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January 20, 2014

VIA E-MAIL

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

British Columbia Securities Commission P.O. Box 10142, Pacific Centre 701 West Georgia Street Vancouver, British Columbia V7Y 1L2 <u>Attention:</u> Larissa Streu, Senior Legal Counsel, Corporate Finance <u>E-mail:</u> lstreu@bcsc.bc.ca	Alberta Securities Commission Suite 600, 250-5th Street SW Calgary, Alberta T2P 0R4 <u>Attention:</u> Tracy Clark Legal Counsel, Corporate Finance <u>E-mail:</u> tracy.clark@asc.ca
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Dear Sirs and Mesdames:

Re: Multilateral CSA Notice 45-312 Proposed Prospectus Exemption for Distributions to Existing Security Holders (the "Proposed Exemption")

This submission is made by the Exempt Market Dealers Association of Canada (the **EMDA**) in response to the request for comments published by the Canadian Securities Administrators (the **CSA**) on November 21, 2013 in connection with the Proposed Exemption.

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First Canadian Place, 100 King Street West, Suite 5700, Toronto, ON M5X 1C7
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WHO IS THE EMDA?

The EMDA is a not-for-profit association founded in 2002 to be the national voice of exempt market issuers, exempt market dealers (**EMDs**) and participants in the exempt market across Canada.

The EMDA plays a critical role in the exempt market by:

- assisting its hundreds of dealer and issuer member firms/individuals to understand and implement their regulatory responsibilities;
- providing high quality and in-depth educational opportunities to exempt market participants;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of the exempt market and its role in the capital markets;
- being the voice of the exempt market to securities regulators, government agencies, other industry associations and the 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 EMDA is located on our website at: www.emdacanada.com.

WHO ARE EXEMPT MARKET DEALERS?

EMDs may act in two primary capacities in the capital markets: (a) as a dealer or underwriter for any securities which are prospectus exempt; or (b) as a dealer for any securities, including investment funds which are prospectus qualified (mutual funds) or prospectus exempt (pooled funds), provided they are sold to clients who qualify for the purchase of exempt securities. The qualification criteria for exempt purchasers and exempt securities are found in National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106**).

EMDs are fully registered dealers who engage in the business of trading in exempt securities, or any securities to qualified exempt market clients. EMDs are subject to full dealer registration and compliance requirements and are directly regulated by the provincial securities commissions. The regulatory framework for EMDs is set out in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) which applies in every jurisdiction across Canada.

EMDs must satisfy the same "Know Your Client" (**KYC**), "Know Your Product" or (**KYP**) and trade suitability obligations as other registered dealers which are IIROC or MFDA members. NI 31-103 sets out a comprehensive dealer regulatory framework (substantially similar for all categories of dealer, including investment dealers) which requires EMDs to satisfy a number of regulatory obligations including:

- educational proficiency;
- capital and solvency standards;
- insurance;
- audited financial statements;
- KYC;
- KYP;

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- trade suitability;
- compliance policies and procedures;
- books and records;
- client statements;
- trade confirmations;
- disclosure of conflicts of interest and referral arrangements;
- complaint handling;
- dispute resolution;
- maintenance of internal controls and supervision sufficient to manage risks associated with its business;
- prudent business practices requirements;
- registration obligations; and
- submission to regulatory oversight and dealer compliance reviews.

EMDs may focus on certain market sectors (*e.g.*, oil and gas, real estate, mining or minerals, technology, venture financing, etc.) or may have a broad cross-sector business model. EMD clients may be companies, institutional investors, accredited investors, or eligible investors who are qualified to purchase exempt securities pursuant to an offering memorandum.

EMDs provide many valuable services to small and medium size enterprises (SMEs), large businesses, investment funds, merchant banks, financiers, entrepreneurs, and individual investors, through their ability to participate in the promotion, distribution and trading of securities, as either a principal or agent.

