

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
22nd Floor
Toronto, Ontario M5H 3S8

M^c Anne-Maire Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22^e 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**