memorandum.

(2) If the material agreements are not attached to the offering memorandum, disclose a place at which during regular business hours those agreements or copies of those agreements may be inspected during distribution of the syndicated mortgage.

#### **Item 18 – Disclosure of Fees Specific to the Syndicated Mortgage**

(1) Disclose whether a mortgage broker has provided a disclosure statement under mortgage broker legislation to the borrower concerning all fees, by whatever name those fees are called, charged to the borrower in addition to assessment, appraisal, survey and legal fees. State that a copy of that disclosure statement is available to the purchaser on request from the mortgage broker or issuer.

(2) If no mortgage broker has provided a disclosure statement to the borrower, state what fees (by whatever name those fees are called) are to be charged to the borrower, how they are to be calculated and paid and when any person involved in the distribution is entitled to payment.

(3) Disclose all fees to be paid by the purchaser, directly or indirectly, including any commissions, charges or referral fees.

#### **Item 19 – Registration documentation**

State:

In addition to all other material and documentation reasonably requested and mutually agreed upon, the purchaser should request, either from the lawyer or notary acting on the purchaser's behalf, or from the borrower, issuer or any mortgage broker involved in the distribution, the following documentation after the completion of registration and disbursement of the syndicated mortgage

- a copy of the certificate of mortgage interest or assignment of the mortgage or any other document evidencing the investment,
- a copy of a confirmation signed by any secured party with priority over the syndicated mortgage confirming the outstanding balance of its encumbrance over the property and that the borrower is not in arrears with any payments,
- written confirmation of valid insurance on the property and disclosure of the interest of the purchaser in the insurance,
- written confirmation that there are no outstanding arrears or delinquent municipal property taxes on the property,
- a state of title certificate, or equivalent, within 120 days of the date of the syndicated mortgage, and
- a copy of administration agreement or trust indenture.

**Item 20 – Certification by Mortgage Broker**

State, in a certificate signed by the mortgage broker, the following:

With respect to matters that are or should be within my personal knowledge, the foregoing contains no misrepresentation. With respect to matters that are not and are not required to be within my personal knowledge, I have made best efforts to ensure that the foregoing contains no misrepresentation.

The certificate must be signed by the persons holding positions with the mortgage broker that are the same as the signatories for an issuer under subsections 2.9(9) to 2.9(12) of National Instrument 45-106 *Prospectus Exemptions*..

8. This Instrument comes into force on ●.

**ANNEX B****PROPOSED CHANGES TO****COMPANION POLICY 45-106CP PROSPECTUS EXEMPTIONS**

1. *Companion Policy 45-106CP Prospectus Exemptions is changed by this Document.*

2. *Section 3.8 is changed by adding the following subsections:*

(11) Issuer of a syndicated mortgage

Where a borrower enters into a mortgage with two or more persons participating as lenders under the debt obligation secured by the mortgage, or enters into a mortgage with a view to the subsequent syndication of that mortgage to two or more purchasers, lenders or investors, we would generally consider the borrower to be the issuer of the syndicated mortgage. Consequently, the obligations to comply with the conditions of the exemption and reporting requirements (including the filing of a report of exempt distribution) would fall on the borrower.

There may be circumstances where we would consider a person other than the borrower to be an issuer of a syndicated mortgage. For example, where a borrower enters into a mortgage with a single lender, and that lender subsequently distributes interests in the mortgage, or assigns interests in the mortgage, to more than one lender, purchaser or investor, the original lender could be considered to be the issuer of the syndicated mortgage. The determination of the identity of the issuer, or issuers of a syndicated mortgage, will depend on the particular facts and circumstances of the transaction.

Where a person other than the borrower is the issuer of a syndicated mortgage, the ability of the issuer to rely on the offering memorandum exemption for the distribution of the syndicated mortgage will be dependent upon the issuer providing the required information regarding the borrower, including financial statements, in the offering memorandum. The issuer's certificate that the offering memorandum does not contain a misrepresentation will extend to any information provided about the borrower under the syndicated mortgage.

(12) Professional association

The definition of "qualified appraiser" in section 1.1 of the Instrument requires a qualified appraiser to be a member of a professional association. The Appraisal Institute of Canada, The Canadian National Association of Real Estate Appraisers and l'Ordre des évaluateurs agréés du Québec are examples of organizations that we consider to meet the definition of a professional association.

(13) Independent qualified appraiser for syndicated mortgages

Subsection 2.9(19) of the Instrument provides the test that the issuer of a syndicated mortgage and a qualified appraiser must apply to determine whether a qualified appraiser

is independent of the issuer. The following are examples of when we would consider that a qualified appraiser is not independent. These examples are not a complete list. We would consider that a qualified appraiser is not independent of an issuer if the qualified appraiser:

- (a) is an employee, insider or director of the issuer,
- (b) is an employee, insider or director of a related party of the issuer,
- (c) is a partner of any person in paragraph (a) or (b),
- (d) holds or expects to hold securities, either directly or indirectly, of the issuer or a related party of the issuer,
- (e) holds or expects to hold securities, either directly or indirectly, in another issuer that has a direct or indirect interest in the property that is the subject of the appraisal or in an adjacent property,
- (f) is an employee, insider or director of another issuer that has a direct or indirect interest in the property that is the subject of the appraisal or in an adjacent property,
- (g) has or expects to have, directly or indirectly, an ownership, royalty or other interest in the property that is the subject of the appraisal or in an adjacent property, or
- (h) has received the majority of their income, either directly or indirectly, in the three years preceding the date of the appraisal from the issuer or a related party of the issuer.

(14) Appraisals

Subsection 2.9(19.1) of the Instrument requires the issuer to deliver an appraisal of the property subject to a syndicated mortgage. The appraisal must disclose the fair market value of the property, without taking into account any proposed improvements or proposed development. The fair market value of the property, as it currently exists, is important information for prospective purchasers to understand the protection afforded by the security interest in the property subject to the syndicated mortgage in the event of a default by the borrower..

3. These changes become effective on ●.

ANNEX C

PROPOSED AMENDMENTS TO

NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS, EXEMPTIONS  
AND ONGOING REGISTRANT OBLIGATIONS*

1. *National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations is amended by this Instrument.*
2. *Section 8.12 is amended by:*
  - (a) *replacing “In Alberta, British Columbia, Manitoba, New Brunswick, Québec and Saskatchewan, subsection (2)” in subsection (3) with “Subsection (2)”, and*
  - (b) *repealing subsection (4).*
3. This Instrument comes into force on ●.

**ANNEX D**

**Local Matters**

There are no local matters for Alberta to consider at this time.



Appraisal Institute of Canada  
Institut canadien des évaluateurs

June 5, 2018

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22nd Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-593-2318  
comments@osc.gov.on.ca

To Whom It May Concern:

**Re: Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages* and Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions***

On behalf of the Appraisal Institute of Canada (AIC) and our more than 5,440 valuation professionals, we are pleased to have the opportunity to make a submission in the context of the proposed amendments to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages* and Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions*. We support the Canadian Securities Administrators (CSA) and Ontario Securities Commission's proposal of mandating professionally prepared appraisals as part of syndicated mortgage offerings.

AIC is the premier real property valuation association in Canada. Founded in 1938, AIC is a self-regulating professional organization that grants the distinguished Accredited Appraiser Canadian Institute (AACI) and Canadian Residential Appraiser (CRA) designations to qualifying individuals across Canada and around the world. Our members adhere to national and internationally recognized standards – the Canadian Uniform Standards of Professional Appraisal Practice – and are respected worldwide for the rigorous designation program and ongoing professional development requirements.

AIC has a long history of providing valued, independent opinions about property value. In 2017, our members conducted over 1.2 million third-party appraisals with an overall value of approximately \$1.28 trillion. This represented \$704 billion in residential property and \$577 billion in non-residential property, including commercial, industrial and many other types of real estate. Furthermore, we have many members who provide in-house expertise



to private and public interests including (but not limited to) governments, crown corporations/agencies, corporations and mortgage insurers.

Our organization is committed to working with government and stakeholders within the real estate industry to ensure consumers are protected and well informed in the case of real estate transactions, as we believe this results in a sustainable and healthy marketplace that enables all Canadians to prosper. This includes syndicated mortgage offerings.

On-site appraisals carried out by qualified professionals are the most effective way to mitigate lending and property investment risk. Professionally prepared appraisals help to ensure that properties are not overvalued/inflated and help to detect and prevent mortgage fraud or other issues involving real property, thus contributing significantly to real estate stability in Canada.

The recent emergence of syndicated mortgage investments on the Canadian funding and investing landscape presents itself as an interesting opportunity for investors, but also exposes retail investors to what may be an unacceptable level of risk. The United States' recent experience in the world of mortgage-linked investments is a good reminder that lenders must practice sound and thorough mortgage underwriting practices, including strong robust valuation principles, and investors should take time to fully understand the offering before participating in such investment products.

While large institutional investors have long invested in real estate through a number of vehicles, they have access to expertise and have a risk tolerance that is different from the average investor. Marketing mortgage-related investments to less sophisticated investors seeking a higher yield on their life savings is another matter altogether. As this market grows, investors and regulators should ensure that these investment offerings are properly vetted and that the necessary due diligence of creditworthiness and collateral valuation has been carried out.

We applaud the efforts of the CSA and its provincial partners to protect the public/investors through the proposed amendments to National Instrument 45-106, 31-103 and Companion Policy 45-106CP that are meant to address the potential risk of syndicated mortgage-related investments. Designated members of the AIC can help mitigate the risk of lending and investment by providing unbiased opinions of value on properties. As previously mentioned, an on-site appraisal prepared by a qualified professional is the most effective way to establish the value of an individual property used as collateral to underwrite a syndicated mortgage.



Following are five recommendations that AIC would like to present for your consideration.

**Recommendation #1: Include a statement that a qualified appraiser must have professional liability insurance appropriate to a valuation assignment.**

AIC fully supports the proposed amendment (Section 1.1 Definitions) that defines “professional association” and “qualified appraiser”. As a complement, we recommend adding the requirement of the qualified appraiser having liability insurance coverage appropriate to the valuation assignment. This ensures proper protection for both the investor/purchaser and the appraiser in high-risk endeavours.

**Recommendation #2: Decrease the time period between the effective date of an appraisal and the date of delivery of the appraisal to six months from 12 months.**

We also agree with the additions of subsection 19 through 19.4 under section 2.9. However, we recommend shortening the time period indicated in subsection 19.1 (d) that stipulates the appraisal is prepared with an effective date that is within 12 months preceding the date that the appraisal is delivered to the purchaser. Markets can change drastically and in a very short period of time in a given market, as we have seen in several cities across the country such as Toronto, Vancouver and Montreal. A 12-month window may be too long of a time period. With a year-long window, our concern is that potential purchasers could end up relying on an appraisal that could already be months out of date by the time it is delivered to them. Thus, we recommend a six-month window between the effective date of the appraisal and its delivery date, as it will better capture any significant change in a given market and allow for less opportunity for changes in a market to occur between the two dates.

**Recommendation #3: The appraisal report must be provided to potential investors/purchasers and regulators.**

In “Item 8 – Appraisal”, while it is mentioned early on in the proposal, we recommend reiterating that the appraisal report in its entirety must be provided to potential purchasers and regulators. Failing that, if the issuer is expected to describe the most recent appraisal, the author of that appraisal should be given the opportunity to review the description of the appraisal provided by the issuer. Additionally, the descriptor “the most recent appraisal” seems to suggest that the appraisal does not need to be the most current. We recommend reiterating that an appraisal report must be the most current appraisal prepared within the six months preceding the date that the appraisal is delivered to the purchaser. In addition, and notwithstanding the previous points, the provision of a copy of the appraisal report does not change, redirect or permit any other reliance on the appraisal



report by any party, other than the original client and intended user, as noted in the original report.

**Recommendation #4: Include an appraisal report in the list of registration documents that are required.**

In “Item 19 – Registration documentation”, in addition to the documents listed, the purchaser should request a copy of the completed appraisal report in its entirety. This ensures the purchaser has an opportunity to validate the estimates provided by the issuer.

**Recommendation #5: An appraisal report should be included in all syndicated mortgage investment transactions.**

As it relates to the question in the “Request for Comments” document on appraisals - *“As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm’s length?”*

We would note that any transaction – at arm’s length or otherwise - will not necessarily provide a true indication of value - purchase/sale prices may be very different than the market value provided by a qualified appraiser. Our recommendation is that there are no exceptions to the requirement for an appraisal in all cases where a syndicated mortgage is distributed under the OM Exemption.

Once again, we applaud the CSA’s efforts and its provincial partners in closing the existing gaps in syndicated mortgage-related investments in order to protect the public and mitigating risks related to mortgage fraud. AIC shares these objectives and is available to provide support to these efforts. If you require further information regarding the recommendations presented above, please do not hesitate to contact me.

Yours truly,

Keith Lancaster MBA, CAE, AACI (Hon.)  
Chief Executive Officer  
Appraisal Institute of Canada

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Theodore Batchler, B.A., LL.B.  
 Melvin Wasserman, LL.B. (retired)

June 1, 2018

**Via email to:**

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

c/o

The Secretary  
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 22nd Floor  
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Dear Sirs/Mesdammes

**Re: Batchler Wasserman / TELB Investments Ltd Comments on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions**

It is with great pleasure that we provide our responses and input to proposed changes on this very important topic. The proposed changes address a very risky and problematic area of private lending (risky, speculative real estate developments) but by defining lending simply by the number of lenders, also eliminates an important contributor to the economy (every day low risk mortgages with multiple lenders), having a very negative, if not a devastating, effect on families, small businesses and average individuals. We submit that syndicated mortgages, identical to standard qualifying mortgages in every way other than the number of lenders, be treated in the same manner from a public protection perspective. Our comments are based on our review of the proposed amendments, our attendance at presentations by the OSC and over 40 years of experience providing syndicated mortgages to families, individuals and businesses.

### General Comments

Private lending plays an important role in the health of the economy and in many cases is a key support for the middle class, helping to fill in gaps left by the specific income based regulations on institutional lending. Many, if not most private mortgages can be characterized as 'People helping People'. Individuals, with money to invest, help people buy or keep their homes, help people buy real estate or strengthen their business assets when traditional banks turn them down. This is an important and vibrant part of our economy and essential for growth in our economy.

With the recent addition of more stringent testing requirements of banks, many people will not be able to renew their mortgages and will face losing their homes, a catastrophic event for many. It is the private lending market that will be able to help these people, filling in the gaps left by bank regulation. These mortgages can be a single lender, a group of lenders or can be supported from a fund invested in by multiple lenders, but they are characterized as primarily first or second mortgages and total LTV is usually no more than 80% of assessed current value. These mortgages are low risk, honest agreements that likely would have been taken by banks under previous, less stringent regulation.

*All seagulls are birds, but not all birds are seagulls.*

Private lending encompasses a broad spectrum of practices that range from the type of mortgages described above to large, risky real estate developments where the assessed value is based on a future 'vision', much higher than the current and recoverable value of the assets involved. In these risky scenarios, many things can happen which may leave investors with no chance of recovering even their initial investment. These risky kinds of investments are very different from the majority of private mortgages and need more regulation and investor protection and truly should not even be called 'mortgages' because they are so different.

In the CSA proposed amendments, the CSA clearly identifies the key risks associated with these large development projects and defines them in specific, measurable terms. Instead of identifying those risky investments with the specific measurable characteristics that they have identified and defined, they have simply applied the proposed controls to all private lending with two or more lenders, eliminating a whole class of important, if not vital lending taking place in our communities today. The CSA needs to recognize that the type of lending they wish to control is characterized not by the number of lenders (syndication) but by the specific risk characteristics that the CSA themselves have identified.

#### Concern:

1. Low risk single lender mortgages keep their exemption status and continue as usual. Low risk mortgages identical to the single lender mortgages, but with two or more contributing lenders lose exemption status and face higher costs and restrictions.

The net effect is that investment will be limited to large investors only and smaller investors will now be excluded, reducing the availability of capital for investment, reducing the

availability of mortgages to those that need them and reducing opportunities for middle class investors to achieve higher returns.

**Proposal:**

1. **High risk, speculative mortgages require more regulation and investor protection, but defining them based on the number of investors is ineffective and misleading and unrelated to the CSA's own reasons for the amendments.** They should be defined based on the CSA's own defined and measurable criteria:
  - a. *(If to)* be used to raise seed financing for real estate developments, such as the costs of initial design proposals and start-up expenses;
  - b. *(If to)* be sold based on projected values of a completed development;
  - c. *(If to)* not be fully secured by a charge against real property, since the amount of the loan may significantly exceed the current fair value of the land;
  - d. *(If to)* be subordinate to future financings, such as construction financing, which may be substantial and effectively render the investment more similar in risk to an equity investment rather than a fixed income investment;
  - e. *(If to)* be offered by issuers with no source of income, rendering the payment of ongoing interest dependent on future financing or reserves from the principal advanced; and
  - f. *(If to)* be subject to the risk of delay and increased costs inherent to real estate development.
2. **Low risk, equity secured first and second mortgages with LTV under 80% should continue to be exempt, regardless of the number of investors.** The definition of qualifying mortgages should be expanded to include mortgages that fit the criteria, but have multiple lenders. Syndicated mortgages have been characterized as complex and so should not be traded under qualifying mortgage exemption. We respectfully submit that syndicated mortgages are not complex and that investors readily and easily understand them. A syndicated mortgage is nothing more than a mortgage where 2 or more persons participate as lenders instead of a single person. Interest and repayment terms are the same as a standard mortgage. They are secured against real property and are generally not considered speculative. Arguably, investments in syndicated mortgages are superior to standard mortgages because they facilitate diversification of the investor's mortgage portfolio risk profile, allowing smaller investments in mortgages from a larger number of borrowers. We respectfully submit that syndicated mortgages and standard mortgages be classed based on their risk profile, and treated in the same manner from a public protection perspective, regardless of the number of lenders.

**Administration and Management of Syndicated Mortgages (General Comment)**

We agree with the added controls for the administration of mortgages, particularly for syndicated mortgages. We would like to see additional requirements added for mortgage administration of syndicated mortgages ensuring better protection for investors and borrowers.

**Concern:**

1. A key difference between a single lender mortgage and a syndicated mortgage is that when there are multiple investors, you have multiple people, each with the ability to trigger a power of sale, even for an easily rectifiable default such as an insurance policy expiring or a single bounced cheque. The extreme of this is where some investors get paid while other cheques bounce, some investors pay attention while others do not. This type of scenario can happen when the broker of a mortgage simply collects a set of post dated cheques from the borrower for each lender, essentially walking away from the issue and potentially leaving the lenders pitted against each other. This scenario is bad management, bad for lenders and borrowers alike and bad for the industry. Among the stakeholders of a mortgage, the Administrator is the one that is equipped, positioned and qualified to monitor and act on behalf of and in the best interests of investors and protect the borrower from multiple uncoordinated actions..

**Proposal:**

1. **Require Mortgage Administrators to be the single payee of a mortgage by a borrower,** responsible for the timely posting of payments and distributions, acting on behalf of all lenders on a mortgage as a group when dealing with defaults or any other issues as they arise, making decisions on notifications, remedies and actions. The role of the administrator should be clearly defined in the Administration Agreement with disclosure/reporting requirements to both lenders and borrowers clearly defined.

**Responses to questions:**

Our primary concern is that the proposed amendments characterize all syndicated mortgages as high risk speculative investments and we submit that this is not the case. The questions below assume that all syndicated loans will require at least an Offering Memorandum and accompanying registrations. We put forward that this requirement should not be required for syndicated mortgages that can be described as identical in every respect to qualifying standard single lender mortgages other than multiple lenders being involved.

*Appraisals*

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?  
**Response: No, up to date appraisals (no less than 6 months old) by registered and accredited appraisers should always be required for all classes of mortgages. Individual sales can be subject to special circumstances and conditions, non-arm's length and may not represent an accurate market value for the property.**

*Mortgage broker requirements*

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.

**Response:** Throughout the mortgage 'creation' process, people make representations. Borrowers make representations and provide documentation to that effect. Appraisers make representations based on their knowledge and training. Brokers work hard to gather all the information that they can and present as clear a view to the lender as possible. Assume all of these people are making best efforts to provide the clearest and most accurate representation of the deal to the lender, but there are no guarantees. A certification by a broker would likely be more misleading than helpful as it could be interpreted as a guarantee, which is improper. What would make more sense is to prescribe the due diligence required for a property, defining the sources and accreditation requirements (such as appraisers) and having the broker certify that those due diligence requirements have been met.

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

**Response:** No, certification by a broker could be interpreted as a guarantee, which a broker is prohibited to do by law. It also adds a largely redundant layer of liability to the broker's job, a liability that is already there. On the other hand, specific requirements for due diligence would be a positive step, accompanied by a representation of best efforts by the broker to ensure that all information presented to a lender is accurate and comprehensive.

To clarify this question, standard mortgages (under 80% LTV of accredited appraisal value) for residential, commercial, building lots, etc. should be exempt from the OM requirement as are single lender qualifying mortgages.

*Exclusion of syndicated mortgages from the Private Issuer Exemption*

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

**Response:** Yes, with standard mortgages under 80% LTV, where a mortgage meets every criteria that a Qualifying Mortgage does, other than having multiple lenders vs. a single lender. In these cases there is no difference between a syndicated mortgage and a single lender mortgage. This should be expanded beyond residential only though, to include Commercial, industrial, multi-residential apartment buildings, building lots, etc.

*Alternative prospectus exemptions*

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?

**Response:** Yes, by classing syndicated mortgages based on the measurable risk factors (as defined by the OSC) and not by the number of lenders, most syndicated mortgages would fall into exemption categories. The increased regulation requirements should be reserved for large, risky, speculative developments that the OSC has so clearly defined and leave the normal, functioning and important lending that happens every day (and just happens to have multiple lenders) well enough alone.

6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 *Mortgages*?

**Response:** Yes, the British Columbia exemption appears to understand that there is little difference between a standard residential mortgage with one lender vs. a standard residential mortgage with multiple lenders but it should be expanded to allow for other types of real properties when the collateral is sufficient such as commercial, multi-residential apartment buildings, building lots, industrial, etc. The key determinants should not be if there are multiple or if the property is commercial, the key determinants for the exemption should be based on the specific risk factors already identified by the OSC.

7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

**Response:** The exemption should be provided based on measurable risk factors (as identified by the OSC). By basing eligibility on risk factors, single lender and syndicated exempt investments should

go beyond only residential and include commercial, industrial, multi-residential apartment buildings, building lots, construction projects, etc. When an individual or a business has an idea to make life better for themselves or grow and innovate, if they have the necessary collateral to protect investors, they should have the right to make those dreams come true, and normal every day investors should have the right to help them do it.

In summary, our primary concern is that a uniform approach to the regulation of all syndicated mortgages is adopted by the Ontario Securities Commission and the Ministry of Finance. We respectfully submit that investments in syndicated mortgages are not all the same, that the presence of multiple lenders does represent high risk in and of itself and that these mortgages should receive the same treatment as standard qualifying mortgages if they meet the same criteria as those qualifying mortgages, other than having more than 1 lender.

We thank you for the opportunity to provide these comments. Please do not hesitate to contact the undersigned should you have any questions.

Yours truly,  
BATCHER, WASSERMAN,

Per:

T. BATCHER. *(TB/jc)*  
E. & O. E.

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June 6, 2018

**VIA EMAIL ([comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca) & [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca))**

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

c/o The Secretary  
Ontario Securities Commission  
20 Queen Street West, 22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8

M<sup>e</sup> Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square-Victoria, 22<sup>e</sup> étage  
C.P. 246, tour de la Bourse  
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment dated March 8, 2018 (the Notice)  
Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* and  
National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing  
Registrant Obligations* relating to Syndicated Mortgages and Proposed Changes to  
Companion Policy 45-106CP *Prospectus Exemptions***

We are writing on behalf of the firms described below in response to the request for comments by the Canadian Securities Administrators (the **CSA**) set out in the Notice regarding the proposed amendments to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* relating to syndicated mortgages and the proposed changes to Companion Policy 45-106CP *Prospectus Exemptions* (**45-106CP**), in relation to syndicated mortgages (such proposed amendments and changes collectively, the **Proposed Amendments**).

## Background

We have been engaged to provide these comments on behalf of a group of ten British Columbia-based firms that have been actively engaged in mortgage syndication activities in British Columbia and other jurisdictions from as early as 1976 and collectively over a period of more than 190 years. Over the past five years alone, these firms have collectively facilitated financing in excess of approximately \$2.112 billion through syndicated mortgage transactions. We are advised that despite the significant value of the funding provided through these firms and the extended period during which these firms have been operating, these firms have received virtually no complaints and never been subject to any litigation or similar proceedings in relation to these activities. The comments below reflect the collective comments of this group.

### A. General

While not necessarily the case in all provinces, syndicated mortgage activities are already thoroughly and appropriately regulated in British Columbia through a combination of existing securities legislation and British Columbia Securities Commission oversight, and mortgage broker legislation and oversight of the BC Registrar of Mortgage Brokers including the specific disclosure requirements mandated by that legislation (see for example, see Form 9 and Form 10 (copies of which are attached as **Appendix A** to this letter) which must be delivered in accordance with the *BC Mortgage Brokers Act*). In our view, these British Columbia specific disclosure requirements, which among other things provide all investors with detailed disclosure regarding each syndicated mortgage, fees charged, risks and conflicts of interest that may be present and are certified by the mortgage broker involved, represent the “gold standard” for this type of investor disclosure in Canada. Accordingly, while we acknowledge and generally support the goal of regulatory harmonization, we do not believe that material changes to the existing rules in British Columbia are required or warranted given the efficacy of the current regime in British Columbia and that any efforts towards harmonization should be based on and modelled after the British Columbia rules.

### B. General Comments on Proposed Amendments

#### *Changes to the Mortgage Exemptions*

1. We acknowledge the rationale behind the differential treatment of syndicated mortgages and other (single lender) mortgages from a securities regulatory perspective and for this reason are generally not opposed to the proposed amendments that would remove the current prospectus and dealer registration exemptions for securities that are mortgages (the **Mortgage Exemptions**) for syndicated mortgages in Ontario, Nova Scotia, Newfoundland and Labrador, Prince Edward Island and each of the territories, *provided that* in conjunction with the removal of the Mortgage Exemptions one or more acceptable alternative prospectus and registration exemptions specific to syndicated mortgages are introduced and made available in the context of mortgage broker legislation and a system regulatory oversight similar to that currently in place in British Columbia. We have provided comments below under “Response to Specific Questions – Alternative prospectus exemptions” regarding the approach we would support for potential acceptable alternative exemptions specific to syndicated mortgage transactions.

### *Dealer registration exemptions*

2. In British Columbia, BC Instrument 32-517 Exemption from Dealer Registration Requirement for Trades in Securities of Mortgage Investment Entities (BCI 32-517) provides a dealer registration exemption for trades in securities of “mortgage investment entities” (as defined) subject to compliance with the conditions set out in that Instrument (the **BC MIE Exemption**). BCI 32-517 is currently set to expire on December 31, 2018. Our understanding is that the BC MIE Exemption is regularly relied upon in British Columbia in relation to syndicated mortgage transactions on the basis that the issuers of syndicated mortgages are “mortgage investment entities” within the meaning of BCI 32-517. We believe that, in conjunction with the *BC Mortgage Brokers Act*, the BC MIE Exemption provides an appropriate and necessary exemption from dealer registration for parties engaged in syndicated mortgage activities and that it is imperative that this exemption be made permanent. In addition, we encourage the CSA to consider adopting a similar exemption across all Canadian jurisdictions in conjunction with comprehensive investor disclosure requirements and a regime for the oversight of mortgage brokers similar to requirements and regime currently in place in British Columbia. Again, we reference Form 9 and Form 10 (copies attached at **Appendix A**) which must be delivered in accordance with the *BC Mortgage Brokers Act* and provide investors with detailed disclosure regarding each syndicated mortgage, fees charged, risks and conflicts of interest that may be present and are certified by the mortgage broker involved, as well as the form of Risk Acknowledgement required by BCI 32-517 (a copy of which is attached at **Appendix B**).

Further to address concerns associated with financings involving “retail investors”, we would support amendments to the BC MIE Exemption that restrict its availability to trades made pursuant to the accredited investor exemption and the family, friends and business associates prospectus exemptions in NI 45-106. This would prohibit reliance on this exemption in relation to investors that may require additional protection but maintain its availability for sophisticated, high net worth parties and others that do not require the same protections afforded to typical retail investors.

3. If the proposed amendments to the Mortgage Exemptions are implemented and not replaced with a separate dealer registration exemption specific to syndicated mortgages and/or the BC MIE Exemption expires without being renewed or made permanent, parties regularly engaged in syndicated mortgage activities would be required to obtain dealer registration or involve another registered dealer in such activities unless a discretionary exemption is obtained. We do not believe that the involvement of a registered dealer is necessary or appropriate for a syndicated mortgage transaction; participants in a syndicated mortgage transaction are “co-lenders” using conventional mortgage loan documentation and should not be treated in the same way as an investor purchasing a typical security such as a stock or a bond. In our view, the involvement of a registered dealer is unnecessary given the fundamental nature of these transactions, and adds additional costs, complexities and inefficiencies that are simply not warranted. In particular, we submit that the proficiency of a typical registered dealing representative does not equip them to analyze and consider a mortgage financing transaction, transactions that require an understanding of mortgage

lending. Instead, the skill set of a licensed mortgage brokerage professional or a qualified real estate lawyer is much better suited to assessing the risks and rewards of a syndicated mortgage transaction.

4. Further, the economic and commercial realities of syndicated mortgage business are such that there is no room for the introduction of an additional third-party intermediary (i.e., a registered dealer) that would charge its own fees. As an illustration, syndicators typically charge fees of 1-3% of the mortgage amount whereas the fee of a registered dealer to participate in a mortgage syndication transaction is estimated to be in the 4-10% range. Accordingly, adding the involvement of a registered dealer would significantly add to a borrower’s costs and could lead to the demise of the syndicated mortgage business.

***Changes to the Private Issuer Exemption***

5. We do not support the proposed amendment to the private issuer prospectus exemption under section 2.4 of NI 45-106 (the **Private Issuer Exemption**) that would make the exemption unavailable for the distribution of syndicated mortgages. In our view, the Private Issuer Exemption should continue to be available in relation to distribution of syndicated mortgages in the same way it is for other types of securities. In particular, we submit that there is nothing inherent to a syndicated mortgage transaction that warrants its specific exclusion from the private issuer exemption. In the alternative, in conjunction with the removal of the Private Issuer Exemption one or more alternative exemptions specific to syndicated mortgages should be introduced. See our comments below under “Response to Specific Questions – Alternative prospectus exemptions”.
6. Although we understand the desire of the regulators to better understand the nature and extent of current syndicated mortgage activities through the information provided in a report of exemption distribution, additional information can be obtained through means other than the removal of the availability of the Private Issuer Exemption and the requirement for such transactions to be made in reliance on exemptions that require the filing of a report of exempt distribution. For example, the desired information could be provided in a form of “Information Report” designed specifically for syndicated mortgage transactions that collects the information specifically desired and relevant for these types of transactions rather than the information required in Form 45-106F1 Report of Exempt Distribution. In addition, to the extent that a reporting requirement is imposed we would suggest that it be implemented on a time limited basis to allow the CSA to review and assess the information and determine whether continued collection of such information is warranted. Requiring a streamlined form of report focused only on the information considered relevant in the context of syndicated mortgage transactions could provide the regulators with the desired information without imposing a significant and unnecessary administrative burden and costs on syndicators, borrowers and co-lenders and potentially requiring disclosure of confidential and/or commercially sensitive information.

*Changes to the Offering Memorandum Exemption*

7. In general, we do not object to the proposed additional requirements in relation to the offering memorandum exemption under section 2.9 of NI 45-106 (the **OM Exemption**) in relation to distributions of syndicated mortgages; however, we do have the following comments in relation to these proposed changes:
  - (a) The Notice indicates the regulators' expectation that the issuer of a syndicated mortgage and the borrower will generally be the same entity; however, in our experience, this is not correct. In a typical syndicated mortgage transaction, the issuer of the syndicated mortgage and the borrower are not the same entity. Accordingly, the revised rules and guidance in 45-106CP should be prepared based on this understanding rather than the expectation set out in the Notice. See our comments below under "Other issues – Issuer of a syndicated mortgage".
  - (b) In circumstances where the syndicator and the borrower are not the same entity (which as noted is by far the most common situation), we have significant concerns with the proposal for syndicators to certify the content of the offering memorandum in relation to the borrower, unless such certificate is appropriately qualified with respect to the actual knowledge of the syndicator.
  - (c) It is common for multiple mortgage brokers to be involved in syndicated mortgage transactions with some having no involvement in the syndication itself. For example, the role of certain mortgage brokers may be limited exclusively to representation of the borrower without any involvement in relation to the syndication. It is crucial that the requirement for mortgage brokers involved in the distribution of a syndicated mortgage under the OM Exemption to provide a certificate regarding the content of the offering memorandum be limited to the mortgage broker(s) primarily responsible for the syndication and that such requirement not extend to mortgage brokers solely representing the borrower or involved.

*Other issues*

8. **Issuer of a syndicated mortgage** – The proposed changes to 45-106CP indicate that the regulators will generally consider the borrower to be the issuer of a syndicated mortgage and therefore, the party responsible for compliance with the terms of available exemptions and reporting requirements. Although we agree that a borrower may technically be viewed as the issuer of a mortgage, in our view for a syndicated mortgage the party responsible for "syndicating" the mortgage with multiple lenders would generally be the appropriate party to treat as the "issuer" of the syndicated mortgage and in our experience, this will typically not be the borrower. Instead, in our experience, the borrower typically has no involvement at all in the syndication of the mortgage financing and in any event, has no knowledge of or dealings with the co-lenders. Rather, in most syndicated mortgage transactions the syndicator is exclusively responsible for the syndication of the mortgage amongst its co-lenders without any involvement from the borrower, and is solely responsible for establishing the terms of the syndication and preparing and settling all

related documentation and matters. Accordingly, in our view, it will generally be appropriate to treat the party primarily responsible for the syndication of the mortgage, as the issuer. This is a fundamentally significant issue that should underpin the way syndicated mortgages are regulated and we strongly recommend that the guidance in 45-106CP (and the final rules) reflect these commercial realities.

### **C. Response to Specific Questions**

#### ***Appraisals***

1. *As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?*

No comments.

#### ***Mortgage broker requirements***

2. *Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.*

As noted above, it is common for multiple mortgage brokers to be involved in syndicated mortgage transactions with some having no involvement in the syndication itself. For example, the role of certain mortgage brokers may be limited to representation of the borrower without any involvement in the syndication. It is crucial that the requirement for “any” mortgage broker involved in the distribution of a syndicated mortgage under the OM Exemption to provide a certificate regarding the content of the offering memorandum be limited to the mortgage broker primarily responsible for the syndication amongst the co-lenders and that such requirement not extend to mortgage brokers involved solely in representing the borrower.