EMDA COMMENTS ON THE PROPOSED EXEMPTION

The EMDA is broadly supportive of the Proposed Exemption and applauds the introduction of appropriately designed prospectus exemptions designed to facilitate fair and efficient capital raising and investor protection in the Canadian marketplace. We are mindful, however, that not all CSA members have agreed to adopt the Proposed Exemption, but are optimistic that if implemented, the Proposed Exemption will be adopted in a uniform fashion across Canada. We would encourage the CSA to continue to work with the securities regulators in Ontario and Newfoundland and Labrador to ensure a consistent adoption of this and other prospectus exemptions across Canada.

The EMDA comments on the following questions:

1. If you are a TSXV issuer, would you use the proposed exemption?

Not applicable.

2. Should the Proposed Exemption be available to issuers listed on other Canadian markets?

The availability of the Proposed Exemption should be consistent with its stated policy rationale which is to ameliorate time and cost concerns for issuers in preparing offering documents while ensuring investors are suitably protected. The EMDA believes that an issuer's marketplace should not, in principle, have any bearing on either of these issues. Time and cost burdens should be the same and investor protection is meant to be afforded by uniform disclosure obligations and marketplace oversight, not by limiting issuers

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to any one marketplace. It is not clear why other recognized stock exchanges were excluded. Accordingly, we believe the Proposed Exemption should be extended to the TSX and the Canadian Securities Exchange since the basis of the exemption is a reporting issuer's public disclosure record on SEDAR and not marketplace considerations.

3. Investors will only be able to invest \$15,000 in a 12-month period unless they obtain advice from a registered investment dealer. Is \$15,000 the right investment limit?

We believe there should be a limit on the amount a retail investor can invest under the Proposed Exemption without obtaining advice from a registrant.

It is not clear on what basis \$15,000 was determined to be the appropriate threshold and some explanation should be provided. However, the EMDA has no objection with the proposed investment limit absent investment advice.

4. In what circumstances would it be suitable for an investor that is a retail security holder to invest more than \$15,000 in a TSXV issuer?

Limiting the amount an investor can invest who is a retail security holder and who would not otherwise qualify under an existing prospectus exemption, such as the accredited investor exemption, provides a measure of protection for such investor. The EMDA believes that an investor should be able to invest more than the \$15,000 limit with advice from an appropriate category of registrant. The EMDA does not support limiting the advice to investment dealers only as set out in the Proposed Exemption.

The EMDA believes that an EMD, in addition to an investment dealer, should be permitted to provide advice to investors, and if suitable, the investor should be able to invest more than the \$15,000 limit. EMDs are required to provide such advice in connection with all other private placement exemptions, including those involving the private placement of treasury securities by reporting issuers. The fact that this is a private placement of treasury securities by an exchange-listed issuer should make no difference. In fact, the provision of such advice is a basic obligation under NI 31-103 for EMDs and other registrants. The EMDA strongly encourages the CSA to amend the Proposed Exemption to include EMDs to provide such advice in addition to investment dealers.

5. Do you agree that there should be no investment limit if an investor receives suitability advice from a registered investment dealer?

Subject to our comments above, we agree. Each individual investor has a different risk profile including investment objectives and risk tolerance which must be considered in its totality by a registrant who provides such suitability advice. Even though the Proposed Exemption does not impose a limit where an investor receives such advice, we believe a limit will be imposed based on the advice provided by a registrant albeit appropriately tailored to that investor.

6. Do you agree that being a current security holder of an issuer enables an investor to make a more informed investment decision in that issuer?

The ability of investors to make informed investment decisions is dependent on a number of factors, and being a current security holder can be one of them. However, it is not necessarily a sufficient condition and

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other factors such as the size of the position and the time period during which it was held must also be given weight and consideration. However, the ability of an existing security holder to access a reporting issuer's public disclosure record on SEDAR and make their own investment decision is a significant factor. The veracity of the information is important and the safeguards under the Proposed Exemption increase the likelihood that there are no material facts or material changes relating to the issuer that have not been generally disclosed. The Proposed Exemption requires this to be represented by an issuer in its subscription agreement while also providing an investor with a right of action under the statutory secondary market liability regime under securities legislation. We believe that investors want the choice to make their own investment decisions today and have the tools and resources available to help them. We also recognize that issuers need an easier and less costly way to raise capital from existing security holders who already have a relationship with and are familiar with the issuer.