3. *Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?*

Provided that the certification requirement is limited to the mortgage broker(s) primarily responsible for the syndication (and not from mortgage brokers solely representing the borrower or in other incidental aspects), we would not be opposed to an appropriately worded certification in relation to such matters that is limited to “commercially reasonable efforts” or some other similar standard.

***Exclusion of syndicated mortgages from the Private Issuer Exemption***

4. *Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.*

As noted above, we do not support the proposed amendment to the Private Issuer Exemption that would make the exemption unavailable for the distribution of syndicated mortgages. In our view, the Private Issuer Exemption should continue to be available in relation to distribution of syndicated mortgages in the same way it is for other types of securities and the desire to obtain additional information regarding the nature and extent of syndicated mortgage activities be addressed through means other than the imposition of a requirement to file a report of exempt distribution. See our comments above under “Changes to the Private Issuer Exemption”.

***Alternative prospectus exemptions***

5. *Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?*

In addition to the permanent adoption of BCI 32-517 as discussed above, we believe that there should be an exemption from both prospectus and dealer registration requirements for certain syndicated mortgage transactions, including for distributions of any type of syndicated mortgage to certain sophisticated, high net worth investors and to certain others that do not require the involvement of a registered dealer, and potentially also for distributions of certain types of syndicated mortgages. In general, we are supportive of the approach taken in BC Rule 45-501 *Mortgages*; however, we would recommend that either:

- (a) the scope of investors permitted to purchase syndicated mortgages under the dealer registration and prospectus exemptions set out in sections 3 and 4 be expanded beyond the currently defined term “institutional investors” to permit the purchase by a much broader group, for example to any persons that qualify as “accredited investors” or are entitled to purchase in reliance on the family, friends and business associates prospectus exemption (i.e., who do not require the involvement of a registered dealer given their sophistication or connection to parties involved in the transaction); or
- (b) the definition of “qualified syndicated mortgage” for the purposes of the dealer registration and prospectus exemptions set out in section 5 be amended to delete the conditions in: (i) paragraph (c) which requires a syndicated mortgage to be on property used solely for residential properties with no more than four residential dwelling units, and (ii) paragraph (d) which prohibits a qualified syndicated mortgage from being for construction or development, as we feel that both such conditions are arbitrary and unnecessary. In addition, if deemed necessary we would not object to the addition of a requirement for the delivery of an “as is” appraisal prepared by a qualified appraiser who is independent of the issuer.

Further, we reference our comments under “Local Matters – British Columbia - Response to Proposed Amendments to BC Rule 45-501” regarding the proposed amendments to BC Rule 45-501 to require the filing of a Form 45-106F1 in connection with transactions made in reliance on the exemptions contained in the Rule.

6. *Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under BC Rule 45-501 Mortgages?*

Yes, but not solely in relation to residential properties. See our comments above in relation to question 5.

7. *Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?*

We do not believe there is a reasonable basis for an exemption based on the number of lenders or specific to residential properties.

**D. Local Matters – British Columbia - Response to Proposed Amendments to BC Rule 45-501**

In relation to the proposed amendments to BC Rule 45-501 Mortgages (found [here](#)) to require the filing of a Form 45-106F1 *Report of Exempt Distribution* in connection with all transactions made in reliance on the exemptions contained in the Rule, we reference our related comments set out above under “Changes to the Private Issuer Exemption” in relation to the proposal to require the filing of a Form 45-106F1 for information gathering purposes. As noted, although we understand the desire of the regulators to better understand the nature and extent of current syndicated mortgage activities, additional information can be obtained through means other than the filing of a report of exempt distribution and payment of the associated fees. Accordingly, we are opposed to the proposed amendments to Rule 45-501 to require the filing of a Form 45-106F1 in connection with transactions made in reliance on the exemptions contained in the Rule. See our comments above for further details.

\*\*\*

Thank you for considering the above comments. If you have any questions or would like to discuss any related issues please contact the writer.

Yours truly,

Borden Ladner Gervais LLP

*(signed) Jason Brooks*

By:

Jason J. Brooks

INCLUDES COMMENT LETTERS

**Appendix A**

Please see the attached.

INCLUDES COMMENT LETTERS



**Registrar of Mortgage Brokers**  
2800 - 555 West Hastings  
Vancouver, BC V6B 4N6  
Ph. 604-660-3555 / Toll-free: 1-866-206-3030 (BC)  
Facsimile: 604-660-3365  
[Mortgagebrokers@ficombc.ca](mailto:Mortgagebrokers@ficombc.ca)  
[www.fic.gov.bc.ca](http://www.fic.gov.bc.ca)

**LENDER DISCLOSURE STATEMENT  
FORM 9- Section 17.1**

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has in any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

**Please write or print clearly. If additional information is required, reference and attach a schedule to this form.**

**A – CAUTIONS**

1. All mortgage investments carry risk. There is a relationship between risk and return. You should very carefully assess the risk of the transaction described in this Lender Disclosure Statement and in the supporting documentation before making a commitment.
2. You are advised to obtain independent legal advice regarding your decision to invest and to ensure that the transaction is structured appropriately to protect your interests.
3. You should only provide mortgage funds "in trust" to a registered mortgage broker or a licensed lawyer or notary. Never provide funds directly to the mortgage borrower or an individual submortgage broker.
4. If you are one of several investors in this mortgage, you may not be able to enforce repayments of your investment on your own if the borrower defaults.
5. You should ensure you have sufficient documentation to support the property valuation quoted in this Investor/Lender Disclosure Statement.
6. You should be satisfied with the borrower's ability to meet the payments required under the terms of this mortgage.
7. A mortgage broker must not administer, or arrange for another person to administer, a mortgage on your behalf unless the mortgage broker has a written agreement with you that covers matters set out in the *Mortgage Brokers Act*.
8. This Investor/Lender Disclosure Statement and the attached documents are not intended to provide a comprehensive list of factors to consider in making a decision concerning this investment. You should satisfy yourself regarding all factors relevant to this investment before you commit to invest.

**B – BORROWER / GUARANTOR / COVENANTOR INFORMATION**

<p>FULL NAME OF BORROWER:</p>    <p>ADDRESS - include postal code</p>	<p>FULL NAME OF GUARANTOR/COVENANTOR (if applicable):</p>    <p>ADDRESS – include postal code</p>
-----------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------

**C – OTHER PARTIES TO THE TRANSACTION REPRESENTED BY THE MORTGAGE BROKER**

The Mortgage Broker represents the following parties to the transaction:

- The lender: \_\_\_\_\_  
Name
- The borrower(s): \_\_\_\_\_
- Syndicate mortgage lenders: \_\_\_\_\_  
(attach list if more space required)  
Name  
Name  
Name
- A person or entity which will acquire the mortgage from the investor/lender: \_\_\_\_\_  
Name
- Other – please describe: \_\_\_\_\_

**NOTE:**  
If the Mortgage Broker has NOT indicated that it represents you, the Mortgage Broker must still exercise a duty of care to you and deal with you fairly. It is recommended that you obtain independent advice with respect to the transaction.

**D – PRE-EXISTING OR EXISTING MORTGAGE IN DEFAULT**

Will the lender/investor be acquiring an interest in a currently registered mortgage ?

- Yes  No

If yes, please explain any defaults by the borrower over the past 12 months which the mortgage broker is aware of:

If the mortgage is new, was there a previous mortgage registered against title with the same borrower?

- Yes  No

If yes, please explain any defaults by the borrower on the previous mortgage over the past 12 months which the mortgage broker is aware of:

**E – REGISTERED INTEREST**

Your interest as a lender will be directly registered in your name on the mortgage document filed at the Land Title Office ; or

\_\_\_\_\_ will act as a trustee or nominee and will hold a registered interest in the mortgage in trust for you as beneficial owner; or

Your interest in the mortgage will be secured under the following arrangements:

**F- MORTGAGE INVESTMENT**

Your investment represents:  the entire mortgage OR  a portion of the mortgage

Your portion represents \_\_\_\_\_ % of the total. \_\_\_\_\_ other parties have an interest in this mortgage.

**G - TRUST FUNDS**

Will the funds be held in trust pending execution of the mortgage?  Yes  No

If yes, please indicate the party that will hold the funds in trust:

**H – MORTGAGE ADMINISTRATION**

Will the mortgage be administered for you?  Yes  No

If "yes", name and address of administrator:

Describe any fees or attach any fee agreement for the provision of administration services: \_\_\_\_\_

**I – PROPERTY TO BE MORTGAGED**

Is this an inter alia mortgage?

Yes  No

If yes, please skip Sections I and K of this Form and complete Sections I and K of the Form 9 Addendum for Inter Alia Mortgages

Legal Description of Property:

Municipal Address of Property:

**Type of Property:**

- Property with existing buildings
  - Single family residential
  - Five or more unit multifamily
  - Industrial
- Two to four unit multifamily
- Commercial
- Other: \_\_\_\_\_

Vacant land, development or construction project.  
Details of project/proposed use:

Other (please describe):

**Property Taxes:**

Are taxes in arrears?

Yes  No

If yes, amount arrears: \$ \_\_\_\_\_

Annual Property Taxes: \$ \_\_\_\_\_

**Zoning**

If mortgage proceeds are to be used for construction financing, is the zoning on the property to be developed appropriate for the proposed use?

Yes  No

If no, details:

**Property Valuation:**

Based on:

Appraisal, dated \_\_\_\_\_  Municipal Assessment, Year \_\_\_\_\_

Sale Price \$ \_\_\_\_\_  Other (please describe) \_\_\_\_\_

If appraisal obtained:  
Name and address of appraiser:

Valuation is:  Current, as at date: \_\_\_\_\_  Projected Value: \$ \_\_\_\_\_

**J – MORTGAGE PARTICULARS**

**Terms of the Mortgages**

Amount of your investment: \$ \_\_\_\_\_ Maximum Indebtedness of Mortgage: \$ \_\_\_\_\_

Interest rate is fixed at \_\_\_\_\_ % per annum **OR** Interest rate is variable, explain: \_\_\_\_\_

Compounding period: \_\_\_\_\_ Payment Frequency: \_\_\_\_\_

Interest only payments:  Yes  No Payments to be made by Borrower: \$ \_\_\_\_\_

Term: \_\_\_\_\_ Amortization: \_\_\_\_\_ Borrower's first payment due: \_\_\_\_\_

Maturity Date: \_\_\_\_\_ Balance on maturity: \$ \_\_\_\_\_

INCLUDES COMMENT LETTERS

Mortgage secures a running account:  Yes  No If running account, provide details \_\_\_\_\_

**K – RANK OF MORTGAGE AND LOAN TO VALUE RATIO**

**Rank of mortgage**

This mortgage will rank:  First  Second  Third  Other: \_\_\_\_\_

**Prior encumbrances (existing or anticipated)**

None **OR**

(i) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(ii) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(iii) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(iv) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**Loan to value ratio**

a) Total amount owing or maximum indebtedness (whichever figure is higher) of all encumbrances which rank in priority: \_\_\_\_\_

\$ \_\_\_\_\_

b) Maximum Indebtedness of mortgage: \_\_\_\_\_

\$ \_\_\_\_\_

c) Total amount of mortgages: \$ \_\_\_\_\_

(a+b)

d) Value: \$ \_\_\_\_\_

(from Part I)

e) Loan to value: \_\_\_\_\_ %

(c/d x 100)

**L – ATTACHED DOCUMENTS**

You should review the following documents carefully and assess the risks of this investment before committing to invest. The following documents are attached:

- A copy of any existing mortgage on the property;
- A copy of any appraisal;
- A copy of any purchase and sale contract entered into by borrower for the purchase of the property;
- Any documentary evidence respecting the borrower's ability to meet the mortgage payments, such as a credit bureau report or a letter from an employer disclosing the borrower's earnings.
- A copy of the borrower's application for a mortgage.
- If the mortgage is a new mortgage, documentary evidence of any down payment made by the borrower for the purchase of the property.

INCLUDES COMMENT LETTERS

A copy of any agreement that you may be asked to enter into with the mortgage broker or other administrator.  
 A copy of the Cost of Credit Disclosure provided to the borrower.

**The Mortgage Broker is also required to provide you with all other information an investor of ordinary prudence would consider to be material to a decision whether to lend money on the security of the property or the credit worthiness of the borrower, so that you can make an informed decision before you commit to invest. This information might include the following:**

1. If the mortgage is for a construction or development project:
  - a. A detailed description of the project;
  - b. A schedule of the funds that have been advanced or are to be advanced to the borrower; and
  - c. The identity of any person who will monitor the disbursements of funds to the borrower and the use of those funds by the borrower.
2. If the property is rental property, details of leasing arrangements and vacancy status.
3. Environmental considerations affecting the value of the property.

**M – CERTIFICATION**

This Lender Disclosure Statement has been completed by:

\_\_\_\_\_

\_\_\_\_\_

Name and address of Mortgage Broker

I have fully completed the above Lender Disclosure Statement in accordance with the *Mortgage Brokers Act* and regulations and declare it to be accurate in every respect.

Date: \_\_\_\_\_ Signature of Mortgage Broker, or of a person authorized to sign on behalf of the mortgage broker

\_\_\_\_\_

Print name of person signing

**N – ACKNOWLEDGEMENT**

I, \_\_\_\_\_, of \_\_\_\_\_

Print name

Address

acknowledge receipt of this Lender Disclosure Statement, signed by the mortgage broker.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

Dated by Investor/Lender: \_\_\_\_\_

**One copy of this form must be provided to the prospective lender, and one copy must be retained by the mortgage broker.**

**CONFLICT OF INTEREST DISCLOSURE STATEMENT  
FORM 10**

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

**Please type or print clearly. If additional information is required, reference and attach a schedule to this form.**

FULL NAME OF MORTGAGE BROKER	TELEPHONE NO.
ADDRESS	POSTAL CODE
ADDRESS OF PROPERTY TO BE MORTGAGED	POSTAL CODE
LEGAL DESCRIPTION OF PROPERTY TO BE MORTGAGED	

Describe any direct or indirect interest the mortgage broker has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

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Describe any direct or indirect interest that a related party or associate of the mortgage broker, as defined in the *Mortgage Brokers Act* Regulations has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

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**CERTIFICATION**

I certify that I am the mortgage broker or an authorized representative of the mortgage broker in this transaction and based on my knowledge, belief and information provided by third parties, this Disclosure Statement contains no untrue statement and does not omit to state a fact that is required to be stated or that is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

FULL NAME OF MORTGAGE BROKER	ADDRESS	POSTAL CODE
SIGNATURE OF MORTGAGE BROKER OR AUTHORIZED REPRESENTATIVE	NAME OF AUTHORIZED REPRESENTATIVE OF MORTGAGE BROKER (PLEASE PRINT)	DATE SIGNED YYYY MM DD

**ACKNOWLEDGEMENT OF RECEIPT**

SIGNATURE	NAME (PLEASE PRINT)	DATE SIGNED YYYY MM DD
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FIN 954 Rev.2000/1/25

INCLUDES COMMENT LETTERS

**Appendix B**

**Risk Acknowledgement**  
**under BCI 32-517 Exemption from Dealer Registration Requirement for**  
**Trades in Securities of Mortgage Investment Entities**

**Name of Issuer:** \_\_\_\_\_

**Name of Seller:** \_\_\_\_\_

**I acknowledge that**

- the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me;
- the person selling me these securities does not act for me;
- this is a risky investment and I could lose all of my money;
- I am investing entirely at my own risk.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Purchaser

\_\_\_\_\_  
Print Name of Purchaser

\_\_\_\_\_  
Name of salesperson  
acting on behalf of the seller

Sign two copies of this document. Keep one for your records.

National Instrument 45-106 *Prospectus Exemptions* may require you to sign an additional risk acknowledgement form.

If you want advice about the merits of this investment and whether these securities are a suitable investment for you, contact a registered adviser or dealer.



**BROWNLEE LLP**  
*Barristers & Solicitors* EST. 1935

2200 COMMERCE PLACE | 10155 102<sup>ND</sup> STREET  
EDMONTON, AB CANADA | T5J 4G8  
TEL. 780.497.4800 | FAX 780.424.3254

INCLUDES COMMENT LETTERS

Refer to: R.I. Swainson  
Direct Line: 780.497.4896  
E-mail: [rswainson@brownleelaw.com](mailto:rswainson@brownleelaw.com)  
Your File No.:  
Our File No.: 83646-0009/RIS

June 1, 2018

**VIA E-MAIL**

ALBERTA SECURITIES COMMISSION  
AUTORITÉ DES MARCHÉS FINANCIERS  
BRITISH COLUMBIA SECURITIES COMMISSION  
FINANCIAL AND CONSUMER AFFAIRS AUTHORITY OF SASKATCHEWAN  
FINANCIAL AND CONSUMER SERVICES COMMISSION (NEW BRUNSWICK)  
MANITOBA SECURITIES COMMISSION  
NOVA SCOTIA SECURITIES COMMISSION  
NUNAVUT SECURITIES OFFICE  
OFFICE OF THE SUPERINTENDENT OF SECURITIES, NEWFOUNDLAND AND LABRADOR  
OFFICE OF THE SUPERINTENDENT OF SECURITIES, NORTHWEST TERRITORIES  
OFFICE OF THE YUKON SUPERINTENDENT OF SECURITIES  
ONTARIO SECURITIES COMMISSION  
SUPERINTENDENT OF SECURITIES, DEPARTMENT OF JUSTICE AND PUBLIC SAFETY, PRINCE  
EDWARD ISLAND

c/o THE SECRETARY  
ONTARIO SECURITIES COMMISSION  
20 QUEEN STREET WEST  
22ND FLOOR  
TORONTO, ONTARIO M5H 3S8  
FAX: 416-593-2318  
[COMMENTS@OSC.GOV.ON.CA](mailto:COMMENTS@OSC.GOV.ON.CA)

c/o ANNE-MARIE BEAUDOIN  
CORPORATE SECRETARY  
AUTORITÉ DES MARCHÉS FINANCIERS  
800, RUE DU SQUARE-VICTORIA, 22E ÉTAGE  
C.P. 246, TOUR DE LA BOURSE  
MONTRÉAL (QUÉBEC) H4Z 1G3  
FAX : 514-864-6381  
[CONSULTATION-EN-COURS@LAUTORITE.QC.CA](mailto:CONSULTATION-EN-COURS@LAUTORITE.QC.CA)



Dear Sirs/Madams:

Re: **Shared Mortgages and Report of Exempt Distribution**

Further to our recent conversations with Mr. Lanion Beck from the Alberta Securities Commission and in light of the Canadian Securities Administrators' proposed amendments to National Instrument 45-106 (the "Instrument"), we confirm that we are writing this letter to further explain the commercial lending and commercial mortgage brokering industry, provide comments on issues we have found with the requirement to file a Report of Exempt Distribution under Section 6 of the Instrument pertaining to this industry, and provide some potential solutions for the ASC and CSA to consider.

**1. Report of Exempt Distribution under National Instrument 45-106**

As you know, depending on which prospectus exemption is relied on, a Report of Exempt Distribution may be required to be filed under Section 6.1, unless there is an exception available under Section 6.2 or otherwise within the Instrument.

Distributions made under the exemption for mortgages in Section 2.36 are exempt from the requirement to file a Report of Exempt Distribution. However, this exemption only applies when there is one lender as the section states:

2.36 (1) In this section, "syndicated mortgage" means a mortgage in which 2 or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage.

(2) Except in Ontario, and subject to subsection (3), the prospectus requirement does not apply to a distribution of a mortgage on real property in a jurisdiction of Canada by a person who is registered or licensed, or exempted from registration or licensing, under mortgage brokerage or mortgage dealer legislation of that jurisdiction.

(3) In Alberta, British Columbia, Manitoba, Québec and Saskatchewan, subsection (2) does not apply to a distribution of a syndicated mortgage.

**2. Shared Mortgages Versus Syndicated – Timing Issue**

Section 2.36 defines syndicated mortgages as those mortgages in which 2 or more persons participate as a lender. However, the section offers no guidance on the timing as to when the participation occurs.



In the general view of the lending industry, mortgages are not "syndicated" simply because there are 2 or more lenders involved; instead, the lending industry generally refers to these mortgages as "shared mortgages". Where 2 or more lenders participate in the making of a mortgage loan, this should not generally be considered to be a syndicated loan. Typically the industry views syndicated loan mortgages to be mortgage loans that are distributed by a lead lender to other lenders after the mortgage loan is made. A mortgage loan is "made" at the time that the commitment letter between the lender and the borrower is signed, and this timing issue is critical. When a borrower signs a commitment letter with a single lender, the legal relationship of lender and borrower is created at that time, and whether or not the lender then proceeds to sell interests in the loan/mortgage to third parties is irrelevant and is beyond the control (and often without the knowledge) of the borrower.

Therefore, the imposition of a set of rules which brand all mortgage loans by co-lenders to be syndicated mortgaged or which assume that the borrower is the syndicating party does not reflect the reality of the industry. Shared mortgage loans should not require securities regulation.

### **3. Issues for Lending Industry Relating to Report of Exempt Distribution**

In addition to taking issue with the definition of syndicated mortgages pursuant to National Instrument 45-106 and highlighting the distinction between syndicated mortgages and shared mortgages (as noted above), we would also take this opportunity to explain the practical issues that arise for the commercial lending industry based on the current definition of syndicated mortgages in National Instrument 45-106.

The vast majority of loans made in the commercial lending industry are made by accredited investors who can rely on the prospectus exemption set out for accredited investors in Section 2.3 of the Instrument. However, distributions under Section 2.3 are not exempt from filing the Report of Exempt Distribution under Section 6.1, and this is where the issue arises. While the issue is partially remedied by Section 6.2, many lenders are still negatively affected.

Section 6.2 of the Instrument has an exemption from the filing requirement for the Report of Exempt Distribution. The relevant Sections of the Instrument state as follows:

**6.2 (1)** An issuer is not required to file a report under section 6.1(1)(a) [*Report of exempt distribution*] for a distribution of a debt security of its own issue or, concurrently with the distribution of the debt security, an equity security of its own issue, to a Canadian financial institution or a Schedule III bank. [*emphasis added*]



"Canadian financial institution" means:

- (a) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act, or
- (b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;

"Schedule III bank" means an authorized foreign bank named in Schedule III of the *Bank Act* (Canada).

Many lenders in the commercial lending industry fall under the definition of accredited investor, but do not fit within the definition of a Canadian financial institution or a Schedule III bank. As a result, loans made involving these types of entities are disadvantaged when compared to loans made by Canadian financial institutions, due to the requirement for someone to file a Report of Exempt Distribution with the ASC and pay the prescribed fee, which can be a substantial sum of money when dealing with large commercial mortgage loans.

#### 4. Industry Background

##### a) General Background

As discussed, the majority of commercial mortgages are funded by more than one lender. It is quite common for a lender to commit to lending money to a borrower and then to reduce its risk by selling portions of the loan to other lenders, hence sharing the risk. The loan stays in the name of the original lender, and the original lender enters into a servicing and/or inter-lender agreement with the original lender and any other lenders to allocate the risk and manage the relationship.

It is important to note that lenders involved in these types of transactions are often Canadian financial institutions or Schedule III banks; however, there are many other types of accredited investors with significant assets that are frequently involved in these shared mortgage loans that do not fall under this definition, such as pension funds, mortgage funds, or mortgage investment corporations. Loans involving these types of lenders that do not fall into the Section 6.2 exemptions are distinctly disadvantaged when compared to shared loans made by those who do, due to the requirement to file a Report of Exempt Distribution and pay the substantial filing fee.



**b) Size of Market**

Most office buildings, large commercial shopping centres and large commercial warehouse developments are funded through these types of shared loans. In fact, it is fair to say that most commercial mortgage loans in amounts of more than \$50 million are shared by at least two lenders.

**c) Substantial Non-Compliance**

Although there are many multi-lender mortgages involving accredited investors that are not Canadian financial institutions or Schedule III banks, we anticipate that the ASC receives very few, if any, Reports of Exempt Distribution in relation to these loans. We understand that the ASC has taken the position that the borrower (not the lender who is selling portions of the loan) is required to file the Report of Exempt Distribution in these situations; however, this is not practical from the borrower's perspective, as the borrower will likely not have the knowledge that the loan has been shared and has no control over whether or not the loan is shared by multiple lenders for the following reasons:

**i) Borrower's Inability To Control Whether Or Not The Loan Is Sold In Whole Or In Part**

From the borrower's perspective, the lender is the party that the borrower initially received a commitment letter from, and the borrower may never know that there is more than one lender involved in the loan.

Additionally, the borrower will have no control over whether or not the lender has sold off interests in the loan to other lenders in order to ultimately share its risk as the lender's interest in a mortgage is assignable without the borrower's consent.

**ii) The Loan Can Be Sold At Any Time**

The transfer of all or any portion of a loan secured by a mortgage can occur at any time. It could occur immediately after a commitment letter is signed between a borrower and a single lender or any time before or after the loan is funded, including years after the loan is funded. Lenders are constantly managing, evaluating, and adapting their risk portfolios based on the current mortgages they hold and this often results in them selling off a portion of their loans to third party lenders either before or after the funds are advanced.



**5. Potential Solutions**

**a) Shared Mortgages and Requirement to File Report of Exempt Distribution**

We have considered some alternative methods to address the above noted issue and conclude that amending Section 2.36 of the Instrument is the most efficient and likely the most palatable from the ASC's perspective. By making some relatively simple changes to this section, the ASC would be able to ensure that shared loans involving sophisticated lenders of all types fall under this exemption, and are therefore not required to file Reports of Exempt Distribution. We propose the following addition to section 2.36, as italicized:

**2.36 (1)** In this section, "**syndicated mortgage**" means a mortgage in which 2 or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage.

**(2)** Except in Ontario, and subject to subsection (3), the prospectus requirement does not apply to a distribution of a mortgage on real property in a jurisdiction of Canada by a person who is registered or licensed, or exempted from registration or licensing, under mortgage brokerage or mortgage dealer legislation of that jurisdiction.

**(3)** In Alberta, British Columbia, Manitoba, Québec and Saskatchewan, subsection (2) does not apply to a distribution of a syndicated mortgage, *unless the syndicated mortgage is held by lenders that are permitted clients pursuant to National Instrument 31-103.*

Note that we have included the definition of permitted client from National Instrument 31-103 as Schedule "A" for your ease of reference.

The above noted amendment will assist with accomplishing 2 objectives:

- 1) All "sophisticated" lenders will be placed on a level playing field, and consequently borrowers that borrow from sophisticated lenders that do not fall within the scope of the definition of "Canadian financial institutions" or Schedule III banks will not be inadvertently disadvantaged due to having to file a Report of Exempt Distribution and pay the significant filing fee. Therefore, all sophisticated lenders will remain equally desirable on this basis.
- 2) Substantial non-compliance with the Instrument in the commercial lending industry will be significantly reduced.

**b) Put Onus on Lenders to File Report of Exempt Distribution**



While we understand that the ASC currently takes the position that the borrower is required to file the Report of Exempt Distribution in situations where a filing is required, this is not practical, as the borrower:

- (i) is not the party that is sharing the mortgage;
- (ii) does not have any control over whether or not a mortgage is shared; and
- (iii) is likely not aware that the mortgage is shared between lenders after the commitment letter has been signed.

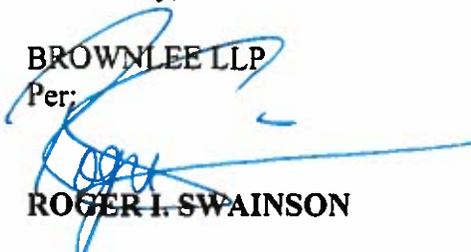
Therefore, the only way the ASC can reasonably have an expectation of shared loans being dealt with in compliance with the Instrument and requiring Reports of Exempt Distributions to be filed if the exemptions available under Section 6.2 do not apply, is to place the onus on the lender to file the report.

We look forward to discussing this matter with you at your convenience and we thank you for your time and attention to this matter. I can be reached at 780-497-4896.

Yours truly,

BROWNLEE LLP

Per:

  
**ROGER I. SWAINSON**

c.c. Alberta Securities Commission – Lanion Beck  
Brownlee LLP – Graeme Swainson



**SCHEDULE "A"**

From National Instrument 31-103:

**"permitted client"** means any of the following:

- (a) a Canadian financial institution or a Schedule III bank;
- (b) the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (Canada);
- (c) a subsidiary of any person or company referred to in paragraph (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of the subsidiary;
- (d) a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser, investment dealer, mutual fund dealer or exempt market dealer;
- (e) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;
- (f) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (e);
- (g) the Government of Canada or a jurisdiction of Canada, or any Crown corporation, agency or wholly-owned entity of the Government of Canada or a jurisdiction of Canada;
- (h) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;
- (i) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec;
- (j) a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a managed account managed by the trust company or trust corporation, as the case may be;
- (k) a person or company acting on behalf of a managed account managed by the person or company, if the person or company is registered or authorized to carry on business as an



adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction;

- (l) an investment fund if one or both of the following apply:
- (i) the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;
  - (ii) the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;
- (m) in respect of a dealer, a registered charity under the Income Tax Act (Canada) that obtains advice on the securities to be traded from an eligibility adviser, as defined in section 1.1 of National Instrument 45-106 Prospectus and Registration Exemptions, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;
- (n) in respect of an adviser, a registered charity under the Income Tax Act (Canada) that is advised by an eligibility adviser, as defined in section 1.1 of National Instrument 45-106 Prospectus and Registration Exemptions, or an adviser registered under the securities legislation of the jurisdiction of the registered charity;
- (o) an individual who beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 Prospectus and Registration Exemptions, having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$5 million;
- (p) a person or company that is entirely owned by an individual or individuals referred to in paragraph (o), who holds the beneficial ownership interest in the person or company directly or through a trust, the trustee of which is a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction;
- (q) a person or company, other than an individual or an investment fund, that has net assets of at least \$25 million as shown on its most recently prepared financial statements;
- (r) a person or company that distributes securities of its own issue in Canada only to persons or companies referred to in paragraphs (a) to (q);

May 18, 2018

**BY EMAIL**

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

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Ontario Securities Commission  
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Email: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

M<sup>e</sup> Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square-Victoria, 22<sup>e</sup> étage  
C.P. 246, tour de la Bourse  
Montréal (Québec) H4Z 1G3  
Email: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

Dear Sirs/Mesdames:

Re: **CSA Notice and Request for Comment – Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* (NI 45-106) and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103) relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP *Prospectus Exemptions* (collectively, the “Proposed Amendments”)**

The Canadian Advocacy Council<sup>1</sup> for Canadian CFA Institute<sup>2</sup> Societies (the CAC) appreciates the opportunity to comment on the Proposed Amendments.

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<sup>1</sup>The CAC represents more than 15,000 Canadian members of CFA Institute and its 12 Member Societies across Canada. The CAC membership includes portfolio managers, analysts and other investment professionals in Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. See the CAC's website at <http://www.cfasociety.org/cac>. Our Code of Ethics and Standards of Professional Conduct can be found at <http://www.cfainstitute.org/ethics/codes/ethics/Pages/index.aspx>.

<sup>2</sup> CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behavior in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come

We generally support the Proposed Amendments to the prospectus exemptions and registration requirements for syndicated mortgages, in light of the inherent risks associated with distributing such products to retail investors under the current regime in Ontario and other jurisdictions. In our view, consistent with the objective of the Proposed Amendments, changes to the syndicated mortgage regime are important for investor protection. Further, the Proposed Amendments would seek to ensure consistency of regulation in relation to these products among all CSA jurisdictions of which we are supportive.

As a general comment, we note that it is our understanding that the commercial real estate mortgage loan market is not homogeneous and varies by property type (e.g. land, hotels, industrial, retail, office) as well as the type of loan (e.g. construction, bridge, term). Some loans, such as term loans, may trade in the secondary market. While limited information is available to the public on the Canadian CRE loan sector, we understand that there is no public data on the Canadian CRE syndicated loan sector. This lack of public data and transparency contributes to the importance of clear disclosure in offering documents in the sector. In addition, the creation of a data utility might be valuable to all market participants as a complement to additional disclosure. A public database of syndicated mortgage loans would facilitate comparison across the types of properties, issuers, brokers, regions, credit, etc.

We wish to provide the following comments to the specific questions raised with respect to the Proposed Amendments:

- 1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?*

We do not think it is necessary to provide a list of exceptions to the appraisal requirement, because such exceptions would undermine a key objective of the Proposed Amendments which is to provide more disclosure to investors given the inherent risks of syndicated mortgages. These risks include leverage (often at a rate of 50% or higher) from financing which can enable syndicated mortgage products to seek attractive returns for investors.

The appraisal requirement may in some instances mitigate against insufficient disclosure of the underlying assets. However, it is not clear to us which type of appraisal would be most useful to investors, or that the same type of appraisal should be required in all circumstances (e.g. based on construction cost,

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first, markets function at their best, and economies grow. CFA Institute has more than 155,000 members in 165 countries, including more than 148,900 CFA charterholders and 149 member societies. For more information, visit [www.cfainstitute.org](http://www.cfainstitute.org).

comparable sales, or economic value). Investors should also be made aware of the limitations of the method used, in order to better understand the value that is disclosed.

Further, the issuer under the Proposed Amendments would still be permitted to disclose any other value for the property (such as the market price of the disposition of the property in an open market) as long as it can demonstrate a reasonable basis for that value and discloses the material factors and assumptions underlying that value and whether it was prepared by an independent, qualified appraiser.

- 2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.*

The additional disclosure and certificate from a mortgage broker involved in the distribution of a syndicated mortgage indicating that the offering memorandum does not contain a misrepresentation is an important safeguard for investors who rely on the representations in the offering memorandum.

- 3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?*

We take the view that the requirement of making best efforts with respect to matters not within the mortgage broker's personal knowledge may be too burdensome for mortgage brokers as there may be a number of matters disclosed in the offering memorandum not specifically related to the product offering that would fall outside the expertise and knowledge of a mortgage broker, such as the corporate structure of the issuer or finances related thereto. Accordingly, requiring mortgage brokers to make best efforts with respect to such matters and certify that they do not contain a misrepresentation may be of little utility to the retail investor and costly. Rather, the certification that the offering memorandum does not contain a misrepresentation with respect to matters within the mortgage broker's knowledge or matters that the mortgage broker ought to know (including for example, determinants of the loan such as probability of default, exposure at default, loss given default) may suffice. As an example, the mortgage broker should be able to give assurances on the rent roll for commercial properties. It is important that the concept of "within the knowledge of" does not become too limiting.

4. *Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.*

In our view, the ability to participate in the exempt market is very important to Canada's capital markets. Limiting investors' participation in the exempt market may not be a preferred regulatory action for all investors. Rather, limiting investor's participation in the exempt market could be for those investors that are unable to evaluate and appreciate the risks. As an alternative, the Private Issuer Exemption could be further limited to certain categories of investors, such as directors, officers and employees of the issuer who are otherwise able to understand the risks of the investment.

We agree that it would be helpful, if this alternative exemption were available, to require reports of exempt distribution to be filed.

5. *Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?*

Although there may be certain differences in the classes of syndicated mortgages, proposing alternative prospectus exemptions based on the class may create confusion and uncertainty among retail investors and in some cases, result in less disclosure. Nevertheless, we take the view that in all cases there should also be disclosure of the fees that lenders receive from borrowers on closing, in order to provide investors with sufficient disclosure on how those fees are distributed back to investors or otherwise allocated.

6. *Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 Mortgages?*

Syndicated mortgages in the context of real estate developments and developments subject to future financings such as construction financings (with potential cost overruns, liens and no cash flow) may bring increased risk to investors compared to the risk profile of existing residential mortgages. In addition, syndicated mortgages in the context of retirement homes with assisted living as well as hotels may also bring increased risks, given operational challenges and the difficulty to repurpose and liquidate the real estate while maintaining operations, respectively. It may be worthwhile for regulators to study this area more in depth in order to determine whether the adoption of an exemption for syndicated mortgages dealing with existing residential property is

warranted. Further, it may also be worthwhile for regulators to study more in depth the secondary trading market for syndicated mortgages with respect to term loans that are subsequently sold to retail investors, as investors may not fully understand the underlying assets once these syndicated mortgages are traded in the secondary market.

7. *Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?*

Given the expected increased cost of the Proposed Amendments, permitting an exemption for syndicated mortgages on a property that is used for residential or business purposes by the mortgagor in the context of a few lenders appears to be reasonable, provided there is sufficient disclosure on the use of the premises and disclosure of financial statements of the operating business. In this context, it seems that the biggest risk on a loan to an owner/operator is the owner's business, which for private businesses is difficult to evaluate. We would also welcome more data on what the specified maximum number of lenders should be to ensure an adequate balance of access to the exempt market and investor protection.

### **Concluding Remarks**

We thank you for the opportunity to provide these comments. We would be happy to address any questions you may have and appreciate the time you are taking to consider our points of view. Please feel free to contact us at [cac@cfacanada.org](mailto:cac@cfacanada.org) on this or any other issue in future.

(Signed) *The Canadian Advocacy Council for  
Canadian CFA Institute Societies*

**The Canadian Advocacy Council for  
Canadian CFA Institute Societies**

# FAIR

Canadian Foundation *for*  
Advancement *of* Investor Rights  
Fondation canadienne *pour* l'avancement  
*des* droits *des* investisseurs

June 13, 2018

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

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Director, Communications and Stakeholder Relations  
401 Bay Street, Suite 1505, P.O. Box 5  
Toronto, ON  
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Sent via e-mail to: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

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Corporate Secretary  
Autorité des marchés financiers  
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**RE: CSA Notice and Request for Comment on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions**

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FAIR Canada is pleased to offer comments on the CSA Notice and Request for Comment (the "Consultation

Document”) on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (hereinafter the “Proposed Amendments”).

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit [www.faircanada.ca](http://www.faircanada.ca) for more information.

## 1. General Comments

- 1.1. FAIR Canada welcomes the introduction of increased investor protections related to the distribution of syndicated mortgages and increasing the level of harmonization regarding the regulatory framework for syndicated mortgages across all CSA jurisdictions.
- 1.2. We believe that the Proposed Amendments are a step in the right direction and we provide recommendations to ensure adequate investor protections relating to syndicated mortgage investments.
- 1.3. In the last few years FAIR Canada has become seriously concerned about the increasing number of frauds and misrepresentations involving the sale by mortgage brokers of syndicated mortgage investments to retail investors, which were sold on the basis that they were safe investments, secured against real property, low- or risk-free and paid high annual fixed rates of interest (8 or 10% and often on a quarterly basis). We urged that the regulation of these investments in Ontario be transferred from the Financial Services Commission of Ontario (“FSCO”) to the Ontario Securities Commission (“OSC”)<sup>1</sup> and were pleased by the recommendation of the Expert Advisory Panel Final Report on the Mandates of FSCO, The Financial Services Tribunal and the Deposit Insurance Corporation of Ontario that syndicated mortgages be regulated as securities,<sup>2</sup> and the Ontario Government’s later announcement that regulation of syndicated mortgages would be transferred to the OSC.<sup>3</sup>
- 1.4. In addition, and more broadly, FAIR Canada has called for risks to investors from real estate investments to be a specific focus of the OSC and other regulators across Canada in order to develop appropriate mechanisms to protect investors and close regulatory gaps.<sup>4</sup>
- 1.5. Several investors have contacted FAIR Canada in search of assistance when the interest

<sup>1</sup> FAIR Canada Comments on Preliminary Position Paper on the Review of Mandate of FSCO (14 December 2015), online: <[http://faircanada.ca/wp-content/uploads/2015/12/151214-Final-Letter-to-Expert-Panel-on-Preliminary-Panel-Recommendations\\_signed1.pdf](http://faircanada.ca/wp-content/uploads/2015/12/151214-Final-Letter-to-Expert-Panel-on-Preliminary-Panel-Recommendations_signed1.pdf)> at 7.

<sup>2</sup> Review of the Mandates of the Financial Services Commission of Ontario, Financial Services Tribunal and the Deposit Insurance Corporation of Ontario (31 March 2016), online: <<https://www.fin.gov.on.ca/en/consultations/fSCO-dico/mandate-review-final-report.pdf>> at 27.

<sup>3</sup> 2017 Ontario Budget, online: <<https://www.fin.gov.on.ca/en/budget/ontariobudgets/2017/ch2.html#ch21>>.

<sup>4</sup> FAIR Canada Comments on Ontario Securities Commission Notice 11-777 – Statement of Priorities (23 May 2017), online: <<http://faircanada.ca/wp-content/uploads/2017/05/170523-FAIR-Canada-Comments-on-OSC-Statement-of-Priorities-2017-2018-Final.pdf>> at 10.

payments on their syndicated mortgage investments have suddenly stopped and their attempts to make contact to get their money back end with no success. Several media articles have highlighted significant risks in this area<sup>5</sup> for retail investors and the lack of effective oversight and enforcement.<sup>6</sup> Reforms to how syndicated mortgages are distributed and regulated are, therefore, much needed.

- 1.6. FAIR Canada is also concerned about the regulatory framework for mortgage investment corporations (“MICs”), and the investor losses and risks associated with MICs that have been highlighted in media reports<sup>7</sup> and an independent report prepared by Fundamental Research Corp. in 2015 for the Canada Mortgage and Housing Corporation (CMHC) (“Independent Report”).<sup>8</sup> Adequacy of the existing mortgage investment regulatory framework in the various provinces and territories needs to be examined, including the repeal of BC Instrument 32-517 which permits an exemption from the dealer registration requirement in BC for securities of mortgage investment entities so long as the person is not registered and does not advise, recommend or represent that the security is suitable for the purchaser.
- 1.7. The amount of money invested in mortgage investments is significant. While there does not appear to be accurate data on the mortgage investment industry in Canada, it is estimated to be up to be as high as \$26 billion<sup>9</sup>. The amount of money invested in syndicated mortgages has risen considerably, going from \$1.5 billion in 2009 to \$4 billion in 2014<sup>10</sup>, and to \$6.6 billion in 2016 in the Province of Ontario alone<sup>11</sup>. The value of mortgages funded by MICs grew by 42 per cent from 2014 to 2016 to US\$4.4 billion. The Independent Report states that their database of 72 MICs held at least \$6.7 billion in mortgages as of December 31, 2014 or June 30, 2015.<sup>12</sup> According to estimates, there are 200-300 MICs operating in Canada. There is no data provided in the Consultation Document to indicate the amount of money involved in these

<sup>5</sup> Dana Flavelle, “The high-risk world of syndicated mortgages” *Toronto Star* (29 April 2016), online: <<https://www.thestar.com/business/2016/04/29/the-high-risk-world-of-syndicated-mortgages.html>>; Janet McFarland, “Ontario regulator revokes broker licenses in syndicated mortgage case” *The Globe and Mail* (31 January 2018), online: <<https://www.theglobeandmail.com/report-on-business/ontario-regulator-revokes-broker-licenses-in-syndicated-mortgage-case/article37802438/>>

<sup>6</sup> Matt Scuffham, “Special Report: Canada regulator ignored warnings on risky mortgage investments” *Reuters* (30 November 2017), online: <<https://ca.reuters.com/article/domesticNews/idCAKBN1DU1YP-OCADN>>.

<sup>7</sup> Tamsin McMahon and Tim Kiladze, “How to lose money in real estate” *The Globe and Mail* (12 November 2017), online: <<https://www.theglobeandmail.com/report-on-business/mortgage-investment-corporation-canada-real-estate/article34526694/?1493592020079>>.

<sup>8</sup> Fundamental Research Corp. “Growth and Risk Profile of the Unregulated Mortgage Lending Sector”, prepared for Canada Mortgage and Housing Corporation (CMHC) (9 October 2015), online: [ftp://ftp.cmhc-schl.gc.ca/chic-ccd/Research\\_Reports-Rapports\\_de\\_recherche/eng\\_unilingual/RR\\_Growth\\_w.pdf](ftp://ftp.cmhc-schl.gc.ca/chic-ccd/Research_Reports-Rapports_de_recherche/eng_unilingual/RR_Growth_w.pdf) [“Independent Report”].

<sup>9</sup> Tamsin McMahon and Tim Kiladze, “How to lose money in real estate” *The Globe and Mail* (12 November 2017), online: <<https://www.theglobeandmail.com/report-on-business/mortgage-investment-corporation-canada-real-estate/article34526694/?1493592020079>>.

<sup>10</sup> Dana Flavelle, “The high-risk world of of syndicated mortgages” *Toronto Star* (29 April 2016), online: <<https://www.thestar.com/business/2016/04/29/the-high-risk-world-of-syndicated-mortgages.html>>

<sup>11</sup> Alexandra Posadzki and James Bradshaw, “OSC flags concerns about growth of alternative mortgage lending” *The Globe and Mail* (15 May 2018), online: <<https://www.theglobeandmail.com/business/article-osc-flags-concerns-about-growth-of-alternative-mortgage-lending/>>.

<sup>12</sup> Independent Report at 7.

investments throughout Canada.

## 2. Specific Comments

### ***Mortgage Exemptions***

- 2.1. We welcome the removal of prospectus and registration exemptions under sections 2.36 of NI 45-106 and 8.12 of NI 31-103 for securities that are syndicated mortgages (the “Mortgage Exemptions”) in Ontario, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island and Yukon. This harmonizes those jurisdictions with the rest of Canada. In light of the experience of retail investors who have been sold syndicated mortgages, it is essential that these investments be regulated like any other securities investment.
- 2.2. As a result of these changes, exempt syndicated mortgages will have to be sold pursuant to other prospectus exemptions. The Consultation Document indicates that they would most likely be offered primarily under the Accredited Investor Exemption, the OM Exemption or the Family, Friends and Business Associates (“FFBA”) Exemption.
- 2.3. FAIR Canada believes that measures need to be taken to compel compliance with the existing rules that govern prospectus exemptions, as non-compliance is a serious and persistent problem. Non-compliance harms investors and weakens confidence in the exempt market and our capital markets generally. Regulatory resources, including enforcement, must be deployed and applied to ensure compliance with existing rules – there is little point in having rules if they are consistently disregarded. In addition, simply placing a heavy emphasis on disclosure cannot provide adequate protection to individual investors.<sup>13</sup>
- 2.4. Recent reports by CSA members summarizing compliance reviews have emphasized that non-compliance in the exempt market continues to be commonplace. For example, the Alberta Securities Commission’s Notice 33-705 *Exempt Market Dealer Sweep* from May 2017 provided results from a sweep of exempt market dealers identifying numerous compliance deficiencies.<sup>14</sup> The OSC also produced a report in July 2017 identifying “current trends in deficiencies from compliance reviews” of exempt market dealers.<sup>15</sup> A summary of the deficiencies identified in these two reports can be found in our letter to the CSA dated September 8, 2017.<sup>16</sup> We do not

<sup>13</sup> Behavioural economics research indicates that disclosure is ineffective and may result in unintended and even perverse consequences. We urge the utilization of other measures to ensure adequate investor protection.

<sup>14</sup> Alberta Securities Commission Notice 33-705 *Exempt Market Dealer Sweep* (10 May 2017), online: <[http://www.albertasecurities.com/Regulatory%20Instruments/5331553%20\\_%20EMD\\_Project\\_Staff\\_Notice%2033-705.pdf](http://www.albertasecurities.com/Regulatory%20Instruments/5331553%20_%20EMD_Project_Staff_Notice%2033-705.pdf)> . Out of 69 firms that were reviewed by ASC staff (of which 66 were completed), regulatory action or other steps were taken in 26 cases. In addition, “[ASC staff] identified deficiencies in compliance with regulatory obligations in all areas tested” at 3.

<sup>15</sup> OSC Staff Notice 33-748 *Annual Summary Report for Dealers, Advisers and Investment Fund Managers* (11 July 2017). The British Columbia Securities Commission also produced a report in June 2014, *Private Placement Review Program*. The Report stated: “staff found that companies have a poor understanding of the exemptions, do not keep adequate records of their private placements, and use professional advisors who do not have specialized knowledge of the securities industry and the private placement market” at 6.

<sup>16</sup> FAIR Canada Comments on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions relating to Reports of Exempt Distribution (8 September 2017), online: <<http://faircanada.ca/wp-content/uploads/2017/09/FAIR-Canada-Submission-re-NI-45-106-Prospectus-Exemptions-Final-Sept-8-2017.pdf>>.

have confidence that the repeated compliance problems that have been previously identified in the exempt market have been addressed.

- 2.5. **FAIR Canada recommends that securities regulators review a certain percentage of Offering Memorandum involving the distribution of syndicated mortgages to ensure that market participants are complying with their disclosure obligations. We believe this would improve the level of compliance and would also deter fraudulent activity.**
- 2.6. Many retail investors are unable to understand the disclosure that is provided to them, so the provision of an Offering Memorandum, even if fully compliant, may not lead to an informed investment decision. Many retail investors lack sufficient financial literacy to be proficient in financial matters (that is, to understand an investment's costs, risks and features) and many do not read or pay sufficient attention to the disclosure provided, often because they simply rely on their advisor to tell them what they should know or because the sales process encourages them to regard disclosure as an inconsequential formality. While improved, plain language disclosure is beneficial, it cannot be viewed in isolation from the behavioural effects of the sales process. It also cannot be viewed as an antidote to incentives for mis-selling that exist.
- 2.7. **FAIR Canada recommends that securities regulators review the efficacy of the existing risk acknowledgement forms by applying behavioural insights.** Many behavioural biases, including confirmation bias, affect investor decision-making and the design and timing of information profoundly affects its impact and effect. We have seen no evidence that these considerations factored into the design of the risk acknowledgement form.
- 2.8. **FAIR Canada also recommends that CSA members gather information on whether the risk acknowledgement form actually can, and does, help investors make better investment decisions.** To that end, FAIR Canada recommends that CSA members: (a) obtain information on the investor experience with risk acknowledgement forms in the exempt market, and in particular with the OM Exemption; (b) publish information disclosing the effectiveness of the use of such forms in light of existing complaints, investigations and enforcement proceedings where such forms were used; and (c) conduct investor testing on the risk acknowledgement form to see whether it actually helps investors make better investment decisions and whether it can be improved upon or whether other, stronger investor protection measures are warranted.

### ***Changes to the OM Exemption***

#### ***Appraisals***

- 2.9. The Proposed Amendments would require issuers to deliver an appraisal of the current fair market value of the property subject to the syndicated mortgage to prospective purchasers under the OM Exemption. This appraisal would be prepared by a qualified appraiser who is independent of the issuer. Another value of the property (expected market value on completion of the development for example) could be disclosed but would be required to have a reasonable basis and the issuer would be required to disclose the material factors and assumptions underlying that value and whether it was prepared by an independent, qualified appraiser.

- 2.10. FAIR Canada recommends that the rules prohibit and projected future market value of the property (such as expected market value on completion) whether it is prepared by an independent appraiser or not. To permit this would be similar to permitting non-GAAP financial measures in financial reporting. Therefore we recommend that subsection 19.3 of section 2.9 of NI 45-106 be removed. A future expected value will undermine the efficacy of the current fair market value determined by an independent, qualified appraiser. Many investors will pay undue regard to the expected market value in relation to the appraised value given investor behaviour, and given the nature of real estate values in the last decade, where we have had, in areas of Canada, continuing increasing real estate values.
- 2.11. FAIR Canada recommends there be restriction on the volume of business any one appraiser's firm could provide to a given issuer group and/or mortgage broker so as to maintain independence. We also caution on placing undue reliance on appraisals as this may lead to undue reliance similar to the problems associated with undue reliance on ratings from credit rating agencies. Furthermore, we recommend that investors be provided with a plain language explanation of the main types of appraisal that can be generated (cost basis, comparable sales basis, economic value, fair value, etc) and their limitations in order to have a better ability to make an informed investment decision.

***Question 1: As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exemptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?***

- 2.12. FAIR Canada does not believe there should be exemptions to the fair market value appraisal requirement as this is not unduly burdensome. In the event there was a recent transaction at arm's-length, the appraisal should be relatively straightforward and inexpensive.

#### ***Supplemental Disclosure Requirements***

- 2.13. FAIR Canada supports the supplemental disclosure requirements that would include disclosure of development risks, prior obligations secured against the real property and the price paid by the developer to acquire the real property, and Form 45-106F2 and Form 45-106F18. These disclosure requirements will include information about the business and financial position of the borrower and certification by the issuer that there is no misrepresentation.

#### ***Mortgage Broker Requirements***

***Question 2: Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements?***

- 2.14. A certification by the mortgage broker that there is no misrepresentation in the OM is a key investor protection mechanism for investors and FAIR Canada is not aware of situations where this would not be appropriate. **FAIR Canada recommends that purchasers in all jurisdictions**

should have a statutory right of action against issuers promoters, and mortgage brokers should the OM contain a misrepresentation, and that any marketing, promotional or advertising material be incorporated by reference into the OM.

- 2.15. FAIR Canada recommends that any mortgage brokers involved in the business of distributing syndicated mortgages be required to be registered as a registrant to ensure that they have the necessary integrity and fitness to participate in capital market activity and in order to facilitate oversight and enforcement or disciplinary action. FAIR Canada expects the CSA to require that market participants that are in the business of trading syndicated mortgages would be required to register and those entities engaged in repeated financing activities would be required to be registered as a dealer (and not simply expect some of them to register).

***Question 3: Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?***

- 2.16. FAIR Canada recommends that the mortgage brokers be required to undertake commercially reasonable due diligence as part of its Know Your Product and Know Your Client obligations or otherwise and certify that to the best of our knowledge, information and belief, the Offering Memorandum provides disclosure of all material facts required under securities legislation of a specific jurisdiction and does not contain a misrepresentation. The CSA should issue guidance setting out the extent of the mortgage brokers' due diligence obligations.

#### ***Private Issuer Exemption***

***Question 4: Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.***

- 2.17. The Consultation Document proposes to make the Private Issuer Exemption unavailable for the distribution of syndicated mortgages in part, because reports of exempt distribution are not required under the Private Issuer Exemption.
- 2.18. The Private Issuer Exemption allows a non-reporting issuer to distribute its securities to a maximum of 50 people who have certain specified relationships with the issuer, including specified family members of its executive officers, directors or founder. The historical rationale for the exemption is that this is the number of individuals who would fall within the requisite categories and have some relationship with the issuer allowing them to (a) gauge the issuer's principals' capabilities and trustworthiness, and (b) extract sufficient material information to avoid a large level of informational asymmetry.<sup>17</sup> The fact of the relationship was also seen to reduce the likelihood of fraud since they would know the principals of the issuer.

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<sup>17</sup> For example, the OSC Staff Consultation Paper 45-710 states that "These types of investors are generally thought to have a relationship to the issuer that allows them to, at least partially, mitigate the risks of the investment because of the closeness of the relationship or the fact that they have access to information from the issuer" at 9.

- 2.19. We do not believe the problem that the Consultation Document is trying to address rests with the Private Issuer Exemption (more so than any other exemption). Accordingly, we would recommend that the Private Issuer Exemption be made available for the distribution of syndicated mortgages but in order for it to be used to distribute syndicated mortgage investments, a report of exempt distribution containing similar information to what is required under other prospectus exemptions be required to be filed with securities regulators.
- 2.20. We believe that reporting to the securities regulatory authorities so that better data can be collected in this area of the exempt market is of vital importance so we do not support providing relief from such reporting obligations.

#### ***Alternative Prospectus Exemptions***

***Question 5: Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?***

- 2.21. FAIR Canada does not see any basis for concluding that there are distributions of syndicated mortgages where “investor protection concerns may not be as pronounced”. We are not aware of any situations where an investor will agree that they are well served having no investor protection requirements.
- 2.22. There are a sufficient number of prospectus exemptions available currently and a greater number of them will not be in the interests of investor protection or the fair and efficient markets and confidence in our capital markets. The existing prospectus exemptions are sufficient for issuers, borrowers and mortgage brokers to utilize and the associated costs with having to comply with registration requirements (including participation fees) are not unduly burdensome.

***Question 6: Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission Rule 45-501 Mortgages?***

- 2.23. We do not support a qualified syndicated mortgages exemption that would permit the distribution of syndicated mortgages without requiring dealer registration or the need to meet the requirements of existing prospectus exemptions. Retail investors are advised to “check registration”<sup>18</sup> (including disciplinary history) when considering making an investment in order prevent being defrauded. If such carve outs are allowed, this step is undermined. Such exemptions also undermine the ability of securities regulators to oversee the market and obtain information on this segment of the market. All such activity should be recorded on the books and records of a given dealer.

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<sup>18</sup> See CSA webpage “It takes only 10 seconds to check registration...as much time as it takes to read this headline” at <https://www.securities-administrators.ca/investortools.aspx?id=1128>. FAIR Canada believes that this headline is misleading as it is not an easy or quick process to adequately check the registration and disciplinary history of a purported financial services representative.

**Question 7: Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?**

2.24.FAIR Canada disagrees that such an exemption should be provided given the investor protection concerns that would result.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Frank Allen at [647-256-6693](tel:647-256-6693)/[frank.allen@faircanada.ca](mailto:frank.allen@faircanada.ca), or Marian Passmore at [647-256-6691](tel:647-256-6691)/[marian.passmore@faircanada.ca](mailto:marian.passmore@faircanada.ca).

Sincerely,

Canadian Foundation for Advancement of Investor Rights



June 5, 2018

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

**Proposed amendments to prospectus and registration exemptions  
applicable to syndicated mortgage transactions**

**About the CMBA**

The CMBA is an inter-jurisdictional umbrella association consisting of provincial mortgage broker associations in Canada, including associations in Atlantic Canada (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador), Ontario and British Columbia.

**Nature of Proposal and CMBA Commentary**

We appreciate the opportunity to comment on the CSA proposal, which contains a number of recommendations to amend available securities exemptions available to mortgage syndicators. The CSA proposal contemplates that the regulation of syndicated mortgages currently within the jurisdiction of mortgage broker regulators will transfer to or remain with securities regulators. The proposal therefore attempts to harmonize securities regulation relating to syndicated mortgages from province to province.

Syndicated mortgage originations are particularly strong in the provinces of Ontario and BC. The Financial Services Commission of Ontario (FSCO) reports that from 2016 Annual Information Return data, 105 mortgage brokerages in Ontario engaged in syndicated mortgage lending activity and funded \$6.6 billion in syndicated mortgages. Further, 36% percent of all syndicated mortgage activity is originated by entities which



are geared to syndicated mortgage lending on an exclusive basis, with the balance originated by brokerages in the course of their mortgage broker practice. This comment letter will therefore focus on syndicated mortgage practices in the provinces of Ontario and BC.

In addition, we are of the view that the CSA proposal contains some assumptions about the role of the licensed mortgage brokers who represent syndicated lenders and the structure of syndicate mortgage lending which are inaccurate and make the CSA proposal unworkable. We will therefore focus our comments on the challenges exempt market dealers would experience in taking over the role of dealing with syndicated mortgage investors from mortgage brokers.

### **The Ontario Case and BC Example of Regulation**

In the 1990's there were no rules governing syndication mortgages in BC. However, legislative amendments to the BC Securities Act and Mortgage Brokers Act were introduced in 2000 after facts surrounding the mortgage brokering activities of Eron Mortgage Corporation (Eron) came to light. Eron was suspended by the Registrar of Mortgage Brokers in 1997, after it was found to have invested lender funds for syndicated mortgages without properly disclosing essential elements of the mortgage arrangements to the lenders. The new provisions divided syndicated mortgage activity into simple (qualified) syndications governed by the Mortgage Brokers Act and more complex (non-qualified) syndications governed by the Securities Act. The most significant consumer protection measure was the introduction of the lender disclosure form; it detailed essential information about the transaction and was to be provided by mortgage brokers to syndicated mortgage lenders prior to the release of funds to the borrower.

Now eighteen years later an Ontario case, very similar to Eron, appears to have become the impetus for regulatory change in that province. Already, the Mortgage Brokerages, Lenders and Administrators Act has been amended with new statutory changes resembling those in BC. They result in the division of syndicated mortgages into qualified (simpler) syndications and non-qualified (more complex) syndications, with different rules applying to each category. As of July 1, 2018, Ontario mortgage brokerages that deal with non-qualified syndicated mortgage transactions will be required to comply with stricter compliance measures.

However, the Ontario government has also recently adopted the objective of transferring regulatory oversight over syndicated mortgages from the mortgage broker regulator, FSCO, to the Ontario Securities Commission. This was Recommendation 17 of the expert panel report dated March 31, 2016 reviewing FSCO. Specifically, it recommended that "the government should require that documents issued to raise capital for syndicated mortgage investments be subject to the same level of regulation



as the securities regulator applies to other offering documents used to raise capital in the Province.”

The challenge is that Recommendation 17 has been made and adopted without a more in-depth analyses of how mortgages are actually syndicated and exactly who looks after the interests of syndicated investors. There appears to be an assumption that the role of licensed mortgage brokers under the mortgage broker regime dealing with syndicated investors can be readily swapped with registered exempt market dealers under the securities regime.

We note that the regulatory system in BC cannot be used as example of how syndicated mortgages can be regulated under the securities regime, as the vast majority of mortgage syndicators are exempt from market dealer registration. This is because they either arrange syndicated mortgages under the Mortgage Brokers Act or they rely on the current Mortgage Investment Entity Exemption (MIE Exemption) under BC Instrument 32-517.

### **How Syndicated Mortgages are Originated**

Across Canada, syndicated mortgages are arranged by either mortgage brokers in the course of their general mortgage broker practice, or by specialized entities which engage in syndicated mortgage lending on an exclusive basis.

Many argue that recent syndicated mortgage failures under the spot light in Ontario were not actually examples of true syndicated mortgage lending and should not therefore be used as a basis for regulatory change. One of our members has explained that in these cases they “were able to dupe the public and the regulators by the simple action of registering a collateral charge on title (a mortgage) to appear to secure its investors’ investments and then attach the word mortgage to them for belt and suspenders. These investments were misrepresented to investors, many of which were unsophisticated and who did not receive proper ILA, suitability investigation or other required diligence. The investments themselves were in fact not mortgages but loosely secured equity investments disguised as a mortgage.”

Although, there are numerous variations<sup>1</sup>, in a typical syndicated mortgage transaction, a borrower will contact a mortgage broker looking for financing. The mortgage broker will take an application from the borrower and shop the application to different lenders, which are represented by other mortgage brokers.

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<sup>1</sup> A mortgage broker might take on a dual role by acting for the both the investor lender and the borrower.



## How will Exempt Market Dealers Replace Mortgage Brokers Acting for Investor Lenders?

Mortgage brokers who act for lenders are more than mere salespeople selling a finished mortgage product. The lender's mortgage broker typically will:

- underwrite the mortgage;
- inspect the property, appraisal and other property information;
- issue a commitment letter for the borrower;
- determine conditions for completion;
- ensure that the conditions have been satisfied;
- prepare lender disclosure for the lenders which states mortgage and transaction details; and
- for draw mortgages, ensure that work has been completed before further draws are authorized.

Exempt market dealers are described by the CSA as “sellers” and investor lenders as “purchasers”. However, when it comes to syndicated mortgage lending, mortgage brokers acting for lenders do not sell investments – they arrange, negotiate, structure, confirm and process the mortgage transaction on behalf of the investor lender.

The mortgage broker acting for the borrower engages in a different role from that of the broker assisting the investor lender (unless acting in dual capacity) and will assist the borrower in assessing the transaction, negotiating terms on behalf of the borrower, obtaining the commitment and clearing off commitment conditions.

The CSA proposal appears to assume that a mortgage broker will still be involved in syndicated mortgage transactions, but it is not clear exactly how. Is it contemplated that a mortgage broker representing a borrower looking for syndicated funds contact an exempt market dealer who has investors and who will then provide a mortgage commitment on behalf of the investors?

Here are some questions which the CSA may wish to clarify. If the lenders are no longer assisted by a mortgage broker, but instead by an exempt market dealer, will the exempt market dealer also be:

- underwriting the mortgage;
- drafting the mortgage commitment;
- ensuring that mortgage commitment conditions have been satisfied;
- ensuring that the mortgage is registered appropriately before authorizing the release of lender funds;



- inspecting development sites to determine whether draws are appropriate; and
- educated, trained and tested for competence in all matters relating to mortgage financing, including those matters specified above?

### **Borrowers are Consumers and Not Issuers**

The CSA proposal identifies borrowers in syndicated mortgage transactions as “issuers”<sup>2</sup> who would need to comply with the requirements of the Securities Act. However, mortgage borrowers are considered under mortgage broker regimes to be consumers deserving of consumer protection measures, and not industry members who must dispense consumer protection to other persons. We are of the view that to catapult the mortgage borrower from consumer to industry service provider under a new syndicated mortgage regime is a serious consumer protection concern which requires further review on an urgent basis.

We are of the further view that it does not make sense for exempt market dealers to turn into syndicated mortgage brokers, when mortgage brokers are already qualified and experienced in this field. The current syndicated mortgage regime in BC with its divided jurisdiction between the Registrar of Mortgage Brokers and the BC Securities Commission and set of exemptions, including the MIE Exemption, works well and should be a model for other jurisdictions to follow. However, if the CSA intends to proceed with its proposal, then we recommend that:

- it develop a broader and more in depth understanding of the mortgage origination process;
- determine how the proposal will impact syndicated mortgage investors and borrowers; and
- explain how gaps in the mortgage origination process will be filled by exempt market dealers.

Thank you for the opportunity to comment on the proposal. Please know that I am available to discuss the CSA proposal further or the comments contained in this letter.

Yours truly,

Samantha Gale, Executive Director, CMBA

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<sup>2</sup> Page 4 of the CSA proposal

## **Request for Comments Response Regarding OSC & Syndicated Mortgages:**

In response to the request for comments, I have reviewed and fully agree with David Mandel's comments as quoted and further below have added certain of my own as applicable:

*"The proposed amendments to National Instrument 45-106 Prospective Exemptions and National Instrument 31-103 Registration Requirements and Ongoing Registration Obligations relating to "Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus exemptions fail to define the various types of syndicated mortgages and thereby needlessly and harmfully target and disrupt mortgage syndications, mortgage investors and mortgage companies, brokers and agents.*

*A mortgage syndication is any mortgage that is being funded by more than a single investor. The OSC imputes "risk" into mortgage terminology by its generic use of the term "Syndicated Mortgage". The OSC proposed amendments are being established in response to the activities of very few companies such as the failed Tier One and Fortress Developments and related Fortress entities. These companies and very few others like them were able to dupe the public and the regulators by the simple action of registering a collateral charge on title (a mortgage) to appear to secure its investor's investments and then attach the word mortgage to them for belt and suspenders. These investments were misrepresented to investors, many of which were unsophisticated who did not receive proper ILA, suitability investigation, or other required diligence. The investments themselves were in fact not mortgages but loosely secured equity investments disguised as mortgages.*

*Most every type of mortgage investment outside of the likes of Fortress and Tier One products are subject to an equity test based on current value and in the case of a development property, both the AS IS appraised value and AS Completed value. Properly structured development and construction projects are funded on a "cost to complete basis" so that there is always enough funding in place to start and complete a project inclusive of contingencies. The Fortress and Tier One products did not employ these necessary tests for quality, substance and preservation of capital. Their products which you term "Syndicated Mortgages" were used to fund "Soft Costs" and since the Borrower typically had little to no real equity in the project, these investments in fact represented pure equity.*

*If you were to analyze the capital stack in any of these failed company programs it becomes evident that each of them is close to being underwater at the time of closing of the initial funding of the investment. Typically, the investor rank is subject to postpone to every type of development financing arranged by Borrower often including but not limited to, a First Mortgage to 75% of Land Value in First Place, A Second Place Vendor Take Back Mortgage to 85% of the value of the land, a third place Bond or charge to secure purchaser deposits that may be drawn upon to reduce the requirement for construction financing, and in Forth place will be City and Regional Development Charges in order for the City or region to insure that the builder/developer complies with terms of the site plan approval and completes necessary works. Then in fifth position comes what you call the "Syndicated Mortgage" with its investors, ranking just above the Borrower whom may have little or no equity in the transaction. Needless to say, that "Syndicated Mortgage" investors represent all of the risk capital without any chance at of principal repayment save and except the successful sell out and completion of the project. Now you tell me please ..... is this syndicated equity or is this a mortgage?*

*The answer is clear that this is not a mortgage but rather syndicated equity and yes, the OSC needs to institute changes and amendments **to better recognize, monitor and regulate these highly specific types of equity investments.***

***The only way to properly implement the proposed amendments is to address the real problem outlined above which requires the OSC and the MOF to define these investments as “Syndicated Equity Investments” and remove them completely from the realm of mortgage brokerage by removing the prospectus exemption and move them alone under OSC registration obligations.***

***There is absolutely no need to change the regulations for any other type of mortgage syndication.***

*Let us draw upon a parallel. Just because 2 schedule A banks get together on a loan and they register a collateral charge on title to the real property of a business to secure a business loan does not redefine their loan as a “Syndicated Mortgage”. It remains a secured business loan.*

*So why are syndicated equity products being defined by the OSC as something they are not? The only mortgage like quality they retain is that they are registered as a charge on title. No different then any other secured loan.*

*Why not define these products for what they are and carve out legislation to deal with them specifically rather than disrupting an otherwise perfectly healthy industry? The mortgage industry has for over 100 years syndicated residential, commercial, industrial, hospitality and special purpose property mortgages successfully.*

*The mortgage industry is providing an essential service to business people and consumers as an alternative to the Chartered Banks or other institutional lenders in a very competitive environment. There is no need for special regulation beyond the current programs overseen by FSCO save and except “**Syndicated Equity**” disguised as a mortgage and being defined by the OSC, MOF, FSCO and hence the media as “Syndicated Mortgages” which definition is wrong and imputes risk into terminology. Calling these syndicated equity products Syndicated Mortgages lends them an incredibly broader and safer meaning. Please focus the proposed amendments only on “**syndicated equity programs**” like Fortress Developments Products, failed Tier One and similar high-risk equity investments as well as those that create and market those products who have skirted securities regulations only by virtue of a valueless mortgage registration.*

***It needs to be noted that the proposed amendments in its current form threatens over \$6 billion of private funded syndicated mortgages in Canada.*** Many real estate developments could not be built without this funding. In fact, many would never be acquired as typically early stage land acquisition and development requires private funding. Private lending in syndication has for years saved many a homeowner from a temporary set back, funded renovations, helped revitalize whole communities through privately funding regentrification where bank financing is simply unavailable, saved families from foreclosure or power of sale, provided necessary working capital to businesses whose working capital or other ratios have put them offside with their bank and thousands of other examples where there is no need to fix what is not broken. Where a mortgage investment is a true mortgage investment where there is a test for real equity, ability to service debt, credit adjudication at a corporate and personal level, as well as property assessment, there is no need for change.