7. What is the appropriate record date for the exemption? Should it be one day before the announcement of the offering or should it be a more extended period? If you think it should be a more extended period, what would be the appropriate period of time?

The ability of an issuer to quickly access capital is important and a long record date would cause difficulty.

The EMDA does not recommend a specific record date, but believes it should be longer than one day for the reasons set out in the Multilateral CSA Notice. The imposition of a sunset clause allows the CSA time to monitor how the Proposed Exemption is being implemented and to deal with any issues or concerns.

8. We are currently proposing the exemption be subject to the same resale restrictions as most other capital raising exemptions (i.e., a four month restricted period). However, there are some similarities between the proposed exemption and the rights offering exemption, which is only subject to a seasoning period.

(a) Do you agree that a four-month hold period is appropriate for this exemption?

Yes. The EMDA favours the adoption of consistent and uniform securities laws across Canada, reason enough to adopt a four month hold period for the Proposed Exemption as currently drafted. Although the rights offering exemption is similar to the Proposed Exemption, it is also different in many important ways, including with respect to the disclosure requirements.

(b) Should we require issuers to provide additional continuous disclosure, such as an annual information form?

No, not if the policy rationale is cost and time burden. We would not anticipate widespread adoption of the Proposed Exemption if such a requirement were imposed.

(c) If we were to consider a seasoning period for this exemption, should we consider some of the restrictions that apply under a prospectus-exempt rights offering, such as "claw-backs" limiting insider participation?

No comment since we do not support a seasoning period.

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- (d) **If securities offered under the exemption were only subject to a seasoning period, would there be a greater need to ensure investors are made aware of and have an opportunity to participate in the offering?**

No comment since we do not support a seasoning period.

9. **We have not proposed any conditions regarding the structure of the financing, i.e., minimum or maximum price, maximum dilution, or period in which an offering must be completed. We contemplate that the proposed financing would be conducted under the standard private placement rules of the TSXV which, among other things, allow pricing at a discount to the market price. Is this appropriate or are there other structural requirements that we should make a condition of the exemption?**

We believe that the Proposed Exemption should follow the private placement rules of the applicable stock exchange. Existing security holders should be treated the same as other investors in a private placement, where an issuer has the right to accept or reject a subscription, in whole or in part, from any investor. Requiring an issuer to allocate securities *pro-rata* among security holders who are interested in participating in a rights offering under the Proposed Exemption would unnecessarily add to the cost and burden of such an exemption especially where this is done on a non-brokered basis.

Other matters

You may also wish to consider whether the Proposed Exemption could be used to facilitate an “equity-line” type of financing and whether this is desired. For example, in such structures a party who is the financier could hold one share of the issuer, and on that basis, propose a financing commitment under an equity-line financing where it would obtain discounted shares relative the VWAP of such shares. We would appreciate if the CSA can provide additional guidance explaining whether this would be permitted or not under the Proposed Exemption.

* * *

We believe the Proposed Exemption strikes the right balance in protecting investors while providing for fair and efficient capital markets subject to our comments above. Many exchange-listed reporting issuers cannot raise capital in this economic climate in a cost effective manner and the Proposed Exemption seeks to accomplish this, while allowing members of the retail public to participate in such offerings in a manner that provides appropriate safeguards.

We thank you for the opportunity to provide you with our comments on the Proposed Exemption and welcome any opportunity for further dialogue on this matter.

Yours very truly,

Exempt Markets Dealers Association of Canada

“Brian Koscak”
Chair

“Conan McIntyre”
Director

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