*The proposed amendments fail to recognize the costs associated with compliance and that additional processes and costs applied particularly where not needed to the mortgage industry will reduce competition resulting in private interest rates rising, fewer deals being consummated, where consumers will bear the brunt of these additional costs. The costs of the proposed amendments hugely outweigh the benefits save and except more laser focused implementation to better control the misuse of mortgage syndication to disguise and market syndicated equity investments. "*

Request for Comments

March 8, 2018 (2018), 41 OSCB 1877

Appraisals

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?

Mortgage broker requirements:

**- It is our feeling that an independent third party valuation by an accredited appraisal firm (CRA or AACI) is necessary and should be included as part of any underwriting package given to each investor participating in the investor group for review and approval of a mortgage loan and needs to be not older than 6 months and either addressed to the mortgagee representing the investor group or a letter of reliance to be provided from the appraisal company to the mortgagee representing the investor group.**

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.

**- Chartered bank representatives, lawyers and other exempted professionals should not be exempt from Disclosure requirements when arranging syndicated mortgages on real property (not equity injections into a development as a quasi partner).**

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Exclusion of syndicated mortgages from the Private Issuer Exemption.

**First define the type of syndicated mortgage you wish to address? Set standards to relate to your definition. Look at the example of the capital stack to address relative risk of an investment, provide a test to determine if the product is actually a mortgage. For example if a mortgage is over 85% Loan to Appraised Value then it is very high risk and either must be insured by CMHC or other insurer or it should be subject to your proposed amendments. All other mortgages should be left out of the proposal.**

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary?

If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

- **As per my previous examples and discussion, provided investors complete a suitability test as well as provide a KYC form there is no need for the OSC proposed amendments save and except mortgages on real property in excess of 85% Loan to Value. For development or construction projects this LTV test should be reduced to 80% (of completed value) after which the proposed amendments should be applicable.**

**Alternative prospectus exemptions – Should apply to all mortgage investments save and except “Syndicated Equity” and subject to the LTV test noted above.**

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?

- **Yes for all mortgages on residential owner occupied homes where current FSCO enforced regulation and processes is doing a great job.**
- **Yes where mortgages on residential properties are less than or equal to lower of 80% loan to appraised value or purchase price and on commercial mortgages are less than or equal to lower of 75% loan to appraised value or purchase price.**

6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission Rule 45-501 Mortgages?

- **Yes where mortgages on residential properties are less than or equal to lower of 80% loan to appraised value or purchase price and on commercial mortgages are less than or equal to lower of 75% loan to appraised value or purchase price.**

-

7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

- **Keep it simple... Yes where mortgages on residential properties are less than or equal to lower of 80% loan to appraised value or purchase price and on commercial mortgages are less than or equal to lower of 75% loan to appraised value or purchase price.**
- **The size of the loan or property being secured does not matter.**
- **The syndicated mortgage should only be available for distribution by a licensed or exempt entity. Also there needs to be a friends and family exemption here particularly for family property (which might include a property housing a family business) and residential dwellings.**

June 1, 2018

The proposed amendments to National Instrument 45-106 Prospective Exemptions and National Instrument 31-103 Registration Requirements and Ongoing Registration Obligations relating to “Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus exemptions fail to define the various types of syndicated mortgages and thereby needlessly and harmfully target and disrupt mortgage syndications, mortgage investors and mortgage companies, brokers and agents.

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principal repayment save and except the successful sell out and completion of the project. Now you tell me please ..... is this syndicated equity or is this a mortgage?

The answer is clear that this is not a mortgage but rather syndicated equity and yes, the OSC needs to institute changes and amendments to better recognize, monitor and regulate these highly specific types of investments.

The only way to properly implement the proposed amendments is to address the real problem outlined above which requires the OSC and the MOF to define these investments as “Syndicated Equity Investments” and remove them completely from the realm of mortgage brokerage by removing the prospectus exemption and move them alone under OSC registration obligations. There is absolutely no need to change the regulations for any other type of mortgage syndication.

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So why are syndicated equity products being defined by the OSC as something they are not? The only mortgage like quality they retain is that they are registered as a charge on title. No different then any other secured loan.

Why not define these products for what they are and carve out legislation to deal with them specifically rather than disrupting an otherwise perfectly healthy industry? The mortgage industry has for over 100 years syndicated residential, commercial, industrial, hospitality and special purpose property mortgages successfully. The mortgage industry is providing an essential service to business people and consumers as an alternative to the Chartered Banks or other institutional lenders in a very competitive environment. There is no need for special regulation beyond the current programs overseen by FSCO save and except “Syndicated Equity” disguised as a mortgage and being defined by the OSC, MOF, FSCO and hence the media as “Syndicated Mortgages” which definition is wrong and imputes risk into terminology. Calling these syndicated equity products Syndicated Mortgages lends them an incredibly broader and safer meaning. Please focus the proposed amendments only on “syndicated equity programs” like Fortress Developments Products, failed Tier One and similar high-risk equity investments as well as those that create and market those products who have skirted securities regulations only by virtue of a valueless mortgage registration.

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#### Request for Comments

March 8, 2018 (2018), 41 OSCB 1877

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Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the

property was acquired recently in an open market transaction with all parties acting at arm's length?

Mortgage broker requirements:

- Unless a mortgage investor certifies that they consider themselves an expert and/or real estate investor or professional and agree in writing to waive an appraisal, the appraisal is necessary and should be provided and needs to be not older than 6 months and either addressed to the investor (investor group) or a letter of reliance to be provided from the appraisal company to the investor (investor group).

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be

appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other

participants in the distribution that should be subject to these requirements.

- Chartered bank representatives are involved with placing true syndicated mortgages for all types of Borrowers and real estate as are lawyers and other previously exempt professionals. They should no longer be exempt to level the playing field.

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering

memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Exclusion of syndicated mortgages from the Private Issuer Exemption

First define the type of syndicated mortgage you wish to address? Set standards to relate to your definition. Look at my example of the capital stack to address relative risk of an investment, provide a test to determine if the product is actually a mortgage. For example if a mortgage is over 85% Loan to Appraised Value then it is very high risk and either must be insured by CMHC or other insurer or it should be subject to your proposed amendments. All other mortgages should be left out of the proposal.

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properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission

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7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a

property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to

conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

- Keep it simple... Yes where mortgages on residential and commercial mortgages are less than or equal to lower of 80% loan to appraised value or purchase price. The size of the loan or property being secured does not matter.

- The syndicated mortgage should only be available for distribution by a licensed or exempt entity. Also there needs to be a friends and family exemption here particularly for family property (which might include a property housing a family business) and residential dwellings.

Donna Lewczuk

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**MEMORANDUM**

**DATE:** June 4, 2018

**FROM:** Michael (Mickey) Baratz  
Principal

**RE:** **Request for Comments Response Regarding OSC & Syndicated Mortgages**

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**The proposed amendments to National Instrument 45-106 and 31-103 relating to Syndicated Mortgages et al, while timely and relevant, fail, nevertheless, to address certain pivotal facts:**

- For centuries syndicated Mortgages were provided to developers in Ontario. Considering banks do not lend for commercial development or land-banking other than for construction, the mere availability of Private funds contributed directly to the growth of the Ontario Economy and in fact, allowed for the growth that the Province experienced over the years.
- With the exception of a few “bad apples”, the Industry, is driven by professionals, often lawyers, accountants etc. Members of the Industry can boast that when audited by FSCO, they passed the audits for the most part without any negative comments. Furthermore, a single audit will show that public complaints were limited, if not rare, except of course in the case of the few who are dragging an entire Industry with them.
- My colleagues have drawn your attention to the fact that the issues that were the catalyst that drove the proposed changes centered squarely on;
  - i. Insufficient lack of or misleading disclosure and
  - ii. undermining risks inherent in the investments that were offered to the public.

The fact is that the majority of the Industry including countless Brokerages and Administrators have for years, provided credible prudent and necessary financing and directly helped the Ontario economy.

Many Brokerages who syndicate Mortgages, yours truly included, will never lend in excess of 70% of loans to value being vetted by qualified Appraisers on an “as is” basis. In most cases the Principals of the Brokerages will themselves invest in the Mortgages alongside the investors, amounts that will exceed any fees earned by the Brokerages. In other words, risk real money, not just fees.

As my colleagues have indicated, loans over a threshold of say 80% - 85% are and should be termed “Syndicated Equity.” As such, syndicated Equity should be treated as a Sale of Securities but not syndicated Mortgages.

**I therefore suggest the following:**

- FSCO, in cooperation with OSC, Mortgage Professional Canada as well as CMBA Ontario, establish a tight list of criteria to identify what constitutes a Mortgage and Mortgage syndication and, by default, what constitutes Equity and Equity Syndication.
- Tight audits should be instituted to ensure compliance. The auditors shall be selected from OSC as well as the industry to ensure compliance. Audit Fees will be charged to each Brokerage / Administrator being audited. A substantive punitive system shall be introduced to ensure that compliance is taken seriously.
- Audit results shall be published, and Brokerages / Administrators shall be ranked as to compliance or lack thereof to forewarn the public in advance (the Medical profession provides a doctor rating system that is very effective).

**As for specific requested comments:**

- 1) **Appraisals:** The fact that a buy and sell transaction is at arm’s length by itself does not mean that the transacted amount is reasonable and fair market. The investing public needs to be informed that, independently, the transacted amount has been independently verified.
- 2) **Additional Disclosure:** There should not be any exemption for additional disclosure which should be requested of all those who are syndicating Mortgages.
- 3) **Exclusion of syndicated mortgages from the Private Issuer Exemption:** The public has the right to rely on Brokers, being experts in their field. If a Broker knows or should know that certain information relates to items not within the Broker’s personal knowledge, he should have the responsibility to ensure he makes best efforts to ensure there are no misrepresentations in the offering but also should alert the public of this risk and possibility of omission.

**In conclusion, the proposed changes are drastic and, in my opinion penalize an entire industry. I invite the OSC to review our processes and files before implementing any changes and to independently assess the extent of the divergence between the few bad apples and the rest of the industry.**

Reply Attention of: Mitchell H. Gropper, Q.C.\*  
Direct Dial Number: (604) 661-9322  
Email Address: mgropper@farris.com

Our File No.: 88888-0001

June 6, 2018

VIA ELECTRONIC MAIL

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

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8  
Fax: 416-593-2318  
[comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

M<sup>e</sup> Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square-Victoria, 22<sup>e</sup> étage  
C.P. 246, tour de la Bourse  
Montréal (Québec) H4Z 1G3  
Fax: 514-864-6381  
[consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

June 6, 2018

- 2 -

**Proposed Amendments to National Instrument 45-106 Prospectus  
Exemptions and National Instrument 31-103 Registration  
Requirements, Exemptions and Ongoing Registrant Obligations  
relating to Syndicated Mortgages and Proposed Changes to Companion  
Policy 45-106CP Prospectus Exemptions (“Proposed Mortgage  
Syndication Amendments”)**

We are making this submission on behalf of several “mortgage syndicators” active in the Province of British Columbia. This submission is primarily directed to the British Columbia Securities Commission.

These mortgage syndicators originate mortgage loans for funding by highly sophisticated investors, all of whom would be “accredited investors” under existing applicable securities laws in Canada or, in some cases, friends, family and business associates.

Our submission will only deal with three of the many changes proposed in the Proposed Mortgage Syndication Amendments, namely:

- The determination of “issuer” for purposes of the regulation of mortgage syndications.
- The removal of the registration exemptions for the distribution of syndicated mortgages.
- The filing of a “report on exempt distribution” for syndicated mortgages.

Firstly, however, we must define our use of the term “mortgage syndication”. The Proposed Mortgage Syndication Amendments define a “syndicated mortgage” as

a mortgage in which two or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by the mortgage

This definition, while intentionally broad, would include:

- Investments in mortgage funds (including “mortgage investment corporations or “MICs”) in which investors invest in “interests” in the fund and the fund makes mortgage loans to several borrowers without allocation of the individual mortgage loans to the separate investors (“Pooled Mortgage Funds”)
- Investment by investors who acquire an undivided (direct or indirect) interest in a specific mortgage (“Specific Mortgage Investments”)

The Proposed Mortgage Syndication Amendments would regulate both Pooled Mortgage Funds and Specific Mortgage Investments in the same manner. However, as there are fundamental differences between the two, separate (but perhaps similar) regulations should apply to each.

Syndicated mortgages are more commonly considered, in the mortgage lending community, as Specific Mortgage Investments. However, it is not the “borrower” who arranges Specific Mortgage Investments but rather a “mortgage broker” who, in British Columbia, is required to be registered, and is regulated

under the *Mortgage Brokers Act* (British Columbia). However, the application of the Proposed Mortgage Syndication Amendments to Specific Mortgage Investments leads to significant changes to the manner in which the syndication of Specific Mortgage Investments would occur.

In this submission, we propose amendments to BC Commission Rule 45-501. The definition of “qualified syndicated mortgage” used in that Rule is appropriate for the definition of Specific Mortgage Investments.

#### **The determination of the “issuer”.**

The Proposed Mortgage Syndication Amendments identify the borrower as the “issuer” and impose new disclosure obligations on the borrower relating to a proposed prescribed form of Offering Memorandum, Appraisal Information and other certification and reporting requirements.

In practice, the person who “arranges” the Specific Syndicated Mortgage is the mortgage broker, and not the borrower. In practice, unlike the issue of other forms of securities such as shares or bonds, the corporation or borrower has little involvement in the process. Requiring borrowers to provide the disclosure materials contemplated by The Proposed Mortgage Syndication Amendments would add additional burdens to borrowers, many of whom may lack the sophistication and resources to provide this information.

We propose that, in the case of Specific Mortgage Investments, or “qualified syndicated mortgages” the “issuer” be the mortgage broker who distributes the interests in the mortgage.

#### **The removal of the registration exemptions for the distribution of syndicated mortgages.**

The Proposed Mortgage Syndication Amendments would remove the prospectus and registration exemptions for the distribution of syndicated mortgages. However, as indicated above, most investors in syndicated mortgages are “accredited investors”, syndicators of mortgages could continue to rely upon the accredited investor exemption for exemption from the prospectus requirements.<sup>1</sup>

The most troubling, and potentially market disruptive, part of the proposed removal of the registration exemption for the distribution of syndicated mortgages is the requirement that these “investments” be distributed by “exempt market dealers or “EMDs” or other persons registered under securities laws for trading in securities.

Currently, British Columbia provides a registration exemption for “mortgage investment entities” under BC Instrument 32-517. This instrument was first introduced in 2010 but is to expire on December 31, 2018. There has been no announcement from the British Columbia Securities Commission about a further renewal of this instrument.

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<sup>1</sup> The commentary to the Proposed Mortgage Syndication Amendments recognize that “syndicated mortgages will most likely be offered...under the accredited investor exemption....”

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The commentary to the Proposed Mortgage Syndication Amendments states:

For firms that are currently in the business of trading in syndicated mortgages and are licensed under mortgage broker legislation, the transition to registration as an exempt market dealer could potentially involve significant costs.

We consider that the costs associated with the Proposed Amendments and the Proposed Changes are proportionate to the benefits of increased investor protection.

The first paragraph quoted above is correct. The second paragraph quoted above provides a conclusion with respect to benefits of increased investor protection without any factual matrix and is wrong.

Firstly, mortgage syndicators are required to be registered, and are regulated, in British Columbia, under the *Mortgage Brokers Act*. Registration as a mortgage broker requires specific industry educational qualifications (including on-going continuing education, licencing renewal and criminal record verification).

Secondly, proficiency requirements, including completing the Canadian Securities Course exam, the Exempt Market Products exam or the U.S. American Series 7 exam and the New Entrants Course exam as well as the in most instances the Canadian Partners, Directors and Senior Officers exam, bear no relationship to the mortgage syndication business. There is no need to know about derivative trading, corporate financial analysis, debt analysis, trading requirements and similar educational requirements when originating mortgage loans. Mortgage lending requires knowledge in real estate markets, mortgage lending laws, appraisal and other real estate underwriting criteria, and similar knowledge. Having a mortgage syndicator licensed as an EMD adds an unnecessary layer or regulatory compliance to the mortgage lending business, without added benefits for participants in mortgage syndications transactions.

Thirdly, requiring syndicated mortgages to be offered by a dealer in securities, including an EMD would add a layer of additional fees and costs, as well as delay in the mortgage origination process. Mortgage syndicators generally charge borrowers fees of between 1% and 3%. EMDs generally charge fees between 3% and 5%<sup>2</sup>. Adding these additional levels of fees will only serve to increase, substantially, the costs of borrowing to the borrower without any additional investor protection being obtained.

Syndicated mortgages are usually “syndicated” quickly. Adding the requirement that these mortgages be distributed solely by persons registered as dealers in securities, including EMDs would slow the origination process (or lead to a termination of the prospective transaction), again without any increase in investor protection.

Fourthly, registered dealers in securities are required to observe “know your client” (“KYC”) rules. There is no need for these rules to be extended to sophisticated investors in syndicated

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<sup>2</sup> We have been informed that some EMDs have suggested fees in the 6% to 10% range, which would make the costs of syndicated mortgages prohibitively expensive, and effectively, eliminate this market.

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mortgages. Again, the increased costs greatly outweigh any commensurate increase in investor protection.

Mortgage syndicators, who are now registered as mortgage brokers, could be registered as exempt market dealers. However, under existing requirements, registration as an exempt market dealer is subject to a number of requirements, including appointment of compliance officers, book and record-keeping standards, capital and insurance requirements, and financial reporting requirements. The exempt market dealer is required to designate and register an ultimate designated person (who must be the chief executive officer) and a chief compliance officer who meets the proficiency requirements referenced above. And persons acting as dealers or soliciting trades for the entity are required to register as dealing representatives.

All of these registrants must meet proficiency requirements, including completing the Canadian Securities Course exam, the Exempt Market Products exam or the U.S. American Series 7 exam and the New Entrants Course exam.

The exempt market dealer entity is required to demonstrate and maintain sufficient working capital of at least \$50,000 and maintain bonding or insurance. Ninety days after the end of its financial year, the exempt market dealer must deliver to its principal regulator audited annual financial statements (comprised of an income statement, balance sheet and notes) prepared on an unconsolidated basis.

None of these requirements bear any relationship or is relevant to the distribution of syndicated mortgages. Imposing these requirements on “mortgage brokers” would add, substantially, to the costs and complexities of the operations of a mortgage broker, without, in our view, increased investor protection over the investor protections existing through the mortgage broker registration system and disclosure requirements.

### **Proposed Amendment to The Proposed Mortgage Syndication Amendments for Specific Mortgage Investments.**

We proposed that The Proposed Mortgage Syndication Amendments be amended to provide for a registration exemption for Specific Mortgage Investments in which only accredited investors and “friends, family and business associates” participate. The existing requirements of NI-45-106 for accredited investors, coupled with the requirement that the originators of Specific Mortgage Investments be registered and regulated under mortgage broker legislation or other regulations specifically directed at the origination of mortgages would, in our view, provide an adequate and improved level of investor protection without unnecessary increases in costs or duplication of regulatory burdens

Our recommendations are as follows (as alternatives) and in” order of our preferred recommendations are as follows:

1. Renew and Amend B.C. Instrument 32-517

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This Instrument provides an exemption to the dealer registration requirement for mortgage syndications. It has been in effect since 2010 and has been renewed on annual and as semi-annual basis. The instrument permits syndicated mortgages to be distributed in reliance on that Instrument, including obtaining a risk acknowledgement from the purchaser.

It is noted that the conditions to the exemption does not require the person who trades in the security to be registered under the *Mortgage Brokers Act* (British Columbia), nor limit the exemption to purchasers of syndicated mortgages who are accredited investors or “family friends and business associates. We propose that BC Instrument 32-517 be adopted as a permanent rule (and as by members of the CSA as a National Instrument) with the following amendments:

- the “person” be registered as a “mortgage broker” under the *Mortgage Brokers Act* (British Columbia);<sup>3</sup> and
  - the purchaser be an accredited investor or a “friend, family or business associate.
2. Amend B.C. Rule 45-501 as proposed in the mark-up attached to this letter

We are informed that B.C. Rule 45-501 has limited application and that it is never (or rarely) used.

Our suggested amendment would:

- amend the definition of “institutional investor” to include “accredited investor” and “friends, family and business associates”; as the currently defined “instructional investors” are all “accredited investors,” the list of persons who are included in “institutional investor” can be deleted;
- amend the definition of “qualified syndicated mortgage” to remove the limitation of the exemption to four residential properties and the prohibition against construction or development financing;
- delete sections 3 and 4 so that the Rule is only applicable to qualified syndicated mortgages; and
- incorporate by reference the provisions of NI 45-106 relating to “accredited investors”.

In addition, in view of our comments below regarding “reports of exempt distributions, change this requirement to a report that is tailored to the mortgage market.

This amendment would limit its application to distributions of “qualified syndicated mortgages” to accredited investors and friends, family and business associates and is consistent with the policy inherent in the exemptions in National Instrument 45-106. The proposed amendments would also

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<sup>3</sup> This additional requirement may already exist as the *Mortgage Brokers Act* (British Columbia) requires persons who “deal” in mortgages to be registered under and comply with the requirements of this legislation.

continue the registration exemption, without the need for Instrument 32-517 (which need not be renewed) and require qualified syndicated mortgages to be distributed by mortgage brokers.

3. Create a new “dealer” registration as “mortgage broker”

The distribution of syndicated mortgages is unique and different from the distribution of stock, bonds, mutual funds and other forms of investment products currently regulated under the securities laws.

If it is the intention of the CSA to bring the regulation of syndicated mortgages under the regime of the securities laws, then a new category of “dealer registration” should be created. This would be a “mortgage broker” or “dealer in syndicated mortgages”. We do not think it necessary to change the current registration and regulation under the Mortgage Brokers Act. However, if the regulation of mortgage brokers is to be brought within the ambit of securities regulation, we recommend that the registration and reporting and oversight requirements be the same as those now required under the *Mortgage Brokers Act*. The change would eliminate the proposal, in the Proposed Mortgage Syndication Amendments, that syndicated mortgages be distributed by EMDs or others registered for trading in securities and adopt a well-known and effective regulatory regime for those distributing syndicated mortgages.

**The Filing of Reports of Exempt Distribution.**

The Proposed Mortgage Syndication Amendments would require persons who distribute syndicated mortgages to file reports of exempt distribution and pay the requisite fees. This is accomplished by the removal of the “private issuer exemption” for syndicated mortgages.

In the Proposed Mortgage Syndication Amendments, the CSA states that the reasons for “removing the private issue exemption for syndicated mortgages would result in more consistent reporting for syndicated mortgage distributions.... The additional reporting would provide us with more information about this market, enabling us to develop more targeted compliance and investor education programs related to syndicated mortgages.”

In our view, the existing reporting requirements for exempt distributions are not tailored to providing further information regarding the market for syndicated mortgages and require additional fees and costs to those involved in the distribution of syndicated mortgages.

While the fee of 0.03% of the dollar value may not appear to be material, when applied to the mortgage market, the fee may be material. Many syndicated mortgages are for terms of less than a year. Assume a \$10 million mortgage with a four-month term. The fee would be \$3,000. But on an annualized basis the fee would be \$9,000 or almost 0.1% of the annualized cost of borrowing. Since the pricing of interest rates on syndicated mortgages is competitive, the additional cost relating to the filing of the reports of exempt distribution would result in increased costs to borrowers.

This is unlike other forms of securities which generally have indefinite terms (stocks) or terms longer than four months or even one year (debt).

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Form 45-106F1 Report of Exempt Distribution is designed for “traditional” forms of securities and, while it could be used to report distributions of syndicated mortgages, the only “market information” that is being provided is the amount of the mortgage and the fees paid to the “mortgage broker”.

It should be noted that the “fees” or “commissions” paid to mortgage brokers may be regarded as sensitive competitive information that is not, today, publicly disclosed. Making this information public could have significant repercussions on the competitive position of persons who distribute syndicated mortgages.

We proposed that if the purpose of requiring reports of exempt distributions for syndicated mortgages is to provide the securities regulators with further information, a form specific to the mortgage lending business be created. Fees should be adjusted so that they reflect, at least, not more than an equivalent annual per cent. And the filings should be confidential.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: “*M. Gropper*”

Mitchell H. Gropper, Q.C.\*

MHG/awm

\*On behalf of a Law Corporation/awm

**COMMISSION RULE 45-501 (BC)**  
**MORTGAGES -PROPOSED AMENDMENT**

(including amendments proposed in the CSA proposed amendments relating to syndicated mortgages)

Definitions

1. In this rule:

“institutional investor” means

- (a) an accredited investor,
- (b) a person to whom Section 2.5(1) of National Instrument 45-106 is applicable (*friend, family or business associate*),
- (c) a mortgage broker acting as principal, or
- (d) such other person as may be designated by order of the commission; “mortgage broker” means a person who is registered under the *Mortgage Brokers Act*;

“qualified syndicated mortgage” means a syndicated mortgage if

- (a) the syndicated mortgage is not contained in or secured by a bond, debenture or similar obligation or in a trust deed or other instrument to secure bonds or debentures or similar obligations,
- (b) the syndicated mortgage is sold through a mortgage broker,
- (c) the syndicated mortgage secures a debt obligation on real property,
- (d) at the time that debt secured by the syndicated mortgage is incurred, the amount of the debt secured by the syndicated mortgage, together with all other debt secured by mortgages on the property that have priority over, or the same priority as, the syndicated mortgage, does not exceed 90 percent of the fair market value of the property, excluding any value that may be attributed to proposed or pending development on the property,
- (e) the syndicated mortgage is limited to one identified debt obligation,
- (f) the rate of interest payable under the syndicated mortgage is equal to the rate of interest payable under the identified debt obligation,
- (g) any amount charged for the administration of the syndicated mortgage is disclosed to the purchaser, and
- (h) the term of the syndicated mortgage is not different from the term of the identified debt obligation;

“syndicated mortgage” means a mortgage in which two or more persons participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage.

#### Interpretation

2. Unless otherwise defined in this rule, a term used in this rule that is defined or interpreted in the *Securities Act*, the Securities Rules or National Instrument 45-106 or National Instrument 14-101 Definitions has the meaning set out in the *Securities Act*, Securities Rules or National Instruments, respectively.

#### Syndicated mortgages-registration not required for trades to institutional investors

3. Dealer Registration
  - 3.1 The dealer registration requirement does not apply to a trade in a qualified syndicated mortgage to an institutional investor if, before the agreement of purchase and sale is entered into, the purchaser is provided with the form of investor disclosure required by the *Mortgage Brokers Act*.
  - 3.2 The prospectus requirement does not apply to a distribution of a qualified syndicated mortgage to an institutional investor if, before the agreement of purchase and sale is entered into, the purchaser is provided with the form of investor disclosure required by the *Mortgage Brokers Act*.
  - 3.3 An issuer that distributes a syndicated mortgage under section 5.2 must, no later than 10 days after the distribution, file a report in Form 45-106F1 Report of Exempt Distribution.
4. Incorporation of Certain Provisions of National Instrument 45-106

The provisions of Sections 2.3 and 2.5 of National Instruments 45-106 are incorporated into this Instrument as if set out in full in this Instrument.

#### Effective Date

5. This rule comes into force on ♦.

Amended ♦

**COMMISSION RULE 45-501 (BC)****MORTGAGES ~~PROPOSED AMENDMENT~~ (including amendments proposed in the CSA ~~proposed amendments relating to syndicated mortgages~~)**Definitions

## 1. In this rule:

“institutional investor” means

- ~~(a) a government of Canada or any province of Canada or a crown corporation or agency of a Canadian federal or provincial government,~~
- ~~(b) a municipal corporation, public board or commission in Canada,~~
- ~~(c) a savings institution,~~
- ~~(d) a cooperative credit society as defined in the Cooperative Credit Associations Act (Canada) or a savings and credit union, federation or confederation as defined in the Savings and Credit Unions Act (Quebec),~~
- ~~(e) the Business Development Bank of Canada,~~
- ~~(f) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a provincial pension supervisory authority,~~
- (a) ~~(g)~~ an insurance company, accredited investor,
- (b) ~~(h)~~ a trust company or insurer authorized under the laws of Canada or the laws of a province other than British Columbia to carry on business in Canada or that province, person to whom Section 2.5(1) of National Instrument 45-106 is applicable (friend, family or business associate),
- (c) ~~(i)~~ a mortgage broker acting as principal, or
- ~~(j) a person registered under the Securities Act or the securities legislation of another province as an investment dealer or equivalent, acting as principal or as an agent or trustee for accounts that are fully managed by it,~~
- ~~(k) a person registered under the Securities Act or the securities legislation of another province as a portfolio manager or equivalent, acting as principal or as an agent or trustee for accounts that are fully managed by it,~~
- ~~(l) a mutual fund or non-redeemable investment fund, if the investment portfolio of the fund is managed by a person that is registered under the~~

~~Securities Act or the securities legislation of another province as a portfolio manager or equivalent, or~~

- (d) ~~(m)~~ such other person as may be designated by order of the commission; “mortgage broker” means a person who is registered under the Mortgage Brokers Act;

“qualified syndicated mortgage” means a syndicated mortgage if

- (a) the syndicated mortgage is not contained in or secured by a bond, debenture or similar obligation or in a trust deed or other instrument to secure bonds or debentures or similar obligations,
- (b) the syndicated mortgage is sold through a mortgage broker,
- (c) the syndicated mortgage secures a debt obligation on ~~property used solely for residential purposes and containing no more than four residential dwelling units,~~
- ~~(d) the syndicated mortgage does not secure a debt obligation incurred for the construction or development of real~~ property,
- (d) ~~(e)~~ at the time ~~of issue~~ that debt secured by the syndicated mortgage is incurred, the amount of the debt secured by the syndicated mortgage, together with all other debt secured by mortgages on the property that have priority over, or the same priority as, the syndicated mortgage, does not exceed 90 percent of the fair market value of the property, excluding any value that may be attributed to proposed or pending development on the property,
- (e) ~~(f)~~ the syndicated mortgage is limited to one identified debt obligation,
- (f) ~~(g)~~ the rate of interest payable under the syndicated mortgage is equal to the rate of interest payable under the identified debt obligation,
- (g) ~~(h)~~ any amount charged for the administration of the syndicated mortgage is disclosed to the purchaser, and
- (h) the term of the syndicated mortgage is not different from the term of the identified debt obligation;

“syndicated mortgage” means a mortgage in which two or more persons participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage.

### Interpretation

2. Unless otherwise defined in this rule, a term used in this rule that is defined or interpreted in the Securities Act, the Securities Rules or National Instrument ~~45-106 or National Instrument 14-101~~ Definitions has the meaning set out in the Securities Act, Securities Rules or National ~~Instrument~~Instruments, respectively.

3. Dealer Registration and Property Requirements

- 3.1 ~~3. Despite section 8.12 (3) of National Instrument 31-103 Registration Requirements and Exemptions, the~~The dealer registration requirement does not apply ~~in respect of~~to a trade in a qualified syndicated mortgage ~~made to~~ an institutional investor if, before the agreement of purchase and sale is entered into, the purchaser is provided with the form of investor disclosure required by the Mortgage Brokers Act.

Syndicated mortgages — prospectus not required for distributions to institutional investors

- 3.2 ~~4. Despite section 2.36 (3) of National Instrument 45-106 Prospectus and Registration Exemptions, the~~The prospectus requirement does not apply ~~in respect of~~to a distribution of a qualified syndicated mortgage to an institutional investor if, before the agreement of purchase and sale is entered into, the purchaser is provided with the form of investor disclosure required by the Mortgage Brokers Act.

Exemption from registration and prospectus requirements

- ~~5. Sections 34 and 61 of the Securities Act do not apply to a trade in a qualified syndicated mortgage if, before the agreement of purchase and sale is entered into, the purchaser is provided with the form of investor disclosure required by the Mortgage Brokers Act.~~

- 3.3 An issuer that distributes a syndicated mortgage under section 3.2 must, no later than 10 days after the distribution, file a report in Form 45-106F1 Report of Exempt Distribution.

4. Incorporation of Certain Provisions of National Instrument 45-106

The provisions of Sections 2.3 and 2.5 of National Instruments 45-106 are incorporated into this Instrument as if set out in full in this Instrument.

Effective Date

5. ~~6.~~ This rule comes into force on ~~September 1, 2000.~~ ~~◆.~~

Amended ~~September 28, 200~~

May 30, 2018

### **Request for Comments Response Regarding OSC & Syndicated Mortgages:**

The proposed amendments to National Instrument 45-106 Prospective Exemptions and National Instrument 31-103 Registration Requirements and Ongoing Registration Obligations relating to “Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus exemptions fail to define the various types of syndicated mortgages and thereby needlessly and harmfully target and disrupt mortgage syndications, mortgage investors and mortgage companies, brokers and agents.

A mortgage syndication is any mortgage that is being funded by more than a single investor. The OSC imputes “risk” into mortgage terminology by its generic use of the term “Syndicated Mortgage”. The OSC proposed amendments are being established in response to the activities of very few companies such as the failed Tier One and Fortress Developments and related Fortress entities. These companies and very few others like them were able to dupe the public and the regulators by the simple action of registering a collateral charge on title (a mortgage) to appear to secure its investor’s investments and then attach the word mortgage to them for belt and suspenders. These investments were misrepresented to investors, many of which were unsophisticated who did not receive proper ILA, suitability investigation, or other required diligence. The investments themselves were in fact not mortgages but loosely secured equity investments disguised as mortgages.

Most every type of mortgage investment outside of the likes of Fortress and Tier One products are subject to an equity test based on current value and in the case of a development property, both the AS IS appraised value and AS Completed value. Properly structured development and construction projects are funded on a “cost to complete basis” so that there is always enough funding in place to start and complete a project inclusive of contingencies. The Fortress and Tier One products did not employ these necessary tests for quality, substance and preservation of capital. Their products which you term “Syndicated Mortgages” were used to fund “Soft Costs” and since the Borrower typically had little to no real equity in the project, these investments in fact represented pure equity.

If you were to analyze the capital stack in any of these failed company programs it becomes evident that each of them is close to being underwater at the time of closing of the initial funding of the investment. Typically, the investor rank is subject to postpone to every type of development financing arranged by Borrower often including but not limited to, a First Mortgage to 75% of Land Value in First Place, A Second Place Vendor Take Back Mortgage to 85% of the value of the land, a third place Bond or charge to secure purchaser deposits that may be drawn upon to reduce the requirement for construction financing, and in Forth place will be City and Regional Development Charges in order for the City or region to insure that the builder/developer complies with terms of the site plan approval and completes necessary works. Then in fifth position comes what you call the “Syndicated Mortgage” with its investors, ranking just above the Borrower whom may have little or no equity in the transaction. Needless to say, that “Syndicated Mortgage” investors represent all of the risk capital without any chance at of principal repayment save and except the successful sell out and completion of the project. Now you tell me please ..... is this syndicated equity or is this a mortgage?

The answer is clear that this is not a mortgage but rather syndicated equity and yes, the OSC needs to institute changes and amendments **to better recognize, monitor and regulate these highly specific types of investments.**

**The only way to properly implement the proposed amendments is to address the real problem outlined above which requires the OSC and the MOF to define these investments as “Syndicated Equity Investments” and remove them completely from the realm of mortgage brokerage by removing the prospectus exemption and move them alone under OSC registration obligations. There is absolutely no need to change the regulations for any other type of mortgage syndication.**

Let us draw upon a parallel. Just because 2 schedule A banks get together on a loan and they register a collateral charge on title to the real property of a business to secure a business loan does not redefine their loan as a “Syndicated Mortgage”. It remains a secured business loan.

So why are syndicated equity products being defined by the OSC as something they are not? The only mortgage like quality they retain is that they are registered as a charge on title. No different then any other secured loan.

Why not define these products for what they are and carve out legislation to deal with them specifically rather than disrupting an otherwise perfectly healthy industry? The mortgage industry has for over 100 years syndicated residential, commercial, industrial, hospitality and special purpose property mortgages successfully. The mortgage industry is providing an essential service to business people and consumers as an alternative to the Chartered Banks or other institutional lenders in a very competitive environment. There is no need for special regulation beyond the current programs overseen by FSCO save and except “Syndicated Equity” disguised as a mortgage and being defined by the OSC, MOF, FSCO and hence the media as “Syndicated Mortgages” which definition is wrong and imputes risk into terminology. Calling these syndicated equity products Syndicated Mortgages lends them an incredibly broader and safer meaning. Please focus the proposed amendments only on “syndicated equity programs” like Fortress Developments Products, failed Tier One and similar high-risk equity investments as well as those that create and market those products who have skirted securities regulations only by virtue of a valueless mortgage registration.

**It needs to be noted that the proposed amendments in its current form threatens over \$6 billion of private funded syndicated mortgages in Canada.** Many real estate developments could not be built without this funding. In fact, many would never be acquired as typically early stage land acquisition and development requires private funding. Private lending in syndication has for years saved many a homeowner from a temporary set back, funded renovations, helped revitalize whole communities through privately funding regentrification where bank financing is simply unavailable, saved families from foreclosure or power of sale, provided necessary working capital to businesses whose working capital or other ratios have put them offside with their bank and thousands of other examples where there is no need to fix what is not broken. Where a mortgage investment is a true mortgage investment where there is a test for real equity, ability to service debt, credit adjudication at a corporate and personal level, as well as property assessment, there is no need for change.

**The proposed amendments fail to recognize the costs associated with compliance and that additional processes and costs applied particularly where not needed to the mortgage industry will reduce competition resulting in private interest rates rising, fewer deals being consummated, where consumers will bear the brunt of these additional costs. The costs of the proposed amendments hugely outweigh the benefits save and except more laser focused implementation to better control the misuse of mortgage syndication to disguise and market syndicated equity investments.**

Request for Comments

March 8, 2018 (2018), 41 OSCB 1877

Appraisals

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM

Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the

property was acquired recently in an open market transaction with all parties acting at arm's length?

Mortgage broker requirements:

- **Unless a mortgage investor certifies that they consider themselves an expert and/or real estate investor or professional and agree in writing to waive an appraisal, the appraisal is necessary and should be provided and needs to be not older than 6 months and either addressed to the investor (investor group) or a letter of reliance to be provided from the appraisal company to the investor (investor group).**

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be

appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other

participants in the distribution that should be subject to these requirements.

- **Chartered bank representatives are involved with placing true syndicated mortgages for all types of Borrowers and real estate as are lawyers and other previously exempt professionals. They should no longer be exempt to level the playing field.**

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering

memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Exclusion of syndicated mortgages from the Private Issuer Exemption

**First define the type of syndicated mortgage you wish to address? Set standards to relate to your definition. Look at my example of the capital stack to address relative risk of an investment, provide a test to determine if the product is actually a mortgage. For example if a mortgage is over 85% Loan to Appraised Value then it is very high risk and either must be insured by CMHC or other insurer or it should be subject to your proposed amendments. All other mortgages should be left out of the proposal.**

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be

appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide

examples and explain why there are limited investor protection concerns in those circumstances.

- As per my previous examples and discussion, provided investors complete a suitability test as well as provide a KYC form there is no need for the OSC proposed amendments save and except mortgages

on real property in excess of 85% Loan to Value. For development or construction projects this LTV test should be reduced to 80% (of completed value) after which the proposed amendments should be applicable.

**Alternative prospectus exemptions – Should apply to all mortgage investments save and except “Syndicated Equity” and subject to the LTV test noted above.**

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated

mortgages where the investor protection concerns may not be as pronounced?

- **Yes for all mortgages on residential owner occupied homes where current FSCO enforced regulation and processes is doing a great job.**
- **Yes where mortgages on residential and commercial mortgages are less than or equal to lower of 80% loan to appraised value or purchase price.**

6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential

properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission

Rule 45-501 Mortgages?

- **Yes where mortgages on residential and commercial mortgages are less than or equal to lower of 80% loan to appraised value or purchase price.**

7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a

property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to

conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

- **Keep it simple... Yes where mortgages on residential and commercial mortgages are less than or equal to lower of 80% loan to appraised value or purchase price. The size of the loan or property being secured does not matter.**
- **The syndicated mortgage should only be available for distribution by a licensed or exempt entity. Also there needs to be a friends and family exemption here particularly for family property (which might include a property housing a family business) and residential dwellings.**

Sincerely,  
David Mandel  
President

First Source Mortgage Corporation

**Via Email**

June 6, 2018

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

Dear Sirs/Mesdames:

**Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (“Proposed Amendments”)**

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The purpose of this letter is to provide comments on the Proposed Amendments. Specifically, we will comment on:

1. The removal of the prospectus and registration exemptions for the distribution of syndicated mortgages; and
2. The introduction of additional requirements when relying on the OM exemption to distribute syndicated mortgages; and
3. The amendment to the private issuer prospectus exemption so that it is not available for the distribution of syndicated mortgages.



When considering the Proposed Amendments, we are viewing them through the CSA's lens which expresses the dual objectives of:

1. Providing additional investor protections related to syndicated mortgages; and
2. Increasing harmonization regarding the regulatory framework for syndicated mortgages across all CSA jurisdictions.

Further, regarding syndicated mortgages, the CSA has stated that "there has been a significant increase in the offering of syndicated mortgages in connection with **real estate developments** in certain jurisdictions."

The CSA then outlines the specific risks associated with mortgages related to real estate developments, namely that, "these offerings potentially raise investor protection concerns, particularly when sold to retail investors, because they may:

- be used to raise seed financing for real estate developments, such as the costs of initial design proposals and start-up expenses;
- be sold based on projected values of a completed development;
- not be fully secured by a charge against real property, since the amount of the loan may significantly exceed the current fair value of the land;
- be subordinate to future financings, such as construction financing, which may be substantial and effectively render the investment more similar in risk to an equity investment rather than a fixed income investment;
- be offered by issuers with no source of income, rendering the payment of ongoing interest dependent on future financing or reserves from the principal advanced; and
- be subject to the risk of delay and increased costs inherent to real estate development."

The prevailing theme in the risks articulated above is that they are 'equity-like' in nature.

### **Don't throw the baby out with the bathwater**

The CSA correctly identifies key risks associated with large real estate developments and these risks should be addressed. A few bad actors took advantage of investors by registering subordinated mortgage charges against real estate developments that were marketed as debt but really were, in all but name, equity or equity-like. We propose that, instead of removing the prospectus and registration exemptions and broadly impacting the entire alternative mortgage lending sector, the CSA should consider regulating the specific risks associated with real estate development loans. The simplest solution could be to remove the exemption on real estate development loans with loan-to-values in



excess of 85% that are based on legitimate third-party appraisals and on loans that are subordinate to 1<sup>st</sup> and 2<sup>nd</sup> positions.

### **Moral Hazard**

The institutional lending space is highly regulated with a large supply of capital. Conventional borrowers benefit from this competitive lending space where they enjoy relatively low interest rates. People and entities who are not able to borrow conventionally need to turn to the alternative lending markets. These markets fulfil a need by providing a source of capital that the regulated financial institutions are not able to provide. Excess regulation of the alternative lending space threatens to remove capital, thereby increasing borrowing costs. This would be prejudicial to lenders, borrowers and the real estate market at-large.

The CD Howe Institute [published a paper](#) that studied the impact of regulation on housing prices and found that regulatory burdens have increased the cost of housing by an average of \$229,000 per home. We would like to suggest that removing the prospectus and registration exemptions would further exacerbate the problem because fewer lenders will participate which will drive up borrowing costs. This is of particular concern at a time when the B-20 rule changes will inevitably prevent an estimated 15% of borrowers from renewing their loans at the prior conventional rates that they were able to obtain before the B-20 changes.

Between the B-20 changes, taxing foreign investment in real estate, high consumer debt levels and increasing interest rates there are many potential pitfalls in Canadian real estate. Further increasing the borrowing costs for Canadian homeowners threatens to push people over the edge of affordability and we urge the CSA to consider the potential cost to the public when performing the cost benefit analysis.

### **Exempt Market Reports and Compliance Costs**

Foremost is regulated as an Exempt Market Dealer in Ontario and it is our estimate that the incremental cost of being a CSA regulated entity is at least \$100,000 to \$200,000 per year. In addition, if you consider the fees when filing exempt market reports, the costs become prohibitively expensive. Not all syndicated funding is raised in one tranche which implies multiple \$500 exempt market report filing fees. These costs will make smaller mortgage syndications economically unviable and will likely push smaller mortgage syndicators out of the market. There would also be an increased possibility that the additional cost burden eliminates syndication of all mortgages other than on large development deals. While this may be the extreme case we believe with certainty that, in the very least, increased regulatory costs will drastically decrease the number of syndicated mortgages available. This will make it



more difficult for investors to create diversified portfolios and will make it harder for borrowers to obtain loans when their mortgages mature.

### **Suggestions for CSA's consideration**

Perhaps the simplest solution could be to remove the exemption on real estate development loans with loan-to-values in excess of 85% that are based on legitimate third-party appraisals and on loans that are subordinate to 1<sup>st</sup> and 2<sup>nd</sup> positions.

In the event that the prospectus and registration exemptions for all syndicated mortgages are eliminated, we strongly urge the CSA to mitigate some of the damage to the industry by exempting syndicated mortgages from the \$500 exempt market filing fee. If an exemption from the filing fee is not possible please consider allowing reports to be filed for syndicated mortgages distributed over a 1-month period, as opposed to a 10 day period to make the fee burden less onerous. We also ask that you consider that in instances where the borrower assigns the obligation to file the reports to an EMD, that the EMD should be viewed as the issuer and should have the ability to file a report that includes all syndicated mortgage sales for the period in question on one report.

To illustrate the risk of imposing \$500 filing fees take a \$200,000 mortgage loan as an example. A lender would likely earn between \$2,000 to \$4,000 in fees on a loan of this nature. Having to file an exempt market report and pay \$500 each time a syndicated investor participates could amount to consuming the entire revenue with regulatory filing fees which is punitive and likely not within the spirit and intent of what the Proposed Changes are trying to achieve.

Alternatively, a simpler approach may be to allow the Private Issuer Exemption to be used on syndicated mortgages. This would mitigate the excessive fee burden associated with CSA regulation (including the exempt report filing fees) while still capturing the risks associated with large real estate developments. Loans on larger real estate development deals would most likely need to be syndicated to more than 50 investors so the Private Issuer Exemption would not apply. This, in conjunction with incorporating our suggestions of focusing regulation on loans greater than 85% LTV or being in 3<sup>rd</sup> position or worse, would be an elegant way of increasing investor protection while not snuffing out the syndication of smaller, less risky loans.



## **Responses to your questions**

### *Appraisals*

1. *As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?*

**Response:** This is not relevant to our type of lending which includes smaller loans. Offering Memorandums are so expensive that it is a certainty they would never be used when syndicating our loans. For larger real estate development loans it is possible that an OM would be used and, yes, in that circumstances an appraisal should be required even if there was a recent open market transaction at arm's length. There is always the possibility that the purchaser overpaid for the asset.

### *Mortgage broker requirements*

2. *Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.*

**Response:** No comment

3. *Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?*

**Response:** No comment

### *Exclusion of syndicated mortgages from the Private Issuer Exemption*

4. *Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.*

**Response:** Allowing the Private Issuer Exemption to be used on syndicated mortgages would mitigate the excessive fee burden associated with CSA regulation (including the exempt report filing fees). Since large real estate developments, and their increased inherent risks and larger loans sizes, would most likely need to be syndicated to more than 50 investors, the Private Issuer Exemption would not apply. This, in conjunction with incorporating our suggestions of focusing regulation on loans greater than 85% LTV or being in 3<sup>rd</sup> or worse position, would be an elegant way of increasing investor protection while not snuffing out the syndication of smaller, less risky loans.



### *Alternative prospectus exemptions*

5. *Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?*

**Response:** Yes. For all loans less than 85% LTV that are in 1<sup>st</sup> or 2<sup>nd</sup> position.

6. *Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 Mortgages?*

**Response:** No comment

7. *Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?*

**Response:** Trying to create specific exemptions such as the one listed above, in order to attempt to mitigate unintended consequences, will be difficult and could create significant regulatory confusion.

### **Closing Remarks**

To summarize our feedback:

1. On the removal of the prospectus and registration exemptions for the distribution of syndicated mortgages – **We agree with removal of the exemptions on loans greater than 85% LTV or not in 1<sup>st</sup> or 2<sup>nd</sup> position.**
2. The introduction of additional requirements when relying on the OM exemption to distribute syndicated mortgages – **It is prudent to require appraisals**
3. On the amendment to the private issuer prospectus exemption so that it is not available for the distribution of syndicated mortgages – **We do not agree that this is optimal.**

When weighing the costs and benefits of the Proposed Changes please also include the potential for a significant adverse impact on borrowers who will not be able to get financing in an already tightening credit environment. If you do go ahead with the Proposed Changes please consider all possible cost mitigators to defray the increased regulatory cost.

Thank you for the opportunity to provide feedback on the Proposed Amendments. We hope you find our feedback constructive.



Please do not hesitate to contact Ricky Dogon, Chief Compliance Officer for Foremost Financial, at [ricky@foremost-financial.com](mailto:ricky@foremost-financial.com) or 416-488-5300 ext. 269.

Sincerely,

Evan Cooperman  
CEO, UDP, Foremost Financial Corporation

Ricky Dogon  
CCO, Foremost Financial Corporation

June 6, 2018

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

Dear Sirs/Mesdames:

**Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (the “Proposed Amendments”)**

We have been requested by a number of our clients who are involved in mortgage syndications in British Columbia to comment on the Proposed Amendments published by the Canadian Securities Administrators (the “CSA”), which we are pleased to do.

### **General Comments**

For over 45 years, our law firm and its predecessor have represented financial institutions in British Columbia on, among other matters, commercial and residential mortgage loans. Due to the increase in the size of many mortgage loans over the last 20 or so years, an increasing percentage of the large commercial mortgage loans have been syndicated among two or multiple financial institutions, each contributing a portion of the total mortgage loan.

Over the last 25 years, our firm has also represented an increasing number of private lenders granting residential and commercial mortgage loans, each of which are funded by a syndication of the lender and a number of corporate and personal investors. Each of the investors contributes a portion of the total mortgage loan.

It is clear that there is a demand by borrowers for these private syndicated loans. This appears to be due to: (i) a general increase in borrowing activity; (ii) provincial, national and global financial institutions bumping against internal and external rules and regulations imposing same name borrower limits and aggregate industry limits; and (iii) new governmental cash flow stress tests. In many instances, private

lenders are able to process and approve loan applications more quickly than normal loan processing times at financial institutions.

A credit analysis performed by our private lender clients for their residential, project and development loans have demonstrated very insignificant loan losses, which they estimate to be less than 0.5% of their loan portfolios.

What we are seeing with our private syndicate lender clients is the circulation of a summary of the terms of the loan and a detailed description of the property to be mortgaged as security for the loan, including a summary of the current appraisal of the property. Accordingly, for each loan transaction, each investor is making his, her or its own assessment of the merits of the investment. Our observations are that the investors are, or soon become, very experienced in analyzing the material provided to them in each summary.

An investment in one of these syndicated loans is not a situation in which an investor is transferring money to a security issuer who has broad discretion as to how the invested funds are to be applied, nor are these contributions to a mortgage fund, from which proceeds are to be lent out by the issuer pursuant to stated criteria. These are “one-off” investments made by sophisticated, high net worth investors who are fully capable of assessing the merits of an investment.

Generally speaking, we see no need for a registered dealer to be employed by the private mortgage lender to provide adequate investor protection or to ensure funds are used in accordance with these criteria. Should regulators deem further investor protection necessary, we submit that issuances to accredited investors remain exempt from the prospectus and dealer registration requirements.

Turning more specifically to the National Instrument, we comment as follows:

### **Dealer Registration Requirements**

Section 8.12 of National Instrument 31-103 “*Registration Requirements, Exemptions and Ongoing Registrant Obligations*” currently provides a dealer registration exemption in respect of trades in mortgages on real property in certain jurisdictions of Canada, primarily Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and the Yukon (the “**NI 31-103 Exemption**”).

In British Columbia, BC Instrument 32-517 “*Exemption from Dealer Registration Requirement for Trades in Securities of Mortgage Investment Entities*” provides a dealer registration exemption for trades in “mortgage investment entities” (the “**BCI 32-517 Exemption**”). We understand that BCI 32-517 is regularly relied upon in British Columbia in connection with syndicated mortgage transactions.

Both the NI 31-103 Exemption and BCI 32-517 Exemption provide lenders with a necessary carve-out from the dealer registration requirements to enable our clients to provide lending services at a cost-efficient rate. While we acknowledge the rationale for creating a harmonized regulatory regime across Canada, the elimination of the NI 31-103 Exemption, coupled with the potential expiry of the BCI 32-517 Exemption, will significantly increase the cost of lending and create unnecessary complexities in the syndicated mortgage industry. Often, syndicated lending deals are required to be completed in short time frames. The requirement to involve a registered dealer in the lending process will invariably increase the transaction time to permit the registered dealer to conduct its necessary due diligence and suitability reviews. In addition, the syndicated mortgage business operates in a particular niche such that there is no room for the introduction of additional third-party fees for registered dealers (fees that are significantly higher than those typically charged by the lenders). Accordingly, the economic and commercial impact of such changes may ultimately lead to the demise of the syndicated mortgage business.

We do not believe that the involvement of a registered dealer is necessary or appropriate for a syndicated mortgage transaction. Participants in a syndicated mortgage transaction are typically high net worth investors that are acting as “co-lenders” using customary mortgage documentation. This is distinguishable from an investor purchasing a typical security such as stock. Given the fundamental nature of syndicated mortgage transactions, the proficiency requirements of a dealer representative do not provide the representative with the adequate tools to assess and evaluate a given syndicated mortgage transaction. A licensed mortgage broker, however, is more aptly equipped to consider the merits of a particular syndicated mortgage transaction.

In light of the foregoing, we submit that any proposed amendments to the NI 31-103 Exemption should be replaced with a separate dealer registration exemption, similar to that of the BCI 32-517 Exemption. Alternatively, the BCI 32-517 Exemption should be made permanent.

### **Private Issuer Exemption**

In connection with the Proposed Amendments to section 2.4 (the “**Private Issuer Exemption**”) of National Instrument 45-106 “*Prospectus Exemptions*”, we do not support any amendment that would make the exemption unavailable for the distribution of syndicated mortgages. In our view, the Private Issuer Exemption should continue to be available in relation to distributions of syndicated mortgages in the same way it is for other types of securities.

Although we understand the desire of the regulators to have access to additional information provided in a report of exemption distribution, this information can be provided through means other than the removal of the availability of the Private Issuer Exemption. As an alternative to filing a report of exemption distribution, the lenders could provide certain information in the form of a streamlined report designed specifically for syndicated mortgage transactions. Such a report could be limited to collecting the information viewed relevant and necessary by the regulators for these types of transactions rather than the information required in Form 45-106F1 Report of Exempt Distribution. By implementing a streamlined form of report, regulators could obtain the desired information without imposing a significant and unnecessary administrative burden and cost on syndicators, borrowers and co-lenders.

### **Alternative Prospectus and Registration Exemption**

*“Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?”*

In response to the CSA’s aforementioned question, we are of the view that both registration **and** prospectus exemptions should be made available for syndicated mortgage transactions, particularly those involving distributions to high net worth investors. These high net worth investors participating in syndicated mortgage transactions are not typical investors, but rather experienced and sophisticated participants in lending transactions that have the necessary skill set, or have access to professionals with the necessary skill set, to evaluate the merits of the syndicated mortgage transaction. Accordingly, these high net worth investors do not need nor require the same investor protections afforded to a typical investor in stock.

In connection with the Proposed Amendments, our clients have serious concerns regarding the impact such changes will have on the syndicated mortgage industry and the viability of the industry on a going-forward basis if such Proposed Amendments come into effect.

PLEASE DO NOT HESITATE TO CONTACT MICHAEL KALEF (604-891-3700 OR MMK@KKBL.COM) OR BERNARD POZNANSKI (604-891-3606 OR BP@KKBL.COM) SHOULD YOU HAVE ANY QUESTIONS ON THE FOREGOING OR REQUIRE FURTHER INFORMATION.

Yours truly,

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**Via Email**

June 6, 2018

Alberta Securities Commission  
 Autorité des marchés financiers  
 British Columbia Securities Commission  
 Financial and Consumer Affairs Authority of Saskatchewan  
 Financial and Consumer Services Commission (New Brunswick)  
 Manitoba Securities Commission  
 Nova Scotia Securities Commission  
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Dear Sirs/Mesdames:

Re: **Submissions and comments with respect to proposed amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages (the “Proposed Amendments”) and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (the “Proposed Changes”)**

This letter is in response to the request for comments by the Canadian Administrators (the “CSA”) with respect to the Proposed Amendments and the Proposed Changes.

## 1. Introduction

Lanyard Financial Corporation (“Lanyard”), a registered mortgage broker in B.C., is in the business of conducting a mortgage brokerage business (as that term is defined under the Mortgage Brokers Act B.C.)<sup>1</sup> in relation to, *inter alia*, Syndicated Mortgages (hereinafter defined). The activity of mortgage brokers in relation to Syndicated Mortgages is simply the long established business of mortgage brokerage (but in relation to more than one lender) and we believe the imposition of EMD requirements concerning classic mortgage brokerage activities will have unintended consequences that will be prejudicial to the entire mortgage brokerage community, borrowers (including the majority of real estate developers who are heavily reliant upon non-bank financing) and lenders in the Province. Furthermore, we can see no logical reason to treat Syndicated Mortgages (which are merely mortgages involving more than one lender) any differently than a mortgage with only one lender. Mortgages are interests in land which require regulatory oversight that is different from that oversight which is appropriate for the conventional securities industry. We believe that the Province of British Columbia, with joint regulatory oversight between the BCSC and FICOM, with extensive disclosure and investor warning requirements: [Form 9](#), [Form 10](#) and [BCI 32-517 Warning](#) (see Schedule “A”), and with sophisticated educational and trust account audit requirements, already has a robust and tailored-made regulatory oversight regime governing Syndicated Mortgages. It would be wrong for British Columbia to abandon such a regime, which has functioned extraordinarily well for a protracted period of years, and adopt a new, unproven regime to remedy perceived regulatory gaps in other jurisdictions that intuitively, and logically, is totally inappropriate for its intended purpose.

It is worth noting at the outset that your Request for Comments references a significant increase in the offering of Syndicated Mortgages in connection with real estate developments in certain jurisdictions and the CSA’s view that such offerings may raise certain potential investor protection concerns. While not stated explicitly, the implication is that the Proposed Amendments are intended to address these potential concerns. Leaving aside whether we agree with these concerns, we urge the regulators not to take a “one size fits all” approach to address the identified concerns and instead to consider changes appropriate to address the specific concerns and issues identified.

## 2. The Problem - No Adequate Definition of “Syndicated Mortgage”; How to Discuss Proposed Regulatory Oversight for Commercial Transactions that are Not Adequately Defined or Understood?

The Securities Act (B.C.) currently defines a syndicated mortgage as: “...*a mortgage in which two or more persons or companies participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage.*” We believe one of the chief reasons regulators (erroneously, we maintain) are proposing EMD requirements in relation to the issuance of syndicated mortgages arises from, firstly, confusion surrounding the definition of the term “syndicated mortgage” and, secondly, a lack of appreciation for how the Syndicated Mortgage business is conducted.

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<sup>1</sup> “mortgage broker” means a person who does any of the following: (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker’s own or that of another person;”

A fair interpretation of the definition “syndicated mortgage” allows for at least two distinctly different interpretations, each deserving of *very* differing regulatory oversight. One could conclude the term “syndicated mortgage” means:

Example 1

- i. a group of lenders (hence, “lending syndicate”) agreeing to lend on a single mortgage loan transaction,

whereas another might assume the term means:

Example 2

- ii. a mortgage or pool of mortgages that is in place (or in a constant state of replacement) and which is syndicated (by way of the selling of fractional interests) to members of the public (the identity of whom might also might be in a constant state of change).

The first definition describes one of the most customary and well understood commercial transactions in relation to real estate – a group of lenders making a mortgage loan arranged by a mortgage broker. The second definition describes a form of investment (involving an issuer of securities) in a fund or pool of underlying assets (that happens to be comprised of mortgages). The former, *in substance*, is a very conventional lending transaction secured by a mortgage against an identifiable piece of realty. The latter, *in substance*, is an investment transaction in a quasi -fund or pool which holds securitized assets (which happen to be comprised of mortgages).<sup>2</sup>

Our business (and that of all other B.C. syndicators with whom we are familiar) involves us, as a registered mortgage broker, sourcing (typically from an independent mortgage broker solely representing a prospective borrower) individual mortgage opportunities, underwriting same, approaching members of our stable of pre-existing, experienced co-lenders and organizing some of them who are interested into a lending syndicate and, finally, to funding and administering the specific transaction. These are customary services rendered by mortgage brokers to lender clients. To shield our co-lenders from liability such lending group is formed into a single purpose limited partnership to make the specific loan (and no other). When the loan is paid back, the principal and outstanding interest is repaid to the co-lenders and the single purpose limited partnership is wound up. There is no re-lending of the original funds. That is what our business involves, period. The other syndicators we know of in B.C. carry on substantially the same type of business.

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<sup>2</sup> The former type of investment is readily understood by any real estate lawyer, generalist solicitor, notary public or licensed mortgage broker who, in the ordinary course of their professions, handle scores (if not hundreds) of such mortgage transactions each year. The latter investment transaction is only easily understood by someone with the skills to analyze a portfolio or pool of assets, the discretionary and other powers granted the manager to manage the investment entity on an ongoing basis and other matters unique to such an investment, such as the existence or absence of actual or threatened litigation affecting the corpus of the pool or fund, contingent liabilities affecting same, etc.

The types of persons (active lender vs. passive investor) who typically involve themselves in these two contrasting types of investment activities are very different from one another. The former investment activity (Example 1) involves an actual lender (alongside other lenders) deciding to lend on an actual, predetermined mortgage loan which he and his fellow lenders must then administer (directly or through a contract administrator). The latter activity (Example 2) involves a passive investor investing in a security in respect of which the underlying asset is a mortgage or, more likely, a pool of ever changing mortgages over which the investor has no control.

Accordingly, for purposes of this submission, to add clarity as to the activities we are speaking of, have elected to define “Syndicated Mortgage” to mean:

*“ A mortgage in which two or more persons or companies participate, directly or indirectly, as **the originating** lenders in the debt obligation that is secured by the mortgage”*

Note this is identical to the current definition found in the Securities Act (B.C.), save for the addition of the words “the originating”. The bolded words are meant to indicate that we are talking about the lenders *who actually fund the loan; not lenders who become such by purchasing a fractional interest in an existing loan, or portfolio of loans.*

In your Request for Comments there appears to be confusion as to who the issuer might be in the context of mortgage syndication. You suggest that the borrower is the issuer. That might conceivably be the case in Example 2, where an owner of a real estate property issued mortgages or fractional interests in same to investors, but could never be the case in Example 1. Similarly, in your Request for Comments we note that there is a suggestion that a mortgage broker for a borrower might be asked to certify the accuracy of an Offering Memorandum prepared by a lender’s mortgage broker for the benefit of the ultimate co-lenders. Again, this might conceivable make sense in certain Example 2 circumstances, but makes no sense in Example 1 circumstances, which we suggest represents the vast majority of syndicated lending in British Columbia.

The failure to differentiate between the two types of activities that might be considered a Syndicated Mortgage makes it impossible to come up with a regulatory regime based on a fair consideration of competing needs – investor protection versus societal (economic) benefits and needs. **Further, it leads us to suspect that regulators outside of B.C. who are considering advocating for adoption of an EMD regime and the abandonment of the private issuer exemption might be doing so as a result of faulty assumptions as to the very nature of the business activity they seek to regulate.**

### 3. Timing Issues Pertaining to the Syndicated Mortgage Transaction

“Timing issues” involved in mortgage financing of the type described under Example 1 above dictate against their appealing to large populations of small investors. Individual mortgages (including Syndicated Mortgages) are typically short - fused transactions which must be funded by the lender (or lending group) within a very short time following the submission of a loan application. This means that a lending group (syndicate) often has one or perhaps two weeks to consider the loan application, review the due diligence material (including the FICOM mandated disclosure documentation) and determine whether to proceed. Accordingly:

- i. this requires the mortgage broker/syndicator have, in place, an existing “stable” of potential co-lenders who are experienced in mortgage lending, able to quickly assess the loan opportunity and, if interested, commit to fund within a tight timeline. In practice, therefore, the mortgage broker/syndicator is not “going out to the public” as that expression is generally used (and which we note, Lanyard never does); and

- ii. the customary timelines for such transactions would simply not permit members of a lending syndicate to visit an EMD for KYC and suitability discussions. Indeed, in practice, potential co-lenders (from the mortgage broker/syndicator's existing stable) are often provided with due diligence materials pertaining to subject loans as and when such materials arrive – often, on a day to day basis, right up to a day before a decision is made by the co-lenders to fund the deal. This is a fast paced, transactional business.

#### **4. Economics of the Syndicated Mortgage Transaction**

The financial remuneration to the mortgage broker/syndicator for its brokerage services in sourcing, underwriting, organizing, funding and administering a syndicated lending opportunity is limited by industry standards to a thin margin (typically between 1-2% of the loan amount) and often paid to the mortgage broker/syndicator from the lender fee customarily charged the borrower. Accordingly, it would be prohibitively expensive (and effectively put the mortgage broker/syndicator out of business):

- i. if it were required to establish and maintain itself as an EMD to handle one or perhaps a few mortgage transactions per month for lender clients who organize themselves as a syndicate to make a loan; or
- ii. if it were required (assuming time permitted; which it does not) to contract with a third party EMD (who had the skills to assess an evolving commercial loan transaction, which seems unlikely and not in accordance with CSC educational requirements) to provide the requisite compliance services for such activity. (Our advice is that a third party EMD would charge fees that will far exceed the entire 1-2% mortgage brokerage fee referred to above).

Accordingly, we strongly believe that the imposition of EMD requirements will have the unintended consequence of needlessly putting many mortgage brokers (particularly those that specialize in Syndicated Mortgages) out of business, with all that would entail for borrowers, lenders and the general economy.

#### **5. Type of Advice Required and Sought in Relation to a Syndicated Mortgage**

It is not common for members of lending syndicates to endeavour to seek suitability advice from a mortgage broker in relation to a Syndicated Mortgage opportunity. This is due to the following factors:

- i. more often than not, members of a lending group are experienced mortgage lenders who are “regulars” (i.e. standby lenders) on the mortgage broker's client list. As such, they are knowledgeable, experienced lenders who know how to assess a mortgage lending opportunity themselves and are retaining the services of the mortgage broker to merely source the opportunity and present it with customary underwriting/due diligence materials which they themselves will analyze (with or without the aid of professional advisors at they deem appropriate);

- ii. the mortgage broker/syndicator, in addition to sourcing the loan opportunity, typically provides prospective co-lenders with customary underwriting and due diligence materials (which includes all of the mandated FICOM disclosure materials (which are very detailed and comprehensive), a full narrative appraisal, environmental materials, tenant lists, etc.). This is typically all the prospective lenders (with or without the assistance of their professional advisors as they see fit) require in order to make an informed decision whether to participate;
- iii. if, infrequently, a prospective lender does make an inquiry in relation to a prospective loan, this will usually be a request for factual details (i.e. further or more detailed information concerning the identity of the borrower or a tenant, detailed information concerning zoning, environmental issues etc.). The mortgage broker is knowledgeable, trained (even to the extent of adhering to mandated continuing education requirements), and licensed to respond to such inquiries;
- iv. as mentioned previously, the types of transactions we are talking about in this submission are essentially, single, stand-alone mortgage transactions. This type of arrangement is easily understood and able to be assessed and explained by any competent real estate lawyer, generalist solicitor, notary public or mortgage broker. Any investor who needed additional advice could readily get same (and from an unbiased, third party source!) from any of the foregoing.

To statutorily impose an obligation on a mortgage broker to give any greater amount of advice (and to take on elements of risk that are not theirs to bear) would have grave, unintended consequence for the mortgage brokerage business in B.C. and would alter the way in which such commerce has been conducted for centuries.<sup>3</sup>

## 6. Some Basic Questions

Before making a significant change to the manner in which one of the most basic techniques for real estate financing can be conducted in British Columbia, at least the following questions should be asked:

- i. **Is there a compelling need to radically change existing regulatory oversight for syndicated lending in British Columbia?** The answer is a resounding NO. Any objective analysis of the Syndicated Mortgage business in B.C. will lead to the opposite conclusion – namely, there are few investment opportunities anywhere that offer the *transparency, simplicity and protection* to the lender (investor) as is offered by a single,

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<sup>3</sup> Notwithstanding our suggestion above, if the regulators felt it was important to provide prospective co-lenders who were not “sophisticated” or “Accredited” with further cautionary warnings concerning the inherent (i.e. generic) risks in lending on mortgages, we feel this could easily be accomplished by merely expanding the current Risk Acknowledgment advice appearing on page one of the mandatory Form 9. In addition, in respect of lenders who were not Accredited Investors, consideration might be given to requiring some basic written, generic suitability advice (*i.e. concerning only the suitability of investing in mortgages generally; not concerning the specific mortgage at hand*). For novice investors who were not Accredited Investors it might also be advisable to urge that they consider having an experienced real estate or lending lawyer provide advice concerning the subject transaction.

identifiable, mortgage loan opportunity that is underwritten and brokered by a registered mortgage broker in compliance with industry-specific legislation and FICOM oversight. Would-be participants can secure competent advice concerning the intended investment readily from any number of lawyers, notary publics or mortgage brokers, all of whom are trained in this specific area of commerce.

- ii. **Will an EMD regime mean that lenders (investors) will be dealing with investment professionals who are more educated or qualified in the realm of mortgage lending?** The answer is NO. The opposite will be the case. The education and continuing education that a mortgage broker undertakes, and the licensing he/she is required to secure and maintain, is sophisticated and specifically tailored to deal with mortgage lending. The EMD educational requirements are not mortgage industry specific and deal extensively with irrelevant areas of finance such as stock, bonds and derivative investments, all of which have no relationship to the mortgage industry. Further, the “time line” of a conventional real estate financing transaction does not permit for the involvement of an EMD. In addition, if a prospective co-lender in a Syndicated Mortgage wanted professional advice they could visit virtually any solicitor or notary public and obtain competent, unbiased, third party advice. An EMD, if internal, would inherently be conflicted. Furthermore, if an external, third party EMD were utilized, chances are that person would develop ties to the Syndicated Mortgage business community and eventually would also become conflicted – due to the fact that he/she would likely only be paid a fee if the subject loan transaction proceeded.
- iii. **Will an EMD regime mean that the lenders (investors) will be provided with more relevant and appropriate mandated disclosure documents?** Again, the answer is NO. The opposite will be the case. The FICOM Forms 9 and 10 (which includes a Risk Acknowledgment) are specifically focused on, and tailored to, mortgage lending. In our view a general regime of securities legislation that is not at all specific to the mortgage industry will offer inferior protection and misguided comfort to the public than the current industry-specific regime of the Mortgage Brokers Act and FICOM.
- iv. **Do Syndicated Mortgages lend themselves to being used by fraud artists or con-men?** No. The opposite is the case:
- a. Significantly, anyone dealing with Syndicated Mortgages in B.C. must be licensed as a mortgage broker by FICOM. Such registration, *inter alia*, requires a bi-annual criminal record and suitability assessment by FICOM (in addition to industry specific education and continuing education requirements);
  - b. In accordance with MBA and FICOM requirements, all client funds must be handled through a trust account which is subject to a mandatory annual audit and audit report to FICOM;
  - c. Syndicated Mortgages, by our definition, are stand-alone transactions; not pooled investments. If a mortgage goes bad, the co-lending group knows this immediately when the monthly payment is not received;

- d. Once the mortgage loan is funded the loan is made; there is no further introduction of new capital. Accordingly, there is no practical way (certainly no simple way) for any kind of “Ponzi scheme” to be perpetrated (as would be the case in an Example 2 transaction previously described); and
  - e. The co-lenders (either directly or through a single purpose lending vehicle (such as a limited partnership or a corporation)) actually own the registered mortgage; so again, the ability to commit fraud is greatly reduced.
- v. **Is there currently widespread abuse of investors in the realm of Syndicated Mortgages in B.C.?** By reason of the very transparent nature of a Syndicated Mortgage transaction, the mandated disclosure requirements of Forms 9 and 10, FICOM oversight of the activities of Mortgage Brokers in BC, including annual audits of trust funds, and the other characteristics of the Syndicated Mortgage outlined above, our understanding is that Syndicated lending in BC is functioning extremely well with very few instances of investor abuse. We acknowledge the experiences in other provinces may be different, but argue that demonstrates the efficacy of the BC system.
- vi. **Will investors in the Province be better served by the Government making Syndicated Mortgages unavailable?** If EMD requirements are mandated for mortgage brokers involved with Syndicated Mortgages, such lending opportunities will cease to be readily available to the investing public. In consequence, lenders who have enjoyed participating in mortgage investments as an easily understandable, transparent, high yielding investment opportunity would rightly feel aggrieved by the removal of such an investment option. Ironically, the Government will have essentially forced such investors to seek similar returns elsewhere – and one might wonder if the majority of such investors will redirect their investment capital: (i) into equity markets (which, we suggest, are frequently far more speculative than, for instance, a conservative first mortgage investment over an income producing property); or (ii) to unscrupulous, unregistered mortgage providers (as previously registered providers will be driven from the business). Alternatively, and equally ironic, most Syndicated Mortgage co-lenders choose to co-lend in order to: (i) diversify their risk (i.e. they can lend \$100,000 along with two other equal co-lenders on one \$300,000 loan, instead of making one \$300,000 loan themselves); and (ii) in order to benefit from the underwriting savvy of those who would potentially co-lend alongside themselves. If certain of the regulators have their way and introduce an EMD regime, the result will be that most mortgage investors who wished to be relatively small lenders (along with other co-lenders) in Syndicated Mortgages, will be forced to be sole mortgagee who makes 100% of the subject loans themselves. That is, they will be forced to make loans without the benefit of diversification and without the benefit of reliance on the lending savvy of experienced co-lenders.
- vii. **Will borrowers in the Province be better off by making Syndicated Mortgage loans unavailable?** The answer is obviously NO as borrowers will experience a loss of an important competitive lender. It should be noted that private lenders often provide lending opportunities that traditional lenders, such as banks, do not provide: (i) short term bridge loans; (ii) loans underwritten on expedited basis to meet urgent time

constraints; (iii) loans underwritten more on the strength of the underlying secured asset than on the strength of the borrower's covenant; (iv) loans to persons with modestly impaired credit ratings; (v) loans to persons who do not qualify for conventional, institutional financing due to recent B-20 and CMHC changes; and (vi) loans to certain industries/entities currently out of favour with conventional institutional lenders, such as licensed medical marijuana establishments, First Nations entities or religious organizations. The Provincial economy will suffer from the removal of this important source of capital. The quantum of loans annually financed by syndicated lenders in the Province of British Columbia, based on our discussions with several of our business associates, must certainly be in the billions of dollars.

### **Summary of Recommendation**

1. FICOM has created exceptionally high calibre and well conceived disclosure and reporting documentation and an equally high calibre and well conceived education, continuing education, licensing, audit and reporting oversight apparatus to govern Syndicated Mortgages in B.C. that is unparalleled when compared to that found in other Provinces. In our view B.C. regulators should not proceed in B.C. with the proposed Amendments and the Proposed Changes. It would be very negative for B.C. if it were to discard what we believe to be its gold standard regulatory regime for Syndicated Mortgages and, instead, adopt an EMD regime that is not industry specific (and, in fact, is entirely premised on the wrong educational and qualification criteria) with the inevitable result that investor freedom, borrower need, mortgage brokers' livelihoods and commerce (particularly, our vitally important real estate industry) all suffer.
2. We suggest that other Provinces examine the B.C. model and institute similar regulatory and oversight regimes.
3. We suggest that the current B.C. exemption from dealer registration provided by BCI 32-517 be extended permanently.
4. We suggest the private issuer exemption should continue to be available to the distribution of Syndicated Mortgages and, accordingly, do not support the Proposed Amendment to the private issuer exemption. There is no apparent reason to remove this well understood and seemingly appropriate exemption for Syndicated Mortgages. Why should Syndicated Mortgages be treated differently from other, more complex and risky investments? Absent such exemption, it would also be necessary for syndicators to file reports of exempt distribution along with associated fees. This will create needless administrative problems and cost for the mortgage broker/syndicator and, importantly, will necessitate the release of its highly confidential list of clients. It will be recalled that mortgage broker/syndicators do not "go out to the public", in the conventional sense, when presenting a loan opportunity to prospective co-lenders. Rather, they merely contact members of their existing pool of clients – which might be a handful in number, but of enormous value to the syndicator. To expose those names to competitors who might poach them, could be ruinous. Lastly, the fees that would be charged are not small. If a \$1 million-dollar subscription was made into an MIC there would be one fee payable at the time of subscription. That investment might stay in the MIC for a decade. In the case of a Syndicated Mortgage investment of the same amount, the loan in question might well be repaid within a period of months and then, for the sake of illustration, the precise same amount re-loaned (again, for clarity, by a different syndicate)

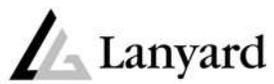


a short while later, and so on. Accordingly, based on this hypothetical illustration, there would be a fee payable by the syndicator on each re-lending of the amount in question. When compared to the one-time fee paid by the MIC, over the course of a decade there might conceivably be 15 times as much fee payable on the syndicator's \$1million loan amount that has been loaned and re-loaned (by separate syndicates) on numerous occasions.

Respectfully submitted,

**LANYARD FINANCIAL CORPORATION**

per: *Ben Goldberg / Brian Chelin*



Schedule "A"

1. Form 9
2. Form 10
3. BCI 32-517 Warning



**Registrar of Mortgage Brokers**  
 2800 - 555 West Hastings  
 Vancouver, BC V6B 4N6  
 Ph. 604-660-3555 / Toll-free: 1-866-206-3030 (BC)  
 Facsimile: 604-660-3365  
[Mortgagebrokers@ficombc.ca](mailto:Mortgagebrokers@ficombc.ca)  
[www.fic.gov.bc.ca](http://www.fic.gov.bc.ca)

## LENDER DISCLOSURE STATEMENT FORM 9- Section 17.1

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has in any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

**Please write or print clearly. If additional information is required, reference and attach a schedule to this form.**

### A – CAUTIONS

1. All mortgage investments carry risk. There is a relationship between risk and return. You should very carefully assess the risk of the transaction described in this Lender Disclosure Statement and in the supporting documentation before making a commitment.
2. You are advised to obtain independent legal advice regarding your decision to invest and to ensure that the transaction is structured appropriately to protect your interests.
3. You should only provide mortgage funds "in trust" to a registered mortgage broker or a licensed lawyer or notary. Never provide funds directly to the mortgage borrower or an individual submortgage broker.
4. If you are one of several investors in this mortgage, you may not be able to enforce repayments of your investment on your own if the borrower defaults.
5. You should ensure you have sufficient documentation to support the property valuation quoted in this Investor/Lender Disclosure Statement.
6. You should be satisfied with the borrower's ability to meet the payments required under the terms of this mortgage.
7. A mortgage broker must not administer, or arrange for another person to administer, a mortgage on your behalf unless the mortgage broker has a written agreement with you that covers matters set out in the *Mortgage Brokers Act*.
8. This Investor/Lender Disclosure Statement and the attached documents are not intended to provide a comprehensive list of factors to consider in making a decision concerning this investment. You should satisfy yourself regarding all factors relevant to this investment before you commit to invest.

### B – BORROWER / GUARANTOR / COVENANTOR INFORMATION

FULL NAME OF BORROWER:

FULL NAME OF GUARANTOR/COVENANTOR (if applicable):

ADDRESS - include postal code

ADDRESS – include postal code

INCLUDES COMMENT LETTERS

**C – OTHER PARTIES TO THE TRANSACTION REPRESENTED BY THE MORTGAGE BROKER**

The Mortgage Broker represents the following parties to the transaction:

- The lender: \_\_\_\_\_  
Name
- The borrower(s): \_\_\_\_\_  
Name
- Syndicate mortgage lenders: \_\_\_\_\_  
(attach list if more space required)  
Name  
Name  
Name
- A person or entity which will acquire the mortgage from the investor/lender: \_\_\_\_\_  
Name
- Other – please describe: \_\_\_\_\_

**NOTE:**

If the Mortgage Broker has NOT indicated that it represents you, the Mortgage Broker must still exercise a duty of care to you and deal with you fairly. It is recommended that you obtain independent advice with respect to the transaction.

**D – PRE-EXISTING OR EXISTING MORTGAGE IN DEFAULT**

Will the lender/investor be acquiring an interest in a currently registered mortgage ?

Yes  No

If yes, please explain any defaults by the borrower over the past 12 months which the mortgage broker is aware of:

If the mortgage is new, was there a previous mortgage registered against title with the same borrower?

Yes  No

If yes, please explain any defaults by the borrower on the previous mortgage over the past 12 months which the mortgage broker is aware of:

**E – REGISTERED INTEREST**

Your interest as a lender will be directly registered in your name on the mortgage document filed at the Land Title Office ; or

\_\_\_\_\_ will act as a trustee or nominee and will hold a registered interest in the mortgage in trust for you as beneficial owner; or

Your interest in the mortgage will be secured under the following arrangements:

**F - MORTGAGE INVESTMENT**

Your investment represents:  the entire mortgage OR  a portion of the mortgage

Your portion represents \_\_\_\_\_ % of the total. \_\_\_\_\_ other parties have an interest in this mortgage.

**G - TRUST FUNDS**

Will the funds be held in trust pending execution of the mortgage?  Yes  No

If yes, please indicate the party that will hold the funds in trust:

**H – MORTGAGE ADMINISTRATION**

Will the mortgage be administered for you?  Yes  No

If "yes", name and address of administrator:

Describe any fees or attach any fee agreement for the provision of administration services: \_\_\_\_\_

**I - PROPERTY TO BE MORTGAGED**

Is this an inter alia mortgage?

Yes  No

If yes, please skip Sections I and K of this Form and complete Sections I and K of the Form 9 Addendum for Inter Alia Mortgages

Legal Description of Property:

Municipal Address of Property:

**Type of Property:**

- Property with existing buildings
  - Single family residential
  - Five or more unit multifamily
  - Industrial
- Two to four unit multifamily
- Commercial
- Other: \_\_\_\_\_

Vacant land, development or construction project.  
Details of project/proposed use:

Other (please describe):

**Property Taxes:**

Annual Property Taxes: \$ \_\_\_\_\_

Are taxes in arrears?

Yes  No

If yes, amount arrears: \$ \_\_\_\_\_

**Zoning**

If mortgage proceeds are to be used for construction financing, is the zoning on the property to be developed appropriate for the proposed use?

Yes  No

If no, details:

**Property Valuation:**

Amount: \$ \_\_\_\_\_

Based on:

- Appraisal, dated \_\_\_\_\_
- Municipal Assessment, Year \_\_\_\_\_
- Sale Price \$ \_\_\_\_\_
- Other (please describe) \_\_\_\_\_

If appraisal obtained:

Name and address of appraiser:

Valuation is:  Current, as at date: \_\_\_\_\_  Projected Value: \$ \_\_\_\_\_

**J - MORTGAGE PARTICULARS**

**Terms of the Mortgages**

Amount of your investment: \$ \_\_\_\_\_ Maximum Indebtedness of Mortgage: \$ \_\_\_\_\_

Interest rate is fixed at \_\_\_\_\_% per annum **OR** Interest rate is variable, explain: \_\_\_\_\_

Compounding period: \_\_\_\_\_ Payment Frequency: \_\_\_\_\_

Interest only payments:  Yes  No Payments to be made by Borrower: \$ \_\_\_\_\_

Term: \_\_\_\_\_ Amortization: \_\_\_\_\_ Borrower's first payment due: \_\_\_\_\_

Maturity Date: \_\_\_\_\_ Balance on maturity: \$ \_\_\_\_\_

INCLUDES COMMENT LETTERS

Mortgage secures a running account:  Yes  No If running account, provide details \_\_\_\_\_

### K – RANK OF MORTGAGE AND LOAN TO VALUE RATIO

#### Rank of mortgage

This mortgage will rank:  First  Second  Third  Other: \_\_\_\_\_

#### Prior encumbrances (existing or anticipated)

None **OR**

(i) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(ii) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(iii) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

(iv) Lender/Charge Holder: \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owing: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

#### Loan to value ratio

a) Total amount owing or maximum indebtedness (whichever figure is higher) of all encumbrances which rank in priority:

\$ \_\_\_\_\_

b) Maximum Indebtedness of mortgage:

\$ \_\_\_\_\_

c) Total amount of mortgages: (a+b) \$ \_\_\_\_\_

d) Value: (from Part I) \$ \_\_\_\_\_

e) Loan to value: \_\_\_\_\_ %  
(c/d x 100)

### L – ATTACHED DOCUMENTS

You should review the following documents carefully and assess the risks of this investment before committing to invest. The following documents are attached:

- A copy of any existing mortgage on the property;
- A copy of any appraisal;
- A copy of any purchase and sale contract entered into by borrower for the purchase of the property;
- Any documentary evidence respecting the borrower's ability to meet the mortgage payments, such as a credit bureau report or a letter from an employer disclosing the borrower's earnings.
- A copy of the borrower's application for a mortgage.
- If the mortgage is a new mortgage, documentary evidence of any down payment made by the borrower for the purchase of the property.





Financial Institutions Commission

Registrar of Mortgage Brokers
2800 - 555 West Hastings
Vancouver, BC V6B 4N6
Ph. 604-660-3555 / Toll-free: 1-866-206-3030 (BC)
Facsimile: 604-660-3365
Mortgagebrokers@ficombc.ca
www.fic.gov.bc.ca

Addendum for Inter Alia Mortgages
FORM 9- Section 17.1
(attach additional Addendum pages as necessary)

I - PROPERTIES TO BE MORTGAGED

Property 1

Legal Description of Property:

Municipal Address of Property:

Type of Property:

- Property with existing buildings
Single family residential
Five or more unit multifamily
Industrial
Two to four unit multifamily
Commercial
Other:

Vacant land, development or construction project.
Details of project/proposed use:

Other (please describe):

Property Taxes:

Are taxes in arrears?

Yes No

Annual Property Taxes: \$

If yes, amount arrears: \$

Zoning

If mortgage proceeds are to be used for construction financing, is the zoning on the property to be developed appropriate for the proposed use?

Yes No

If no, details:

Property Valuation:

Based on:

Appraisal, dated

Sale Price \$

Amount:

Municipal Assessment, Year

Other (please describe)

If appraisal obtained:

Name and address of appraiser:

Valuation is: Current, as at date:

Projected Value: \$

INCLUDES COMMENT LETTERS

**K – RANK OF MORTGAGE AND LOAN TO VALUE RATIO**

**Rank of inter alia mortgage on Property 1**

This mortgage will rank:  First  Second  Third  Other: \_\_\_\_\_

**Prior encumbrances (existing or anticipated)**

None

**OR**

**(i) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(ii) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(iii) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(iv) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

INCLUDES COMMENT LETTERS

**I - PROPERTIES TO BE MORTGAGED**

**Property 2**

Legal Description of Property:

Municipal Address of Property:

**Type of Property:**

Property with existing buildings

Single family residential

Five or more unit multifamily

Industrial

Two to four unit multifamily

Commercial

Other: \_\_\_\_\_

Vacant land, development or construction project.

Details of project/proposed use:

Other (please describe):

**Property Taxes:**

Are taxes in arrears?

Yes  No

Annual Property Taxes: \$ \_\_\_\_\_

If yes, amount arrears: \$ \_\_\_\_\_

**Zoning**

If mortgage proceeds are to be used for construction financing, is the zoning on the property to be developed appropriate for the proposed use?

Yes  No

If no, details:

**Property Valuation:**

Based on:

Appraisal, dated \_\_\_\_\_

Sale Price \$ \_\_\_\_\_

Amount: \_\_\_\_\_

Municipal Assessment, Year \_\_\_\_\_

Other (please describe) \_\_\_\_\_

If appraisal obtained:

Name and address of appraiser:

Valuation is:  Current, as at date: \_\_\_\_\_

Projected Value: \$ \_\_\_\_\_

INCLUDES COMMENT LETTERS

**K – RANK OF MORTGAGE AND LOAN TO VALUE RATIO**

**Rank of inter alia mortgage on Property 2**

This mortgage will rank:  First  Second  Third  Other: \_\_\_\_\_

**Prior encumbrances (existing or anticipated)**

None

**OR**

**(i) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(ii) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(iii) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**(iv) Lender/Charge Holder:** \_\_\_\_\_  Priority: \_\_\_\_\_

Amount Owning: \$ \_\_\_\_\_ Maximum potential indebtedness allowable under Mortgage: \$ \_\_\_\_\_

In default?  Yes  No

**LOAN TO VALUE RATIO**

a) Total amount owing or maximum indebtedness (whichever figures are higher) of all encumbrances which rank in priority for all properties subject to the inter alia mortgage:

\$ \_\_\_\_\_

b) Maximum Indebtedness of this mortgage:

\$ \_\_\_\_\_

c) Total amount of all mortgages registered against the properties subject to the inter alia mortgage: (a+b)

\$ \_\_\_\_\_

d) Total Value of all properties subject to the inter alia mortgage: (from Parts I)

\$ \_\_\_\_\_

e) Loan to value: (c/d x 100)

\_\_\_\_\_ %

INCLUDES COMMENT LETTERS

# CONFLICT OF INTEREST DISCLOSURE STATEMENT FORM 10

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has any way passed on the merits of the matters dealt with in this information statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

**Please type or print clearly. If additional information is required, reference and attach a schedule to this form.**

FULL NAME OF MORTGAGE BROKER	TELEPHONE NO.
ADDRESS	POSTAL CODE
ADDRESS OF PROPERTY TO BE MORTGAGED	POSTAL CODE
LEGAL DESCRIPTION OF PROPERTY TO BE MORTGAGED	

Describe any direct or indirect interest the mortgage broker has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

Describe any direct or indirect interest that a related party or associate of the mortgage broker, as defined in the *Mortgage Brokers Act* Regulations has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

**CERTIFICATION**

I certify that I am the mortgage broker or an authorized representative of the mortgage broker in this transaction and based on my knowledge, belief and information provided by third parties, this Disclosure Statement contains no untrue statement and does not omit to state a fact that is required to be stated or that is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

FULL NAME OF MORTGAGE BROKER	ADDRESS	POSTAL CODE
SIGNATURE OF MORTGAGE BROKER OR AUTHORIZED REPRESENTATIVE <b>X</b>	NAME OF AUTHORIZED REPRESENTATIVE OF MORTGAGE BROKER (PLEASE PRINT)	DATE SIGNED YYYY MM DD
<b>ACKNOWLEDGEMENT OF RECEIPT</b> SIGNATURE <b>X</b>	NAME (PLEASE PRINT)	DATE SIGNED YYYY MM DD

INCLUDES COMMENT LETTERS

**Risk Acknowledgement under BCI 32-517 *Exemption from Dealer Registration Requirement for Trades in Securities of Mortgage Investment Entities***

**Name of Issuer:**

**Name of Seller:**

**I acknowledge that**

- the person selling me these securities is not registered with a securities regulatory authority and is prohibited from telling me that this investment is suitable for me;
- the person selling me these securities does not act for me;
- this is a risky investment and I could lose all of my money;
- I am investing entirely at my own risk.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Purchaser

\_\_\_\_\_  
Name of salesperson  
Acting on behalf of the Seller

\_\_\_\_\_  
Print Name of Purchaser  
(Should match the Subscription Agreement)

Sign two copies of this document. Keep one for your records.

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**June 5, 2018**

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Office of the Superintendent of Securities, Northwest Territories  
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Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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**Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (collectively, the "Proposals")**

Dear Sirs/Madam,

I am writing on behalf of MCAP Commercial LP and its affiliates (collectively, "MCAP"). MCAP is in the business of originating, underwriting, selling, securitizing and servicing residential, commercial and construction mortgages across Canada. In the course of its activities, MCAP sells and services mortgages on behalf of institutional investors, the NHA MBS Program, the Canada Mortgage Bond Program, and bank-administered conduits, with virtually all of those institutional investors qualifying as federally regulated financial institutions ("FRFIs") subject to supervision by the Superintendent of Financial Institutions ("OSFI"). MCAP originates approximately \$15.5 billion in residential, commercial and construction mortgages in a calendar year, expects to renew approximately an additional \$3.6 billion in mortgages this calendar year and currently services and administrators approximately \$70 billion in mortgages for institutional investors. In the course of their activities, MCAP entities are regulated by Canada Mortgage Housing Corporation ("CMHC"), the applicable provincial mortgage brokerage regulators across Canada and, in order to underwrite, service and administer mortgages for or on behalf of its FRFI clients, applicable MCAP entities are also required to meet OSFI guidelines notwithstanding none of the MCAP entities are FRFIs. MCAP is also effectively monitored and regulated by mortgage insurers, including CMHC, Genworth Financial Mortgage Insurance Company Canada and Canada Guaranty Mortgage Insurance Company under the *National Housing Act* (Canada), the *Protection of Residential Mortgage or Hypothecary Insurance Act* (Canada) and OSFI Guidelines B-10 (outsourcing of business activities, functions and processes) and B-21 (residential mortgage insurance underwriting practices and procedures).

MCAP understands that there has been a significant increase in the offering of "syndicated mortgages" for real estate construction and development to retail investors in Ontario and that there are legitimate investor protection concerns with respect to these "syndicated mortgages", particularly with respect to the complexities of development and construction financing which may not be apparent to a retail investor base. While MCAP does not participate in this "retail" part of the development and construction mortgage market (MCAP participates solely in the institutional component of the development and construction mortgage market), MCAP agrees with and understands the concerns that are applicable in relation to retail investors. MCAP further understands that, while these concerns have traditionally been addressed under mortgage brokerage regulation, there is a broader policy movement to suggest that certain aspects of this function should be transferred to securities regulators.

Simply put, MCAP supports regulatory efforts aimed at protecting and informing retail investors about the risks and complications involved in development and construction financing. On the other hand, however, MCAP does not support or see a benefit to measures to further regulate mortgage brokers involved with institutional investors in development and construction financing since this part of the market raises no public policy concerns under the present regulatory regime. **To achieve the public policy goals of the Proposals, and to protect the efficient functioning of capital markets for mortgage brokers and institutional investors involved in development and construction financing, we suggest that the definition of "syndicated mortgage" and the Proposals only be applicable if both the following two conditions are satisfied: (i) an entity that is a developer is the borrower in relation to a real estate development and construction mortgage; and (ii) the real estate development and construction mortgage security is being distributed to retail investors. Accordingly, our submission exempts residential and commercial lending and it also exempts real estate development and construction mortgages that are distributed exclusively to institutional investors. We believe that**

these alterations will best achieve the public policy goals of the Proposal, while minimizing unnecessary complexity and costs in a well-functioning institutional investor mortgage marketplace. The remainder of our submission will provide the rationale for our suggestions and some of the details that need to be addressed in implementing our suggestions.

While MCAP agrees with the need to protect retail investors investing in development and construction mortgages, MCAP has substantive concerns with respect to the impact of the Proposals on the operation of Canadian mortgage markets more generally. MCAP believes that the definition of “syndicated mortgage” in combination with the removal of the Mortgage Exemptions for prospectuses goes well beyond the policy objectives of the Proposals and creates a series of unintended and undesirable consequences and complications with respect to the future relationship between mortgage brokerage regulation, securities regulation and banking regulation for mortgage-related products. After setting out problems that will be created by the Proposals, including the interaction of the Proposals with existing mortgage brokerage regulation and banking regulation, our submission addresses some specific features of the Proposals. The submission then provides commentary in response to some of the specific questions raised by the Proposals. The submission closes with our suggestions for changes to the Proposals to meet the policy objectives of the Proposals, while addressing the concerns and problems we have raised in this submission.

- (1) Interaction of the Proposals with mortgage brokerage regulation, banking regulation and the existing securities law rules for residential mortgage-backed securities (“RMBS”), commercial mortgage-backed securities (“CMBS”) and mortgage investment corporations (“MICs”): The Proposals, and specifically the definition of “syndicated mortgage” in combination with the removal of the Mortgage Exemption, creates substantial and unnecessary problems and complications for the institutional investor mortgage markets. To begin, the definition of “syndicated mortgage” impact trades and distributions of mortgage-related products well beyond real estate development and construction mortgages (at times in this submission, we will refer to a “construction mortgage” as a short-hand reference to a “development and construction mortgage”). Specifically, the definition of “syndicated mortgage” applies to any trade or distribution involving any type of mortgage (including residential, commercial and construction mortgages) and further does not differentiate between retail investors and institutional investors. The broad application of the definition of “syndicated mortgage” to all residential, commercial and construction mortgages and to both the retail and accredited investor marketplaces, raise a series of complex questions and problems, including the following:
  - a. To start, there is a question of the interplay between the Proposals and mortgage brokerage regulation. Ostensibly, mortgage brokerage regulation already comprehensively governs the distribution and trading in syndicated mortgages. With the Proposals, however, it would appear that the distribution and trading of residential, commercial and construction mortgages would be governed by both the mortgage brokerage regulation and securities law regulation. However, there is no need for a complete replication of regulatory regimes given the narrow focus of public policy concerns that have elicited the Proposals. The policy concerns that have elicited the Proposals are premised on the offering of real estate development and construction mortgages to retail investors. With this policy focus, and to demarcate mortgage

brokerage regulation from securities regulation, mortgage brokerage regulation should still continue to exclusively apply to the distribution and trading of residential, commercial and construction mortgages that are offered by mortgage brokers to institutional investors that qualify as accredited investors. To achieve this objective, and as noted above, we suggest that this could be accomplished by restricting the definition of “syndicated mortgages” and the Proposals such that they would only be applicable to development and construction mortgage securities that are distributed to retail investors.

- b. A further complication involves the inter-play between the Proposals and the banking regulatory framework. As is well known, the federal government and OSFI have spent considerable time and effort in focusing on the real-estate related activities of FRFIs and on the general topic of mortgage lending. In the OSFI context, part of this activity can be seen in the proliferation of guidelines involving real estate lending. These include the calibration of stress tests for residential real estate lending and the various guidelines published by OSFI in relation to real estate lending and the enhanced risk management measures that apply to real estate. What is important to understand is that the OSFI guidelines do not only apply to FRFIs. They also apply to entities and mortgage brokers that enter into contractual relationships with FRFIs in relation to the origination, underwriting, sale and servicing of residential, commercial and construction mortgages, and the outsourcing of mortgage-related activities from FRFIs to these entities and mortgage brokers. Accordingly, mortgage brokers that originate, sell or service mortgages, or perform various outsourcing duties, on behalf of FRFIs have to meet the requirements of OSFI guidelines, notwithstanding that these mortgage brokers are not directly regulated by OSFI. The indirect, but nonetheless concrete application, of OSFI Guidelines to non-FRFI entities is a feature of various OSFI Guidelines, including OSFI Guideline B-10 (outsourcing of business activities, functions and processes), and Guideline B-20 (residential mortgage underwriting practices and procedures). MCAP submits that mortgage brokerages that distribute and sell “syndicated mortgages” to FRFIs are already subject to comprehensive regulation as a requirement to carry on business with FRFIs and, accordingly, the application of the Proposals to this part of the market is unnecessary and would not accomplish any meaningful public policy objectives. If the Proposals do not apply to the sale or distribution of residential, commercial or construction mortgages by mortgage brokers to accredited investors, mortgage brokerage regulation (and banking regulation where the accredited investors are FRFIs) would nonetheless continue to apply;
- c. A further problematic area involves the inter-action of the definition of “syndicated mortgages” and the proposed amendments to NI 45-106 Prospectus Exemptions with the issuance of CMBS, RMBS and MICs pursuant to offering memorandums. With respect to investors, CMBS and RMBS transactions are designed to either provide investors with a co-ownership interest in the mortgage pool or a debt instrument that is secured by a mortgage pool. In either event, the definition of “syndicated mortgage” would be applicable since the definition of “syndicated mortgage” applies to any residential or commercial mortgage where there are multiple investors. With this in

mind, the proposed amendments to NI 45-106 prospectus exemptions apply to CMBS and RMBS transactions. Notwithstanding the application of the proposed amendment to the NI 45-106 Prospectus Exemptions, the features and requirements of these Prospectus Exemptions do not properly apply to CMBS and RMBS transactions involving ordinary residential or commercial mortgages. As an example, and with respect to risk factors, a requirement under the NI 45-106 Prospectus Exemptions includes a statement in bold that “Investments in syndicated mortgages are speculative and involve a high degree of risk...”. We believe this requirement has very little merit involving a CMBS or RMBS transaction where “AAA” or “AA” securities are offered to investors. More generally, we submit that the NI 45-106 Prospectus Exemptions, as drafted in the Proposal, should not apply to CMBS, RMBS or MICs involving residential or commercial mortgages. For CMBS, RMBS and MICs that feature residential and commercial mortgages, the present scheme of securities regulation can continue to apply without modification by the Proposals, including the sale of RMBS, CMBS and MICs to retail investors that are accredited investors. The proposed NI 45-106 Prospectus Exemptions should only be applicable to real estate development and construction mortgages that are distributed to retail investors under the accredited investor exemption (while we provide a definition later in our submission, our concept of a real estate development and construction mortgage would be a mortgage provided to a “developer” (as such term will be discussed below) for land servicing, land development, the development or construction of more than one residence or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction).

The reason for the somewhat technical distinction set out in the above paragraph in relation to CMBS, RMBS and MIC transactions is based on the fact that an ordinary commercial or residential mortgage may be used by the borrower for purposes of construction or improvement. While lenders grant residential and commercial loans with the understanding that proceeds may be used for renovation or construction, , there are lending products, such as lines of credit, where the lender may not necessarily know in advance that proceeds will be used for renovation or construction purposes by the borrower. Accordingly and to deal with this feature of ordinary residential and commercial mortgages, our suggestion is that, in applying the definition of “syndicated mortgages” to real estate development and construction mortgages, the definition of “syndicated mortgage” should not include residential mortgage loans and commercial loans made in the ordinary course where proceeds could be used for renovation, construction or improvement. While there is not a neat and easy analytical separation involved with respect to the distinction we are trying to make between mortgages for real property development and construction versus ordinary course commercial or residential mortgages where the proceeds may be used by a borrower for renovation, construction or improvement, there is nonetheless a very real difference in operation. Mortgages which raise public policy concerns for purposes of the Proposals are those mortgages distributed to retail investors which are made to a developer so that the developer may engage in land servicing, land development, the development or construction of more than one residence or the development or construction of one or

more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction. In furtherance of the distinction we are attempting to make, the submission provides a decision tree for application of our suggested changes to the Proposals and a working definition of “syndicated mortgage”;

- d. There are further problems caused by the present definition of “syndicated mortgage”. For similar reasons given in (c) above in terms of the definition of “syndicated mortgage” applying to ordinary CMBS and RMBS transactions, the definition of “syndicated mortgage” could also apply in relation to the sale of residential mortgages or commercial mortgages into the CMHC NHA MBS Program. Whether or not this is the case would depend on whether the sale of mortgages into the CMHC NHA MBS Program is characterized as a sale to CMHC or is characterized as a sale to multiple investors (with CMHC acting as a nominee of behalf of the investors). We would submit that the transaction is best characterized as a sale to multiple investors, thereby fitting such a sale within the definition of “syndicated mortgage”. We do note that there is a standard, prospectus exemption in securities regulation for the sale of securities issued or guaranteed by the Government of Canada and that this exemption would be applicable. However, one is still left with the potential requirement for the seller of mortgages into the NHA MBS Program to be registered as an “exempt market dealer”. This would be inappropriate insofar as the NHA MBS Program Guide has comprehensive requirements set out by CMHC with respect to initial and on-going requirements for mortgage sellers to be eligible to participate in the NHA MBS Program.

(2) Specific Comments on features of the Proposals: Apart from the over-broad definition of “syndicated mortgages” and the problematic interaction of the Proposals with existing mortgage brokerage regulation and banking regulation as a result, some specific comments can be made with respect to the ambit of the Proposals. These comments address: (a) the institutional versus retail markets; (b) a discussion of prospectus exemptions for syndicated mortgages; and (c) a discussion of the exempt market dealer regime as envisaged by the Proposals. The intent of our commentary on these points is to provide further assistance in shaping the Proposals to meet the public policy concerns with respect to property development and construction mortgage products offered to retail investors.

- a. As noted above, the Proposals apply to all mortgage products distributed to both the institutional and retail investors. Previously, the Mortgage Exemption went to the opposite extreme in exempting mortgage brokers from securities regulation in relation to trades and distributions of all mortgage products to both the institutional and retail investors. In view of the public policy objectives of the Proposals, we would submit that the Proposals represent an over-inclusive regulatory regime and the Mortgage Exemption represented an under-inclusive regulatory regime. We suggest a middle path to achieve the public policy objectives animating the Proposals. Specifically, we suggest that the Proposals retain an exemption for accredited investors that are institutional investors as opposed to retail investors. Mortgage-related markets for institutional, accredited investors in Canada have not raised any public policy concerns. The institutional mortgage market in Canada consists of FRFIs, sophisticated and well

capitalized mortgage brokerages, pension funds and large insurers. This market has functioned efficiently and effectively to facilitate the financing of residential, commercial and construction mortgages with mortgage brokerage regulation (and now banking regulation). While technically governed by mortgage brokerage regulation in relation to the sale or distribution of syndicated mortgages by mortgage brokers, the practical reality is that the practice, information disclosure, covenants and monitoring requirements of institutional purchasers in the Canadian mortgage markets are well in excess of what would otherwise be applicable in terms of mortgage brokerage regulation or the Proposals. The imposition of banking regulation through OSFI guidelines that apply to mortgage brokers that deal with FRFIs in relation to mortgages has only further elevated the regulatory requirements for the Canadian institutional mortgage market. Moreover, institutional investor purchasers of mortgage products (whether or not they are FRFIs) have direct and extensive experience in the origination, management and servicing of residential, commercial and construction mortgages. Institutional investors are well-placed in analyzing, pricing and overseeing the underwriting, origination and servicing of mortgage-related products. The requirements of applicable securities law regulation, through prospectus requirements and a requirement that a mortgage broker register as an exempt market dealer, would not add any protections or address any public policy concerns arising out of or related to the Canadian institutional mortgage market, including that part of the market focused on development and construction financing. Further, and if the Proposals did not apply to the institutional component of the market for distributions of “syndicated mortgages”, the applicable mortgage brokerage regulation and banking regulation as discussed above would still be applicable with respect to institutional investors.

- b. In relation to the proposed amendments to NI 45-106 Prospectus Exemptions, and as we noted above, we believe that the Proposals should only be applicable to the sale or distribution of syndicated mortgages where the investors are not exclusively accredited investors and where “syndicated mortgages” are defined as mortgages provided to developers for purposes of land servicing, land development, the development or construction of more than one residence, or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction. As noted above, the design and specific requirements set out in the proposed amendments to NI 45-106 Prospectus Exemptions only make sense in this specific context.
- c. Based on our comments above, a specific discussion of the Proposals in relation to the requirement that mortgage brokers may have to register as “exempt market dealers” is appropriate. The Proposals note that “market participants that are in the business of trading syndicated mortgages would be required to consider whether the registration requirement applies to them” and further note that “some of these firms will be required to become registered as a dealer or to rely on a registration exemption.” The Proposals observe that for “firms that are currently in the business of trading in syndicated mortgages and are licensed under mortgage broker legislation, the transition to registration as an exempt market dealer could potentially involve significant costs.

These firms would be subject to new requirements and would be required to adopt new policies and procedures.” In recognition of these difficulties, the Proposals suggest that the changes to registration exemption for mortgages will take effect one year later than the other Proposed Amendments to minimize the immediate impact on these firms.

We note that, if “syndicated mortgages” are “securities”, and under the current configuration of exemptions provided under the Proposals, a mortgage broker would also have to be registered as an “exempt market dealer” under NI 31-103 in order to distribute “syndicated mortgages” under the accredited investor exemption for the prospectus requirement. This would ostensibly require mortgage brokers who participate exclusively in the institutional, accredited investor space with respect to residential, commercial or construction mortgages to register as an “exempt market dealer” under NI 31-103. We do not believe that this would be a beneficial result for a variety of reasons. First, we do not believe that there is a public policy requirement or need to replace the application of mortgage brokerage regulation with the Proposals as it relates to the institutional investor market in relation to residential, commercial or construction mortgages. In this respect, we note that while the Proposals point “particularly” to the need for investor protection in the context of the retail market, the Proposals provide no indication that there are any concerns with respect to any part of the institutional investor marketplace with respect to mortgage-related products. The public policy concerns are best addressed by targeting the Proposals to cover retail investors (notwithstanding some retail investors may be accredited investors). Second, there is no public policy objective in requiring a mortgage broker to register as an exempt market dealer in relation to the sale and distribution of residential and commercial mortgages. From a policy perspective, registration as an “exempt market dealer” should only be a requirement with respect to trades and distributions by a mortgage broker of mortgages made to developers for land servicing, land development, the development or construction of more than one residence or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction where the investors include retail investors (thereby excluding trades or distributions solely involving institutional investors that are accredited investors). Additionally, trades or distributions involving ordinary residential or commercial mortgages through RMBS, CMBS or mortgage investment company private placements offered by mortgage brokers and other persons to accredited investors (including retail investors) should continue to be addressed by the current, applicable securities law requirements.

While the CSA recognizes the duplication of costs, regulation and administration that will occur as a result of the application of both mortgage brokerage and securities regulation to mortgage brokers, and while we agree with these comments and concerns, there are some additional points that can be usefully made in relation to this general topic. The first is that the costs and concerns extend beyond corporate procedures and compliance. There are also concerns with respect to the licensing of personnel. If a mortgage broker is required to also be registered as an “exempt market

dealer”, this would also likely entail the requirement to duplicate the registration of mortgage brokerage personnel who are currently licensed as “mortgage associates”, “mortgage salespersons”, “mortgage agents” or similar designations as “dealing representatives” under NI 31-103. While a mortgage brokerage may find a person that meets the requirements of a “chief compliance officer” under NI 31-103, there are substantial concerns about qualifying mortgage brokerage personnel as “dealing representatives” under NI 31-103. Specifically, the educational and experience requirements for “dealing representatives” are different from those required under mortgage brokerage regulation. We are concerned about the employability of personnel that do not successfully complete the initial and on-going educational requirements to be a “dealing representative” of an “exempt market dealer”. We would also add that the regulatory concerns relating to interacting with institutional investor clients is comprehensively addressed under mortgage brokerage regulation, and that for these purposes, the “clients” are all large sophisticated banking, insurance and pension clients that qualify as accredited investors. We do not see any practical benefit in requiring mortgage brokers that exclusively sell residential, commercial and construction mortgages to institutional investors to be registered as “exempt market dealers” and we further see no benefit in having personnel of these mortgage brokerages register as “dealing representatives”. There will simply be additional costs and complications for all mortgage brokers serving institutional investor clients, with the unnecessary costs passed on to investors and then ultimately to consumers.

**(3) Requested Comments on the Proposals:** The Proposals requested comments with respect to a number of features. This part of the letter will address the specific topics on which the Proposals asked for commentary that are relevant for purposes of our submission. In this respect, questions 5 through 7 asked by the CSA are relevant to our submission. Our answers in response to these questions are as follows:

- a. **Answer to Question 5 (should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?):** In our submission, and in relation to “syndicated mortgages”, the only specific area that raises investor protection concerns involves development and construction mortgages offered to the retail market. In this respect, we note that the Proposals also provide no indication that there are any problematic aspects with respect to the operation of the institutional investor mortgage marketplace and we further note that the proposed amendments to NI 45-106 Prospectus Exemptions only make sense as it relates to development and construction mortgages. As noted above, institutional investors that purchase residential, commercial and construction loans are experienced in the origination, underwriting, valuation and servicing of these mortgage products and, in view of the application of mortgage brokerage regulation (and now banking regulation to a mortgage broker that is involved with a FRFI in relation to the origination, underwriting or servicing of any type of mortgage product) to the institutional investor marketplace, we believe that there are compelling reasons to provide additional exemptions to specifically focus the Proposals on a very specific part of the mortgage market that raise investor protection

concerns, being the retail part of the market as it relates to development and construction mortgages. We further believe that the definition of “syndicated mortgages” should be tweaked so that they exclude ordinary residential and commercial mortgages which may be used for real property improvement.

- b. Answer to Question 6 (should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for “qualified syndicated mortgages” under British Columbia Securities Commission Rule 45-501 Mortgages?): In defining the concept of a “qualified syndicated mortgage”, BC Rule 45-501 addresses a “syndicated mortgage”: (i) sold through a mortgage broker; (ii) that secures a debt obligation on property used solely for residential purposes and containing no more than four residential dwelling units; and (iii) does not secure a debt obligation incurred for the construction or development of property (amongst other criteria). Within the confines of BC Rule 45-501, the mortgage broker does not have to rely on a prospectus exemption and does not have to be an exempt market dealer with respect to a trade or distribution involving institutional investors. While we believe that BC Rule 45-501 moves in the right direction, we believe that it has a number of problems. First, as indicated above, we believe that the distribution of both residential and commercial mortgages by mortgage brokers to institutional investors through co-ownership agreements, participations or other agreements in which there is more than one “lender” should not be subject to securities regulation for the reasons outlined above. As drafted, BC Rule 45-501 only covers residential mortgages. Second, and while we understand why the drafting included the proviso that a “syndicated mortgage does not secure a debt obligation incurred for the construction or development of property”, we have concerns about this mechanism for purposes of limiting the exemption. As we previously noted, and in the ordinary course, the proceeds of some residential and commercial mortgages may be used for property improvement or redevelopment. We would suggest that these mortgages are different from and should be distinguished from syndicated mortgages provided to developers for property development and construction financing. Amongst the salient differences, BC Rule 45-501 captures renovations and improvements by property owners in relation to their own properties. BC Rule 45-501 is not restricted to developers that are in the construction and development business who perform construction and development activities for resale. Further, and as indicated, and for certain lending products such as lines of credit, a lender may not know whether an owner will use the proceeds to perform construction or renovation on their property. Given this, and also given the fact that construction and renovation may be an incidental feature of ordinary residential and commercial loans, the application of BC Rule 45-501 complicates the inclusion of ordinary residential and commercial mortgages which may be used for construction and renovation in RMBS and CMBS transactions and in MICs. Third, BC Rule 45-501 does not distinguish between situations where real property and development mortgages are distributed or sold by mortgage brokers exclusively to institutional investors as accredited investors versus situations in which these products could be sold by mortgage brokers to the retail investors through an accredited investor exemption or other exemptions. We believe that trades and distributions of

development and construction mortgages by mortgage brokers to exclusively institutional accredited investors should remain outside of the scope of “syndicated mortgages” and the Proposal. The definition of “syndicated mortgages” should only capture situations in which development and construction mortgages are to be sold or distributed by mortgage brokers to retail investors, whether through the accredited investor exemption or other existing exemptions.

- c. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?): We believe we have answered this question in the body of our submissions. As noted, we believe that residential, commercial and construction mortgages sold by mortgage brokers to institutional investors that are accredited investors should continue to be governed by mortgage brokerage regulation (and banking regulation to the extent that a mortgage broker is dealing with a FRFI). The definition of “syndicated mortgage” and the Proposals should only apply to development and construction mortgages made to developers and distributed to retail investors.. With this in mind, and as we noted above, our references to “construction” or “development and construction mortgages” are meant to refer to mortgages specifically provided to developers for land servicing, land development, the development or construction of more than one residence or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction. As noted, the term “developer” could be defined to only include an entity engaged in the business of land servicing, land development, the development or construction of more than one residence or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction. The intention of referring to a “developer” would be to exclude an owner of a residential or commercial property that performs construction, renovation or development activity on their own property for their own use.

**(4) Summary of Recommendations:** In closing, we would like to take the opportunity to provide a decision tree for purposes of the application of the Proposals. In our submission, the definition of “syndicated mortgage” and the Proposals would apply where both conditions (1) and (2) set out below are satisfied::

**1) Is the mortgage a development and construction mortgage?**

A development and construction mortgage would have the following features:

- a) It is a loan made to a “developer”. A “developer” would be an entity engaged in the business of land servicing, land development, the development or construction of more than one residence or the

development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction;

- b) It is a loan made for the specific purpose of the developer engaging in the business described in (a) above.

If the answers to both (1)(a) and (b) are yes, proceed to (2).

If the answer to either (1)(a) or (b) is no, it is not a “syndicated mortgage” and the Proposals do not apply.

**2) Is the mortgage distributed to retail investors in whole or in part?**

If the answers to question (1) and question (2) are yes, it is a “syndicated mortgage” and the Proposals apply.

If the answer to either question (1) or question (2) is no, it is not a “syndicated mortgage” and the Proposals do not apply.

On our submission, and if (1) and (2) above are applicable to the definition of a “syndicated mortgage”, a working definition of “syndicated mortgage” could read as follows: “a mortgage made to a developer for purposes of land servicing, land development, the development or construction of more than one residence or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction and in which two or more persons (excluding accredited investors that are institutions) participate, directly or indirectly, as a lender in a debt obligation that is secured by such mortgage.” The definition of a “developer” would be an entity engaged in the business of land servicing, land development, the development or construction of more than one residence, or the development or construction of one or more commercial or industrial buildings or properties for resale to other persons after completion of the development or construction.

We thank you for the invitation to participate and provide commentary on the Proposals and we are happy to discuss our submissions with you at your request.

**Yours truly,**

**Mark Adams  
General Counsel  
MCAP Commercial LP**



June 06, 2018

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Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment  
Proposed Amendments to National Instrument 45-106 Prospectus  
Exemptions and National Instrument 31-103 Registration Requirements,  
Exemptions and Ongoing Registrant Obligations relating to Syndicated  
Mortgages**

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*Please reply to Bannister Road Office*

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This letter is provided in response to the CSA Notice and Request for Comment - Proposed Amendments to National Instrument 45-106 *Prospectus Exemptions* and National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* relating to Syndicated Mortgages, published on March 8, 2018 (the "**Notice**").

We are pleased to provide the following responses to the specific questions set out in the Notice in the order in which they appear:

### **Appraisals**

1) The requirement to add an appraisal or information from an appraisal to an OM may add to the cost of the appraisal, and hence the overall cost of preparing an OM. Appraisal institutes should be consulted to determine if inclusion of an appraisal in an OM would be acceptable, or would increase its overall cost.

We believe an exception to this requirement should be made where the property was recently acquired in an open market transaction with all parties acting at arm's length.

### **Mortgage Broker Requirements**

2) We don't feel such a certificate signed by a mortgage broker is appropriate where the distribution is not being conducted by a mortgage broker. For example, where the borrower or a registrant is the issuer, a certificate of a mortgage broker should not be required.

3) Assuming the mortgage broker is not the issuer, then this proposal imposes securities related obligations and liabilities likely unfamiliar to most mortgage brokers on an already heavily regulated industry (via provincial mortgage brokerage legislation). Prior to signing the certificate in the OM, mortgage brokers would likely have to obtain legal advice from a securities lawyer, which seems overly burdensome and costly for them. If however the mortgage broker is the issuer, then it would be appropriate for them to sign a certificate as currently prescribed. Generally however, guidance from the regulators on who they would consider to be the issuer of a syndicated mortgage would be helpful.

If such a requirement were imposed on mortgage brokers, a "best efforts" standard is too onerous.

### **Exclusion of syndicated mortgages from the Private Issuer Exemption**

4) A syndicated mortgage created only in conjunction with a mortgage on a property used for residential or business purposes by the mortgager is an example of a situation where the use of the Private Issuer Exemption would be appropriate. In these situations, the risk would appear to lie primarily with the borrower, as opposed to the "investor". Another example would be where the investors in a syndicated loan are sophisticated lenders in the business of lending.

It should also be noted that the cost associated with reporting may be prohibitively expensive for many mortgage lenders operating in the residential and small business loan space. Imposing the requirement to file Reports of Exempt Distribution puts these lenders at a competitive disadvantage as compared to other financial institutions not required to report.

**Alternative prospectus exemptions**

5) and 6) Yes, we believe there should be an exemption for distributions of syndicated mortgages on existing residential properties similar to the exemption for “Qualified Syndicated Mortgages” under BCSC Rule 45-501 Mortgages. In addition, in circumstances where all investors in a syndicate are sophisticated investors in the business of lending, they should be entitled to an alternative prospectus exemption that does not obligate them to report the distribution or incur filing fees with the regulators. Further, such exemptions should not result in an issuer losing its status as a “private issuer” should it already be one.

7) Please refer to our answer in question 4 above. A condition that the syndicated mortgage relates to property used for residential purposes or business purposes by the mortgagor would be appropriate. However, limiting the availability of the exemption to circumstances where the mortgagor is an individual is overly restrictive since it could frequently exclude mortgages on property used for business purposes. However, some restrictions and or stipulations around the nature of the business may be appropriate to exclude land development or speculative land holding businesses.

We wish to thank the Canadian Securities Administrators for the opportunity to respond to the Notice and to provide our comments on the proposed amendments contained therein. If you have any questions, we would be pleased to discuss with you in further detail. Please feel free to contact Neil Hutton at (403) 225-6416, or by email at [anhutton@mcleod-law.com](mailto:anhutton@mcleod-law.com), or Ryan Franzen at (403) 873-3707, or by email at [rfranzen@mcleod-law.com](mailto:rfranzen@mcleod-law.com), or Matthew Burgoyne at (403) 254-3827, or by email at [mburgoyne@mcleod-law.com](mailto:mburgoyne@mcleod-law.com).

Yours very truly,  
McLeod Law LLP

Date June 6, 2018

**Via Email**

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

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8

M<sup>c</sup> Anne-Maire Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square-Victoria, 22<sup>e</sup> étage  
C.P. 246, tour de la Bourse  
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Submissions and comments with respect to proposed amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages (the “**Proposed Amendments**”) and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (the “**Proposed Changes**”)

We are writing in response to the request for comments by the Canadian Securities Administrators (the “**CSA**”) with respect to the Proposed Amendments and the Proposed Changes.

We have been engaged to provide these comments on behalf of a client that is actively involved in syndicated mortgage transactions in British Columbia since 1999 and who wishes to remain anonymous. We also represent other clients involved in the same industry activities. These comments are made on behalf of clients and reflect the views of the author but not necessarily the views of McMillan LLP or its partners.

### **General Comments**

Alternative lenders such as mortgage syndicators play a vital role in the lending industry by being able to organize required capital very quickly to allow major developments to proceed which have been rejected by an institutional lender thereby saving the development project and preventing deposits from being forfeited, which is a benefit to commerce and satisfies an important void. These alternative lenders also satisfy market demands resulting, to a large degree, from new and restrictive regulatory regimes impacting regulated institutional lenders. The environment for mortgage lending by institutional lenders has been negatively impacted in recent years due to an increase in restrictive regulations and compliance obligations, as well as changes to the CMHC mortgage insurance program. As a result, many loan opportunities that were once considered “conventional” have become prohibited or have become otherwise unacceptable to institutional lenders.

Syndicated mortgage transactions are regulated in several jurisdictions in Canada, however, such transactions are already appropriately regulated in British Columbia through existing securities legislation in British Columbia as well as through the *Mortgage Brokers Act* (British Columbia), which is implemented and administered by the British Columbia Financial Institutions Commission. According to the *Mortgage Brokers Act* (British Columbia), a mortgage broker is required to provide an investor/lender with a Form 9 Disclosure Statement, which provides necessary precautions as well as detailed information about the intended transaction, prior to the lender advancing any funds under the intended transaction, and which Form 9 Disclosure Statement must be retained by the mortgage broker for a period of 7 years. In addition, a mortgage broker is required under the *Mortgage Brokers Act* (British Columbia) to provide an investor/lender with a Form 10 Conflict of Interest Disclosure Statement which discloses any direct or indirect interest the mortgage broker or any associate or related party of the mortgage broker has or may acquire in the transaction, which Form 10 must also be retained by the mortgage broker for a period of 7 years. Therefore, we do not believe that any of the Proposed Amendments are necessary in British Columbia. Possibly other jurisdictions in Canada that do not have a regulatory regime similar to the one in British Columbia should consider implementing such a regulatory regime.

We must not lose sight that a majority of syndicated mortgages are commercial contracts and loans secured by an interest in land, and therefore, the proper regulation is under the applicable mortgage broker legislation of the applicable jurisdiction and not under the securities legislation of the applicable jurisdiction.

It is also important to note that the definition of “syndicated mortgage” under section 8.12(1) of National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, which provides as follows: “means a mortgage in which two or more persons or

companies participate, directly or indirectly, as lenders in the debt obligation that is secured by the mortgage”, confuses two distinctly different commercial transactions, which are deserving of differing regulatory oversight. Specifically, this confusion enables one to legitimately assume the term “syndicated mortgage” means either:

- (a) a group of lenders (a co-lender syndicate) agreeing to lend on a single mortgage loan transaction, or
- (b) a mortgage or pool of mortgages that is in place (or in a constant state of replacement) and which is syndicated by way of selling fractional interests in such mortgage(s), which may include members of the public.

The situation in (a) above describes one of the most customary and well understood commercial transactions in relation to real estate – a group of lenders actively assessing and making a mortgage loan arranged by a mortgage broker. The situation in (b) above describes a form of investment involving trades in fractionalized interests of pre-existing mortgages or trades in securities in a pool of underlying assets which is comprised of mortgages. The former is a single lending transaction secured by a mortgage against an identifiable piece of real property. The latter is an investment transaction in a pre-existing mortgage or a pool of mortgages.

We respectfully submit that the definition of “syndicated mortgage” should be revised so that there is a distinction between the two interpretations of such definition, or that another definition be adopted so as to carve out a “co-lender syndicate” as described above from the definition of “syndicated mortgage.” The dominant business activity of a mortgage broker that structures a co-lending syndicate from its lending clients is the lending of money secured by a mortgage on real property with respect to a single loan transaction and not the creation or distribution of fractionalized interests in a pre-existing mortgage or a pool of mortgages.

The type of lender and timing of a typical syndicated mortgage by a co-lending syndicate are significantly different than those associated with the situation in (b) above. The lenders in a co-lending syndicate are typically individuals with significant financial assets who are sophisticated and familiar with such types of commercial contracts and are actively involved in assessing the mortgage loan opportunity, whereas the typical individuals involved with the situation in (b) above are passive investors investing in a fractionalized interest of a pre-existing mortgage or a pool of mortgages. In addition, the timing associated with a typical syndicated mortgage by a co-lending syndicate is usually short fused transactions that require funding within a very short time period following a loan application by a prospective borrower to the mortgage broker. Therefore, the co-lending syndicate often has one or two weeks to consider the loan application, review the due diligence materials (including, but not limited to, appraisals, environmental and in British Columbia the Form 9 and Form 10 mandated disclosure documentation) and determine whether to proceed with funding the mortgage loan opportunity. This short timeline requires the mortgage broker to have in place an existing client pool of potential lenders who are interested, experienced in mortgage lending and who are able to quickly assess the loan opportunity, and, if interested, commit funds within a tight timeline. This type of lending activity is not compatible with the marketing of fractionalized interests in a pre-existing mortgage or a pool of mortgages.

### Changes to the Mortgage Exemptions

If the current prospectus and registration exemptions for securities that are mortgages (the “**Mortgage Exemptions**”) are removed for syndicated mortgages in Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island and Yukon, then we respectfully submit that alternative prospectus and registration exemptions be adopted that are specific to syndicated mortgages and specifically for syndicated mortgages that are a “co-lending syndicate.” As discussed above, jurisdictions in Canada that do not have a regulatory regime similar to the one in British Columbia (the *Mortgage Brokers Act* (British Columbia) which is implemented and administered by the British Columbia Financial Institutions Commission) that requires, *inter alia*, a prescribed form of lender disclosure statement and a conflict of interest disclosure statement) should consider implementing such a regulatory regime together with alternative prospectus and registration exemptions for syndicated mortgages.

### Dealer Registration

If the Mortgage Exemptions are removed for syndicated mortgages, then specific exemptions from the dealer registration requirements should be adopted to allow the mortgage syndicators, especially those mortgage brokers that organize a co-lending syndicate for each single mortgage loan opportunity, to be able to operate without being required to register as an exempt market dealer. We respectfully submit that an exemption from the dealer registration requirement similar to that in British Columbia pursuant to BC Instrument 32-517 – *Exemption from Dealer Registration Requirement for Trades in Securities of Mortgage Investment Entities* (“**BCI 32-517**”) be adopted together with enhanced disclosure documentation under mortgage broker legislation in the applicable jurisdiction similar to that required under the *Mortgage Brokers Act* (British Columbia). In British Columbia mortgage brokers typically rely upon the exemption from dealer registration requirement under BCI 32-517 for syndicated mortgage transactions as most co-lending syndicates are structured as “mortgage investment entities” as defined under BCI 32-517 as well as CSA Staff Notice 31-323 - *Guidance Relating to the Registration Obligations of Mortgage Investment Entities*. Therefore, we respectfully submit that the exemption from the dealer registration requirement provided by BCI 32-517 should be made permanent.

The failure to adopt a specific exemption from the dealer registration requirements for syndicated mortgages, or the failure of the British Columbia Securities Commission to make BCI 32-517 permanent, would then result in parties frequently engaging in syndicated mortgage transactions to be required to register as an exempt market dealer or else engage an exempt market dealer to bring investors/lenders into the syndicated mortgage transaction.

We respectfully submit that syndicated mortgage transactions, especially those mortgage brokers that organize a co-lending syndicate, would not benefit from the involvement of a registered dealer and neither would such involvement be appropriate for syndicated mortgage transactions. The proficiency requirements for a dealing representative of an exempt market dealer which mainly deals with securities such as shares and derivatives are not mortgage industry specific and not appropriate for analyzing a mortgage loan transaction. Whereas, the education that a

mortgage broker undertakes along with the licensing a mortgage broker is required to secure and maintain as well as the skill set of a real estate lawyer are sophisticated and specifically tailored to assess the merits and risks of a syndicated mortgage transaction. In our view, requiring the involvement of a registered dealer in syndicated mortgage transactions whose proficiency requirements are not specific to the mortgage industry will not offer any additional protection to the public than what is already provided for under the current regulatory regime in British Columbia under the *Mortgage Brokers Act* (British Columbia) and the oversight of same by the British Columbia Financial Institutions Commission.

In addition to the inappropriate skill set of a registered dealer with respect to syndicated mortgage transactions, the additional costs and expenses associated with having to engage a registered dealer, which fees are typically between 4 to 8% of the funds raised from the clients of the registered dealer, would change, for the worse, the economic landscape of the syndicated mortgage industry. The industry standards for fees charged by mortgage syndicators is typically between 1 to 2% of the loan amount, which is often paid to the syndicator from the lender fee customarily charged to the borrower. Therefore, having to also include a registered dealer fee which would be over and above the syndicator's fee would need to be added to the amount of the loan provided to the borrower. This would make the cost of such alternative lending prohibitively expensive to the borrower and put many alternative lenders (particularly those that specialize in syndicated mortgages) out of business. It is important to keep in mind that these alternative lenders provide a vital role in the lending industry, and the reduction or elimination of this type of alternative lenders would have a negative impact on commerce.

As discussed above, the syndicator in a co-lending syndicate frequently only has one or two weeks to consider the loan application, review the due diligence materials (including, but not limited to, appraisals, environmental and in British Columbia the Form 9 and Form 10 mandated disclosure documentation), appraisal and determine whether to proceed with funding the mortgage loan opportunity transaction. Most registered dealers would not be able to complete their know-your-client and suitability analysis in order to comply with their registered dealer obligations within this short time frame in which these syndicated mortgage transactions need to close. Furthermore, how could such a registered dealer satisfy its know-your-product obligation when the structuring of the subject transaction in question is often not finalized until the very day of funding? Real estate lending is a fast paced and dynamic transactional business. Therefore, if an exemption from the dealer registration requirements is not adopted for syndicated mortgages, then the imposition of a registered dealer would jeopardize a significant amount of these types of mortgage loan opportunities having a negative effect on major development projects as well as commerce.

### **Changes to the Offering Memorandum Exemption**

Since the syndicator in a typical co-lending syndicate has a short time frame in which to analyze the mortgage loan opportunity and to prepare the necessary due diligence materials and mandated disclosure documentation in British Columbia, we believe that it may well be too onerous for many syndicators to utilize the offering memorandum exemption.

In addition, requiring the issuer of a syndicated mortgage, where the borrower is not the issuer (which in our experience is much more often the situation than the borrower being the issuer of a syndicated mortgage), to provide required information regarding the borrower would also prevent syndicators in a typical co-lending syndicate from utilizing the offering memorandum exemption. To the extent the syndicator in a co-lending syndicate is able to secure information concerning the borrower, how could it verify the veracity of the information and certify that the offering memorandum does not contain a misrepresentation unless extensive due diligence of the borrower is performed which would be cost prohibitive and impossible under usual time constraints. We respectfully submit that any certification to be provided by a co-lending syndicator concerning the borrower should be limited to the actual knowledge of such syndicator and not require such syndicator to use best efforts to ensure that matters that are not within its knowledge do not contain a misrepresentation.

### **Changes to the Private Issuer Exemption**

We respectfully submit that the private issuer exemption should continue to be available to the distribution of syndicated mortgages, especially for those mortgage brokers/syndicators that organize a co-lending syndicate, and we do not support the Proposed Amendments to the private issuer exemption.

In our experience with syndicated mortgage transactions where a mortgage broker/syndicator organizes a co-lending syndicate, there are typically a small number of lenders (definitely less than 50) which lenders each have significant financial assets, are sophisticated and familiar with such types of commercial contracts and are actively involved in assessing the mortgage loan opportunity. The mortgage broker/syndicator as well as the co-lenders desire to keep the information about the loan as well as the co-lenders confidential as there is no need for such information about how much money was syndicated for a particular mortgage loan to be made available to the public to review, which would be the case if a report of exempt distribution is required to be filed for syndicated mortgage transactions. We appreciate the regulators desire to collect information about syndicated mortgage distributions, however, we believe that the relevant information could be obtained through, in British Columbia, the mandatory requirement to file the Form 9 Investor/Lender Disclosure Statements or some other form containing the information desired by the regulators with respect to each syndicated mortgage transaction with the applicable regulator privately through a portal service or else in paper format and without any required filing fee. In addition, the requirement to file relevant information with the applicable regulator should continue for only as long as absolutely necessary for the regulators to gather the required information about the syndicated mortgage market in order to assess compliance requirements so that the administrative burden on the syndicator is minimized.

Another concern with respect to imposing a report of exempt distribution on syndicators is the related filing fee associated with the Form 45-106F1, which fees would need to be passed onto the borrower making access to such funds more expensive.

**Changes to Section 3.8 of Companion Policy 45-106CP**

We respectfully submit that any Proposed Changes to Section 3.8 of Companion Policy 45-106CP need to fully consider the distinctly different commercial transactions that may occur under the definition of “syndicated mortgage” as explained above under the section titled “General Comments” as the Proposed Changes do not take into account the substance and activities of co-lending syndicates with respect to a mortgage loan transaction.

If you wish to discuss any aspect of this letter, please contact the undersigned by email at michael.shannon@mcmillan.ca or by telephone at 604.893.7638.

Yours truly,

*“Michael Shannon”*

for **McMillan LLP**

June 6, 2018

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

**RE: REQUEST FOR COMMENTS RELATING TO SYNDICATED MORTGAGE ACTIVITY IN CANADA**

Thank you for the opportunity to respond to the proposed amendments to syndicated mortgage exemptions under the jurisdiction of the Canadian Securities Administrators (CSA). On behalf of our members, Mortgage Professionals Canada is pleased to respond to the public consultation.

Mortgage Professionals Canada is the national mortgage industry association representing approximately 11,500 individuals and 1,000 companies, including mortgage brokerages, lenders, insurers and industry service providers. Our members make up the largest and most respected network of mortgage professionals in the country whose interests we represent to government, regulators, media and consumers. Together, we are dedicated to maintaining a high standard of industry ethics, consumer protection and best practices.

The mortgage broker channel we represent originates more than 35% of all mortgages in Canada and 55% of mortgages for first-time homebuyers, representing approximately \$80 billion dollars in annual economic activity. With this diverse and strong membership, we are uniquely positioned to speak to issues impacting all aspects of the mortgage origination process.

Mortgage Professionals Canada supports stronger consumer protection and increased regulatory oversight for syndicated mortgage activity. We have been pleased to work closely with both the Financial Services Commission of Ontario (FSCO) and the Ontario Ministry of Finance in developing interim regulations in

Ontario before the transition from FSCO to the Ontario Security Commission (OSC) occurs.

With that said, our members do have some concerns about the significant costs that the proposed measures will have on many mortgage brokerages who are currently involved in responsible and prudent syndicated mortgage activity. The CSA acknowledges that the proposals “potentially involve significant costs” and indicate that these are “proportionate to the benefits of increased investor protection”.

Without making adjustments to the proposed regulations, we are concerned that many businesses that arrange smaller syndicated mortgages will be faced with such high regulatory costs that they will no longer be able to offer these products and will be forced to exit the industry. Given the current uncertainty in the Ontario market with rising rates, new federal regulations and a persistent lack of housing supply, the removal of required syndicated mortgage finance opportunities from the market could prove damaging to the economy.

While we fully support the intention and objective of increased consumer protection, we are asking that the CSA consider the following comments that will, in our view, assist to better achieve the balance between the expected financial burden to the industry and consumer protection.

Firstly, we support the adoption of “an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for ‘qualified syndicated mortgages’ under British Columbia Securities Commission Rule 45-105”. This exemption will allow many of our members to continue to arrange and fund non-complex syndicated mortgages. Without this exemption, the transfer of oversight will remove a necessary source of financing from the market. Having such an exemption would be consistent with the Ontario Ministry of Finance’s qualified syndicated mortgage exemption, introduced in the new regulations coming into force on July 1, 2019. Additionally, given that the industry will already be adjusting to new regulations, it will be disruptive to brokerage operations to remove the qualified syndicated mortgage exemption when the transfer to the OSC occurs. We would propose that the Ontario Ministry of Finance’s definition be used and applied across the country unless otherwise specified in provincial legislation.

Secondly, the proposed 12-month transition period is not long enough given the anticipated licensing and compliance framework. We are requesting that the transition period be extended to 24 months, or that a mortgage broker’s previous syndicated mortgage oversight activity and experience be recognized by the

OSC when considering an individual's ability to perform the expected duties of a Chief Compliance Officer.

In our view, it will otherwise be impossible for principal mortgage brokers to complete the education and licensing requirements to obtain exempt market-dealer status, and then complete the required 12 months of related securities experience to act as a Chief Compliance Officer within the proposed 12-month transition period. In the absence of an appropriate timeline or approach permitting a practical transition, businesses will either be forced to incur significant staffing costs in the hiring of an existing accredited Chief Compliance Officer or simply cease arranging these types of loans.

Principal brokers have a strong understanding of the appropriate Know Your Client forms as well as procedures, product and investor suitability, and a sophisticated understanding of how syndicated mortgages work. As such, their previous experience should be recognized toward the granting of Chief Compliance Officer status, provided they attest to engaging solely in syndicated mortgages under securities regulations. This will limit the costs for our industry while ensuring the desired improvements in consumer protection.

Thirdly, there is costly red-tape with the filing of the 45-106F1 Report of Exempt Market Distributions that we would like to see addressed. We are concerned with the \$500 fee per file, the need to file a report for each individual syndicated mortgage transaction, the obligation to file within 10 days, and the number of individuals required to file the report. We are concerned that the costs associated with these elements will all but eliminate the simple, less complex forms of syndication that many accredited investors have been using for decades.

The proposal could negatively impact a mortgage investor's ability to create a diversified portfolio, as smaller syndications will be removed from the investor's portfolio leaving only larger, more complex, and longer-term syndications. We believe that prudent and sophisticated investors would benefit from having any risk associated with syndicated mortgages to be as diversified as possible in order to ensure proper risk management and suitability. Our concern is that as the current regulations are proposed, this will be impossible to do.

Therefore, we recommend that in situations where the borrower assigns the obligation to the file that reports to an exempt market dealer, that the exempt market dealer is considered as the issuer and need only file one monthly report – at a cost of \$500 - that contains all of the syndicated mortgage sales for that period of time. We believe this meets the intention and desire of the OSC's proposal without unintentionally removing many mortgage options from the market.

Finally, we recommend that simple husband and wife and legally recognized spousal relationship syndications be exempt from these new regulations. Since private lending still is regulated under the MBLAA, we want to ensure that a mortgage investment made by legally recognized spouses would be treated as one person on the mortgage - not syndicating two individuals on one mortgage.

Currently this is how many mortgage brokerages operate: the husband and wife named jointly on one set of investor disclosure documents. The mortgage is registered through Teranet Registration System as a single mortgage and with husband and wife as the joint mortgagees. We believe that it is not the intention of the regulations to preclude these types of syndications and we want to avoid any unintentional consequences by explicitly stating that these types of activities will be exempt from the new regulations.

In conclusion, we are supportive of the CSA's objectives of improved consumer protection and increased regulatory oversight. Please consider our comments and suggestions constructive, which we believe will better address the concern CSA has in finding the appropriate balance between consumer protection and costs to the industry.

We would be pleased to discuss our submission in more detail and answer any questions that you may have. Please contact Paul Taylor, President and CEO at [ptaylor@mortgageproscan.ca](mailto:ptaylor@mortgageproscan.ca) or by phone at 416.644.5465.

Paul Taylor  
President and CEO  
Mortgage Professionals Canada



**Via Email**

June 6, 2018

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M<sup>e</sup> Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
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Alberta Securities Commission  
Autorité des marchés financiers  
British Columbia Securities Commission  
Financial and Consumer Affairs Authority of Saskatchewan  
Financial and Consumer Services Commission (New Brunswick)  
Manitoba Securities Commission  
Nova Scotia Securities Commission  
Nunavut Securities Office  
Office of the Superintendent of Securities, Newfoundland and Labrador  
Office of the Superintendent of Securities, Northwest Territories  
Office of the Yukon Superintendent of Securities  
Ontario Securities Commission  
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Dear Sirs/Mesdames:

**Re: Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions**

Olympia Trust Company (“**Olympia**”) is grateful for the opportunity to provide comments to the Canadian Securities Administrators (the “**CSA**”) with respect to the Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (collectively, the “**Proposed Amendments**”).

**About Olympia**

Olympia is a non-deposit taking trust corporation formed under the *Loan and Trust Corporations Act* (Alberta). Olympia is licensed to provide trust services in the Provinces of Alberta, British Columbia,

Saskatchewan, Manitoba, Quebec, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador. Olympia's principal business is the provision of trust services to individuals who have established a self-directed registered plan, such as an RRSP, RRIF, TFSA, RESP or LIRA, with Olympia in accordance with the *Income Tax Act* (Canada).

Funds held in self-directed registered plans are used by the registered plan holders to make investments in private company securities, syndicated mortgages, mutual funds, public securities, bonds and other investments qualified to be held in a registered plan under the *Income Tax Act* (Canada).

Approximately, 90,000 self-directed registered plans holding approximately \$4.5 billion in private company securities, syndicated mortgages, mutual funds, public securities, bonds and other investments are currently administered by Olympia.

#### **Disclosure of Financial Information respecting Syndicated Mortgages held by Olympia**

As one of the few registered plan trustees that accepts syndicated mortgages as plan assets, Olympia is uniquely positioned to provide insight to the CSA with respect to the financial performance of syndicated mortgages in Canada. As the CSA is undoubtedly aware, information on the financial performance of syndicated mortgages in Canada is difficult to obtain as there are few publicly available sources for such information. In addition, those publicly sources that are available (i.e. Provincial Land Title Registries) provide incomplete financial information that needs to be further refined to even have the potential to be of use.

It is Olympia's view that the lack of available information with respect to the financial performance of syndicated mortgages has created considerable speculation and supposition on the risks associated with syndicated mortgage investments in Canada. In the absence of information, it is human nature to assume the worst and presume that the risks associated with an investment are higher than they may be actually be. It is Olympia's hope that the disclosure of financial information to the CSA with respect to the performance of syndicated mortgages held by Olympia will permit the CSA to conduct an objective assessment of their associated risks and modify the Proposed Amendments accordingly.

As an example of the information available to Olympia, Olympia is pleased to advise the CSA as follows:

- In 2015, 2016 and 2017 Olympia funded a total of 2,083 syndicated mortgages across Canada with between 2 to 10 account holders per syndicated mortgage on existing residential or commercial properties.

- Of the 2,083 syndicated mortgages funded:
  - 861 (41.3%) paid out with a complete return of principal and interest to account holders;
  - 1,085 (52%) remain outstanding, but are current in terms of payment of interest and principal;
  - 80 (3.8%) paid out with a loss of some principal or interest to the account holder;
  - 35 (1.7%) are currently in foreclosure proceedings;
  - 19 (<1%) resulted in the account holder losing all of their money; and
  - 3 (<1%) saw the account holder foreclose and take ownership of the secured property.

Olympia, in its sole discretion, is prepared to disclose additional information to the CSA respecting the financial performance of the syndicated mortgages held by Olympia. Such disclosure would be in the aggregate and would not include any particular information with respect any single syndicated mortgage or any personal information that may be in Olympia's control or possession.

#### **Harmonization of Syndicated Mortgages and Debt Securities Regulatory Regimes**

Olympia generally agrees that amendments to the current syndicated mortgage regime are required to enhance investor protection (particularly in Ontario). However, it is Olympia's position that the resulting syndicated mortgage regulatory regime needs to be harmonized with and be substantively similar to the regulatory regime that exists with respect to debt securities such as bonds and debentures.

Olympia notes that the issuance by an issuer of bonds or debentures that are secured by a collateral mortgage against real property is substantively the same as the issuance of a syndicated mortgage against the same real property. However, under the Proposed Amendment a syndicated mortgage will be subject to a far more onerous regulatory regime than a comparable issuance of bonds or debentures secured by a collateral mortgage against real property. Specifically, the issuer of bonds or secured debentures secured by a collateral mortgage against real property will:

1. not be subject to the proposed additional requirements for syndicated mortgages under the offering memorandum exemption under section 2.9 of National Instrument 45-106 - *Prospectus Exemptions* ("**NI 45-106**"); and
2. continue to be able to use the Private Issuer exemption under section 2.4 of NI 45-106.

Olympia also notes that under the Proposed Amendments, unsecured bonds and debentures will be subject to a less onerous regulatory regime than a syndicated mortgage, even though arguably there is less risk associated with the syndicated mortgage (which is secured against real property) than with

unsecured bonds or debentures. It is Olympia's view that the requirements of any regulatory regime designed to provide investor protection should be proportionate to the anticipated risks borne by such investors.

Finally, Olympia notes that the definition of "syndicated mortgage" under the Proposed Amendments is problematic. This definition reads follows:

"syndicated mortgage" means a mortgage in which two or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by a mortgage.

It is Olympia's view that this definition elevates the form of the offered security (i.e. a mortgage) over the substance of the offered security (i.e. a debt obligation that is secured by real property). Olympia is unable to discern a reason as to why the form of any debt obligation that is secured by real property should matter in determining the application of the proposed regulatory regime. All debt obligations that are secured by real property should be subject to the same regulatory regime.

As a result of the issues outlined above, it is Olympia's view that the effect of the Proposed Amendments will be to cause issuers that previously used syndicated mortgages to finance their business activities to adopt bonds or secured debentures as an alternative financing vehicle as the regulatory regime associated with bonds and secured debentures is less onerous than the one being proposed with respect to syndicated mortgages.

#### **Definition of "Syndicated Mortgage" a Disincentive to Diversification**

Olympia is concerned that the threshold number of lenders at which the regulatory regime proposed by the Proposed Amendments becomes applicable has been set too low. Under the Proposed Amendments "syndicated mortgage" means a mortgage in which two or more persons participate, directly or indirectly, as a lender in a debt obligation that is secured by a mortgage. It is Olympia's view that this definition of syndicated mortgage will encourage issuers to make efforts to avoid the proposed regulatory regime by requiring that the offered mortgage be held by only a single mortgagor. As a consequence investors wishing to invest in a mortgage will be required to invest a greater share of their investment portfolio in a single mortgage and will have less ability to diversify their overall investment portfolio.

The importance of diversification in the mitigation of idiosyncratic investment risk is well established and in Olympia's opinion should be encouraged by any regulatory regime proposed by the CSA.

Furthermore, as evidenced by the information disclosed above with respect to the financial performance of syndicate mortgages having between 2 and 10 lenders, it is Olympia's experience that the risk of default with such mortgages is actually quite low and can be reasonably managed through diversification.



However, if lenders are unable to or are discouraged from diversifying their mortgage investment portfolio they will be required to assume unnecessary idiosyncratic investment risk.

Accordingly, it is Olympia recommendation that the definition of "syndicated mortgage" under the Proposed Amendments be changed so that only those syndicated mortgages with 10 or more lenders are subject to the proposed regulatory regime.

In further support of this recommendation, Olympia notes that the syndicated mortgages that have recently dominated news headlines usually had hundreds of investors; not 10 or less. It is Olympia's view that it is appropriate and in accordance with the public expectations that the regulatory regime adopted with respect to syndicated mortgages place stricter regulatory requirements on syndicated mortgages with more than 10 investors than on those with less than 10 investors.

#### **Conclusion**

Olympia would like to reiterate its appreciation to the CSA for the opportunity to comment on the Proposed Amendments and, as indicated above, is prepared to provide the CSA with access to significant information respecting the financial performance of syndicated mortgages in Canada. Olympia sincerely believes that this information would be of great assistance to the CSA in its current endeavours.

Sincerely,

"Signed"

Craig Skauge  
President  
Olympia Trust Company

"Signed"

Jonathan Bahnuik  
General Counsel  
Olympia Trust Company

Wednesday June 6, 2018

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

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Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions**

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The Ontario Mortgage Investment Companies Association (“**ONMICA**”) thanks you for the opportunity to provide our comments in connection with the Canadian Securities Administrators’ (“**CSA**”) Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (the “**Proposal**”) as set out below.

ONMICA is an association of Mortgage Investment Corporations, Mortgage Funds, Mortgage Mutual Fund Trusts, and other Mortgage Investment Entities (MIEs) as well as registrants including exempt market dealers (“EMDs”) and mutual fund dealers registered with the Ontario Securities Commission who operate in the MIE space. There are currently 27 ONMICA members who collectively have approximately \$3.7 billion of gross assets under administration.

ONMICA’s purpose is to:

- Facilitate the exchange of information and ideas between members.
- Present a unified voice to regulators and other stakeholders to protect the specific interests of our industry.
- Set and uphold industry standards for ethics and professionalism.
- Act as an advocacy group for the MIE “community” dealing primarily with securities regulators (such as the Ontario Securities Commission) to further their understanding of the business of MIEs and ensuring the regulation of capital raising is fair, simple, and specific to our industry.
- To raise the profile and understanding of MIEs in the minds of both investors and capital raising industry participants.
- To assist the members of our organization with advice, problem solving and professional referrals.

ONMICA membership criteria includes that the member firm’s primary source of income is derived from being or managing a MIE whose securities are distributed through a registered entity recognized by the Ontario Securities Commission, and who conducts business in an ethical and professional manner that positively reflects on the industry.

## **GENERAL COMMENTS**

### **General Comments on Proposed Amendments**

ONMICA welcomes the Proposal and its potential to enhance investor protection and improve harmonization within the mortgage investment industry. However, we are concerned that there may be the potential for unintended consequences to the syndicated mortgage industry based on the current Proposal. We believe there are facets that need to be discussed in order to find a regulatory regime for syndicated mortgages that protects investors and is practical for syndicated mortgage providers, borrowers, registrants and regulators.

There has long been a structural issue in the mortgage investment industry whereby investments made into pooled mortgage funds have involved higher investor protection protocols when compared to syndicated mortgages regardless that both investment vehicles are lending on the same product. We maintain that all syndicated mortgages should be held to the higher standard implemented by securities regulators as the current and proposed investor protection regime mandated by the Financial Service Commission of Ontario is not sufficient. Elevating to the OSC/CSA’s standard will not only provide sufficient investor protection protocols it will also thwart bad actors targeting syndicate mortgages where there is less regulatory oversight.

### **Comments on Carve-Outs for Qualified (Non-Complex) Syndicated Mortgages and the Private Issuer Exemption**

ONMICA believes that the carve outs to exemptions for syndicated mortgages should not be implemented. We are proponents of increasing jurisdictional harmony. We believe in order to

have fair and efficient capital markets it is important to have homogeneity among the CSA members and therefore the complexities that could arise from adding these carve outs should be avoided.

*The Private Issuer Exemption:*

ONMICA does not agree with carving out trades in syndicated mortgages from the private issuer exemption (“PIE”). We maintain the importance of the exemption for persons who are not in the business of mortgage lending and should not therefore be subject to securities obligations. However, we recommend that the CSA should include in a companion policy commentary on the appropriate use of the exemption. The commentary should highlight the business trigger test to ensure that individuals who are in the business of mortgage lending are not to rely on the exemption as this violates the spirit of the rule. It should also speak to small mortgage investment entities who purposefully limit the number of their investors to be below 50 in order to skirt registration and reporting obligations. ONMICA believes that the proposed commentary is in keeping with regulators’ current ideology of the acceptable use of the exemption and would appreciate the opportunity to comment on amendments to the companion policy.

*Qualified (Non-Complex) Syndicated Mortgages & British Columbia Securities Commission Rule 45-501 (“BCSCR”):*

Adopting a carve out for an exemption for the distribution of syndicated mortgages on non-complex transactions as well as BCSCR is unnecessary if the PIE as recommended above is maintained.

ONMICA is concerned that mortgage syndications on non-complex assets are ostensibly being categorized as less risky transactions. Currently, a large portion of retail syndications are being conducted by mortgage brokers on standard residential assets. To date, these brokers and their investors have had the benefit of a rising housing market. However, with changing market conditions, we are concerned that the vulnerability of these investments will likely surface.

In addition to the added complexities created by having separate regulatory authorities monitoring the same industry, ONMICA feels that an adoption of the carve outs may raise investor protection issues. ONMICA maintains that security regulators and their registrants are best suited for securities transactions particularly on matters relating to investor protection. We are wondering if the provincial regulatory authorities that oversees mortgage brokers have a sufficient focus on investor protection. Comparatively, securities regulators have a history of investor protection which includes a higher level of proficiencies for registrants. Furthermore, we recognize that some mortgage broker regulators, such as FSCO, are in the process of adopting know your client (“KYC”) and suitability requirements for syndicated mortgages that will likely mirror current securities regulations. While laudable, we wonder if mortgage brokers have the requisite training or qualifications to properly conduct these assessments as they have historically focused on know your product (“KYP”) on qualified (non-complex) syndicated mortgages, which is only one third of the trinity of KYC, KYP & suitability.

**Registration and Transition Period**

ONMICA recognizes that firms transitioning from licensing under mortgage broker legislation to registration as exempt market dealers under securities regulation may result in short term disruption during the transition period. In the spirit of fair and efficient capital markets, regulators should be prepared to allocate additional resources for a likely uptick in applications and for the

ongoing oversight of the increase in number of registrants. Applicants will require time to consider the registration requirements and if appropriate, prepare their application and obtain any required proficiencies. Given this, it is important that the transitory period provides industry participants with reasonable time to transition to the new requirements.

## RESPONSES TO QUESTIONS

### Appraisals

*1) As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?*

ONMICA believes that due to the cost and time involved in establishing an OM, the OM exemption will be rarely used and only for large transactions. So, while an exception from the appraisal requirement sounds reasonable, this and any other exceptions would probably not be a determining factor in whether an issuer distributes under the OM Exemption. Please note that one of the primary reasons that borrowers turn to alternative lenders is that the underwriting process is supposed to take less time than traditional lenders. In addition, it is arguably part of the dealer's KYP responsibilities to ensure that there has been a recent and reliable appraisal.

### Mortgage Broker Requirements

*2) Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.*

ONMICA feels there is ambiguity regarding what information is expected to be within the personal knowledge of a mortgage broker. Subsequently, we feel that it is unfair to place the onus on the mortgage broker to make representations regarding information that should or should not be within their personal knowledge. If there was more clarity on these expectations, then a more informed discussion could occur about what a certificate page should include.

*3) Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?*

See response to question 2.

### Exclusion of Syndicated Mortgages from the Private Issuer Exemption

*4) Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.*

Yes. Mortgages are used in a variety of settings that fall outside the actions intended to be captured in the Proposal. For instance, an individual providing a vendor take back mortgage to ensure the sale of their property. Mortgages are also used in business and personal transactions

and not just for investment purposes. ONMICA believes that keeping the private issuer exemption in place in conjunction with providing additional commentary on the business trigger test and expectations of when PIE is not to be relied upon will strike an appropriate balance of not subjecting the above activities to undue securities regulations while ensuring those who are engaged in the business of trading in securities are fulfilling their regulatory requirements.

### **Alternative Prospectus Exemptions**

*5) Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?*

Not necessary if the PIE is maintained.

*6) Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 Mortgages?*

Not necessary if the PIE is maintained. See comments above under the section titled *Qualified (Non-Complex) Syndicated Mortgages & British Columbia Securities Commission Rule 45-501 ("BCSCR")*.

*7) Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?*

No, not necessary if the PIE is maintained.

### **ADDITIONAL COMMENTARY SOUGHT**

ONMICA is aware of discussions about who should be responsible for the reporting of distributions relating to syndicated mortgages. We are requesting commentary on who will be required to file reports of exempt market distributions as we recognize that the borrower, who is technically the issuer, may not be the person best suited to do so. We ask that we are provided an opportunity to submit comments on the CSA's proposal on this matter.

We are requesting feedback on how the proposed changes to syndicated mortgages impact the current process of consolidation of Ontario regulators (Financial Services Commission of Ontario, Ontario Securities Commission and the Financial Services Regulatory Authority of Ontario).

ONMICA recognizes that relevant securities industry experience is determined by the regulator. ONMICA members are requesting guidance on what will be considered acceptable relevant securities industry experience for those individuals who have historically not had to be registered but have been in the business of mortgage syndications.

**Closing Remarks**

ONMICA would like to thank to the CSA for their efforts in drafting the Proposal and for soliciting feedback from various stakeholders.

\* \* \* \*

We thank you for considering our submissions and we would be pleased to respond to any questions or meet with you to discuss our comments.

Yours truly,

**ONMICA Volunteer Members**

---

Diana Soloway

May 15, 2018

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Office of the Superintendent of Securities, Newfoundland and Labrador  
Office of the Superintendent of Securities, Northwest Territories  
Office of the Yukon Superintendent of Securities  
Ontario Securities Commission  
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Dear Sir or Madam:

Further to the March 8th, 2018 publication for comment on the proposed amendments first referenced above, I shall provide comments to the questions posed. My comments are in red.

#### Appraisals

1. As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?

An exception may be that the property was recently acquired in a market transaction however may pose the potential for fraud or misrepresentation. The requirement must be clearly defined as to the type of appraisal and the methodology applied to ensure plain language disclosure to the investor. Highest and best use; Cost Approach; Capital

Cost Analysis; and Direct Comparison – all considerations by the appraiser and the analysis thereof. The appraisal requirement ought to be limited to the OM Exemption distributions only. The syndicated mortgage industry that distributes under the Accredited Investor or Friends Family and Business Associates Exemptions, relies almost entirely on its ability to act quickly and to provide funding on a timely basis. The requirement for an appraisal could add three to six weeks to the process and most certainly negatively impact syndicated mortgage lenders.

#### Mortgage broker requirements

2. Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.

Certification by a mortgage broker may not add value particularly when the licensing bodies, such as RECA in Alberta, do not have the resources for oversight.

3. Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?

Certification by a mortgage broker may provide a false sense of security to the investor. The lack of oversight must be addressed if this is to be a requirement.

#### Exclusion of syndicated mortgages from the Private Issuer Exemption

4. Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.

I don't believe there are ANY circumstances where the Private Issuer Exemption would be appropriate. It appears that the biggest risks to investors come from the 'self-funding' mortgage syndicates.

#### Alternative prospectus exemptions

5. Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?

I cannot think of any.

6. Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 Mortgages?

No, there is too much room for misrepresentation – existing residential properties may have a myriad of issues that detract or diminish the value.

7. Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?

No. Individuals or small groups leave more room for misrepresentation, in my opinion.  
Thank you for your time and consideration.

S

Sandra A. Bautz, on behalf of:  
Paragon Capital Corp. Inc., in my capacity as Mortgage Associate  
ROQ Capital Partners Ltd., in my capacity as Vice-President and Chief Compliance  
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Calgary, AB T2R 1J4  
Tel: 403 263-6446 Facs: 403 263-6445  
Email: [sandy@paragoncorp.ca](mailto:sandy@paragoncorp.ca)  
Direct Tel: 403 263-6447

June 5, 2018

Re: New Syndication Comments

I agree that syndicators that are raising funds for equity and not a traditional mortgage need to be regulated.

However interfering with traditional syndicated mortgages make no sense. How many people have complained about those products.

Why classify commercial mortgages differently from residential? A commercial 50% loan to value mortgage is safer than a 80% loan to value residential mortgage.

The OSC and FSCO allowed the likes of Fortress to skirt the rules for too long. So overacting to the problem and shutting down a system that has been working well for a very long time makes no sense. Tackle the actual problem without hurting the compliant brokers and investors who may not be able to invest in mortgages anymore.

Paul Mangion



June 6, 2018

Alberta Securities Commission  
 Autorité des marchés financiers  
 British Columbia Securities Commission  
 Financial and Consumer Affairs Authority of Saskatchewan  
 Financial and Consumer Services Commission New Brunswick  
 Manitoba Securities Commission  
 Nova Scotia Securities Commission  
 Nunavut Securities Office  
 Office of the Superintendent of Securities Newfoundland and Labrador  
 Office of the Superintendent of Securities Northwest Territories  
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Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment on Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions**

---

The Private Capital Markets Association of Canada (“PCMA”) is pleased to provide our comments in connection with the Canadian Securities Administrators’ (“CSA”) Proposed Amendments to National Instrument 45-106 Prospectus Exemptions and National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations relating to Syndicated Mortgages and Proposed Changes to Companion Policy 45-106CP Prospectus Exemptions (the “**Proposal**”) as set out below.



## **About the PCMA**

The PCMA is a not-for-profit association founded in 2002 as the national voice of the exempt market dealers (“**EMDs**”), issuers and industry professionals in the private capital markets across Canada.

The PCMA plays a critical role in the private markets by:

- assisting hundreds of dealer and issuer member firms and individual dealing representatives to understand and implement their regulatory responsibilities;
- providing high-quality and in depth educational opportunities to the private capital markets professionals;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of private capital markets in Canada;
- being the voice of the private capital markets to securities regulators, government agencies and other industry associations and public capital markets;
- providing valuable services and cost-saving opportunities to its member firms and individual dealing representatives; and
- connecting its members across Canada for business and professional networking.

Additional information about the PCMA is available on our website at [www.pcmacanada.com](http://www.pcmacanada.com).

The first section of the letter presents our general comments on the Proposal, followed by responses to specific questions asked in the Proposal.

## **GENERAL COMMENTS**

### **General Comments on Proposed Amendments**

The PCMA welcomes the Proposal and its potential to enhance investor protection and improve national regulatory harmonization. However, we are concerned that there may be the potential for unintended consequences to the syndicated mortgage industry based on the current Proposal. We believe there are facets that need to be discussed in order to find a regulatory regime for syndicated mortgages that protects investors and is practical for syndicated mortgage providers, borrowers, registrants and regulators.



## **Comments on Carve-Outs for Qualified (Non-Complex) Syndicated Mortgages and the Private Issuer Exemption**

The PCMA believes that the carve outs to exemptions for syndicated mortgages should not be implemented. We are proponents of increasing jurisdictional harmony. We believe in order to have fair and efficient capital markets it is important to have homogeneity among the CSA members and therefore the complexities that could arise from adding these carve outs should be avoided.

### *The Private Issuer Exemption:*

The PCMA does not agree with carving out trades in syndicated mortgages from the private issuer exemption (“PIE”). We maintain the importance of the exemption for persons who are not in the business of mortgage lending and should not therefore be subject to securities obligations. However, we recommend that the CSA should include in a companion policy commentary on the appropriate use of the exemption. The commentary should highlight the business trigger test to ensure that individuals who are in the business of mortgage lending are not to rely on the exemption as this violates the spirit of the rule. It should also speak to small mortgage investment entities who purposefully limit the number of their investors to be below 50 in order to skirt registration and reporting obligations. The PCMA believes that the proposed commentary is in keeping with regulators’ current ideology of the acceptable use of the exemption and would appreciate the opportunity to comment on amendments to the companion policy.

### Qualified (Non-Complex) Syndicated Mortgages & British Columbia Securities Commission Rule 45-501 (“BCSCR”):

Adopting a carve out for an exemption for the distribution of syndicated mortgages on non-complex transactions as well as BCSCR is unnecessary if the PIE as recommended above is maintained.

In addition to the added complexities created by having separate regulatory authorities monitoring the same industry, the PCMA feels that an adoption of the carve outs may raise investor protection issues. The PCMA maintains that security regulators and their registrants are best suited for securities transactions particularly on matters relating to investor protection. We are wondering if the provincial regulatory authorities that oversees mortgage brokers have a sufficient focus on investor protection. Comparatively, securities regulators have a history of investor protection which includes a higher level of proficiencies for registrants. Furthermore, we recognize that some mortgage broker regulators, such as FSCO, are in the process of adopting know your client (“KYC”) and suitability requirements for syndicated mortgages that will likely mirror current securities regulations. While laudable, we wonder if mortgage brokers have the



requisite training or qualifications to properly conduct these assessments as they have historically focused on know your product (“KYP”) on qualified (non-complex) syndicated mortgages, which is only one third of the trinity of KYC, KYP & suitability.

### **Registration and Transition Period**

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### **RESPONSES TO QUESTIONS**

#### **Appraisals**

*1) As proposed, an appraisal would be required in all cases where a syndicated mortgage is distributed under the OM Exemption. Should there be exceptions to this requirement? For example, should an appraisal be required if the property was acquired recently in an open market transaction with all parties acting at arm's length?*

The PCMA believes that due to the cost and time involved in establishing an OM, the OM exemption will be rarely used and only for large transactions. So while an exception from the appraisal requirement sounds reasonable, this and any other exceptions would probably not be a determining factor in whether an issuer distributes under the OM Exemption. Please note that one of the primary reasons that borrowers turn to alternative lenders is that the underwriting process is supposed to take less time than traditional lenders. In addition, it is arguably part of the dealer’s KYP responsibilities to ensure that there has been a recent and reliable appraisal.



### **Mortgage Broker Requirements**

*2) Are there circumstances where requiring additional disclosure by and a certificate from a mortgage broker would not be appropriate in connection with the use of the OM Exemption? If so, please explain why and whether there are other participants in the distribution that should be subject to these requirements.*

The PCMA feels there is ambiguity regarding what information is expected to be within the personal knowledge of a mortgage broker. Subsequently, we feel that it is unfair to place the onus on the mortgage broker to make representations regarding information that should or should not be within their personal knowledge. If there was more clarity on these expectations, then a more informed discussion could occur about what a certificate page should include.

*3) Is it appropriate to require a mortgage broker to certify that it has made best efforts to ensure that the offering memorandum does not contain a misrepresentation with respect to matters that are not within its personal knowledge?*

See response to question 2.

### **Exclusion of Syndicated Mortgages from the Private Issuer Exemption**

*4) Are there circumstances where the distribution of syndicated mortgages under the Private Issuer Exemption would be appropriate and reporting to the securities regulatory authorities would not be necessary? If so, please provide examples and explain why there are limited investor protection concerns in those circumstances.*

Yes. Mortgages are used in a variety of settings that fall outside the actions intended to be captured in the Proposal. For instance, an individual providing a vendor take back mortgage to ensure the sale of their property. Mortgages are also used in business and personal transactions and not just for investment purposes. The PCMA believes that keeping the private issuer exemption in place in conjunction with providing additional commentary on the business trigger test and expectations of when PIE is not to be relied upon will strike an appropriate balance of not subjecting the above activities to undue securities regulations while ensuring those who are engaged in the business of trading in securities are fulfilling their regulatory requirements.



### **Alternative Prospectus Exemptions**

5) *Should alternative prospectus exemptions be provided to facilitate the distribution of specific classes of syndicated mortgages where the investor protection concerns may not be as pronounced?*

Not necessary if the PIE is maintained.

6) *Should we consider adopting an exemption for the distribution of syndicated mortgages on existing residential properties similar to the exemption for "qualified syndicated mortgages" under British Columbia Securities Commission Rule 45-501 Mortgages?*

Not necessary if the PIE is maintained. See comments above under the section titled *Qualified (Non-Complex) Syndicated Mortgages & British Columbia Securities Commission Rule 45-501 ("BCSCR")*.

7) *Should an exemption be provided for the distribution of a syndicated mortgage to a small number of lenders on a property that is used for residential or business purposes by the mortgagor? If so, should the exemption be subject to conditions? For example, should the exemption be available only for a distribution: (i) by an individual; and/or (ii) relating to a residential property; and/or (iii) involving a specified maximum number of lenders?*

No, not necessary if the PIE is maintained.

### **ADDITIONAL COMMENTARY SOUGHT**

The PCMA is aware of discussions about who should be responsible for the reporting of distributions relating to syndicated mortgages. We are requesting commentary on who will be required to file reports of exempt market distributions as we recognize that the borrower, who is technically the issuer, may not be the person best suited to do so. We ask that we are provided an opportunity to submit comments on the CSA's proposal on this matter.

We are requesting feedback on how the proposed changes to syndicated mortgages impact the current process of consolidation of Ontario regulators (Financial Services Commission of Ontario, Ontario Securities Commission and the Financial Services Regulatory Authority of Ontario).

The PCMA recognizes that relevant securities industry experience is determined by the regulator. PCMA members are requesting guidance on what will be considered acceptable relevant securities industry experience for those individuals who have historically not had to be registered but have been in the business of mortgage syndications.



**Closing Remarks**

The PCMA would like to thank to the CSA for their efforts in drafting the Proposal and for soliciting feedback from various stakeholders.

\* \* \* \*

We thank you for considering our submissions and we would be pleased to respond to any questions or meet with you to discuss our comments.

Yours truly,

Yours truly,

**PCMA Executive**

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Doug Bedard  
Chair

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Georgina Blanas  
Executive Director

1. General Observations and Comments:
  - Mortgages require to be treated in a “special category” as they relate to “a security instrument”. The only similarity is that it is a “debt instrument” the differences are:
    - (a) There are specific laws and rules for mortgages regarding enforcement.
    - (b) Registrations rules.
    - (c) the need for lawyers in the process etc.
    - (d) It is not that clear that a Mortgage should be treated as an “Exempt Product”. The fact is that there is no opportunity or way to file a Prospectus or take advantage of becoming a “reporting entity”. By the nature of the mortgage, there are numerous built in protections that would not require a “prospectus” (mortgage brokers and lawyers involved in the process).
  - Not all mortgages are the same:
 

A mortgage on an existing residential or commercial structure is not the same as mortgages for land and developments. The issue is “change in value”. The underlying asset in one case is constantly changing in value due to business decisions of the borrower (keeping market values out of the formula). So mortgages to finance developments are actually an investment in a business. Not so for mortgages for existing residential or commercial properties.

    - Why allow an individual to invest in a mortgage without Security Commissions’ involvement BUT if one more person joins the party and invests in the same mortgages, it becomes off-side. The “security” is the same.
2. Recommendations:
  - There is no need for further regulatory oversight for existing residential or commercial properties. The present regime that exists is sufficient. There are lawyers, appraisers, and mortgage brokers involved in every deal right now. At most maybe limit the number of investors allowed to participate in a given mortgage. Additional oversight is redundant.
  - There is definitely a need for additional regulations for “development” financing. These deals are a “business” venture and should fall directly under Security Commissions regulations, as recommended by these changes.

I greatly value the efforts and vigilance of our regulators. The investor protection requirements should never be understated. However, in this case the proposed changes as they stand, is using a “sledge hammer” when a “hard shoe” will do. Do not fix certain things if they are not broken!

**Regards,**

**Sam Singal**

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