

December 22, 2015

**SENT BY E-MAIL**

**Cooperative Capital Markets Regulatory System**

**NORTON ROSE FULBRIGHT**

Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Fulbright Canada LLP  
Royal Bank Plaza, South Tower, Suite 3800  
200 Bay Street, P.O. Box 84  
Toronto, Ontario M5J 2Z4 CANADA

F: +1 416.216.3930  
[nortonrosefulbright.com](http://nortonrosefulbright.com)

**Michael Sabusco**  
+1 416.202.6731  
[Michael.Sabusco@nortonrosefulbright.com](mailto:Michael.Sabusco@nortonrosefulbright.com)

Our reference  
DM#5385827

Dear Sir/Madam:

**RE: Comments on the revised consultation draft *Capital Markets Act* and regulations**

This letter is submitted in response to the request for comments on the revised consultation draft provincial/territorial *Capital Markets Act* and draft initial regulations thereunder (collectively, the **Draft CMA**) published by the participating provinces and territory of the Cooperative Capital Markets Regulatory System (**CCMR**) on August 25, 2015. It has been prepared on behalf of our client, Centro Mortgage Inc., which carries on business as a licensed mortgage brokerage and licensed mortgage administrator under the *Mortgage Brokerages, Lenders and Administrators Act (MBLA)* under the regulatory supervision of the Financial Services Commission of Ontario (**FSCO**). Our client is of the view that the Draft CMA, particularly with respect to the proposed change to the registration requirements and exemptions relating to syndicated mortgages, will impose (i) unnecessary new requirements in respect of syndicated mortgages and (ii) dual regulation of syndicated mortgages which are already regulated under MBLA by another regulator, FSCO. Our client has asked us to provide you with their comments on the draft CMA, which we set out on their behalf below.

**Background**

*I. NI 45-106 introduced - syndicated mortgages remain exempt from registration and prospectus requirements in Ontario.*

In 2004, the Canadian Securities Administrators (**CSA**) issued a request for comments regarding the proposed introduction of a new national instrument, now called National Instrument 45-106 – *Prospectus Exemptions (NI 45-106)*, that, at the time, proposed exemptions from the prospectus and registration requirements of Canadian securities legislation. The initial draft of NI 45-106 provided an exemption under which mortgages sold by persons registered or exempt from registration under applicable mortgage brokerage legislation would be exempt from the registration and prospectus requirements imposed by Canadian securities legislation. However, the initial draft did not extend the mortgage exemption to syndicated mortgages, which reflected a comparable existing exemption in British Columbia's securities legislation (which excluded trades in syndicated mortgages from the prospectus and registration exemption). The *Securities Act* (Ontario) did not have a similar limitation on

---

**CONFIDENTIALITY NOTICE:** This external memorandum, including any attachments, is confidential and may be privileged. If you are not the intended recipient please notify the sender immediately, and please delete it; you should not copy it or use it for any purpose or disclose its contents to any other person.

---

Norton Rose Fulbright Canada LLP is a limited liability partnership established in Canada.

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa (incorporated as Deneys Reitz Inc) and Fulbright & Jaworski LLP, each of which is a separate legal entity, are members of Norton Rose Fulbright Verein, a Swiss Verein. Details of each entity, with certain regulatory information, are at [nortonrosefulbright.com](http://nortonrosefulbright.com). Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

the availability of the exemption for trades in syndicated mortgages and instead allowed all mortgages (both syndicated and non-syndicated) to qualify for the exemption from prospectus and registration requirements (the **OSA Mortgage Exemption**).

The CSA published the following comments, which it received in respect of the changes to the mortgage exemption (from registration requirements) proposed in the initial draft of NI 45-106:

- mortgage broker legislation should regulate all aspects of the mortgage industry, including syndicated mortgages;
- any attempt to improve the protection of lenders should be achieved in consultation with the mortgage industry and should allow time for further study;
- if syndicated mortgages are governed by securities legislation, a dual registration regime would be created resulting in increased compliance costs;
- a syndicated mortgage is no more complex than a mortgage held by a single private individual as the underlying loan is the same.

In response to the above comments, the CSA amended the mortgage exemption section of the revised draft of NI 45-106 to maintain the status quo in Ontario (that the mortgage exemption from both the registration and prospectus requirements would be available in NI 45-106 (which came into force in 2008) for the trade of both syndicated and non-syndicated mortgages in Ontario (and various other Canadian jurisdictions)) while the CSA studied the issue further. In other words, the CSA made the determination that the OSA Mortgage Exemption should continue to be available as a carve-out from the general mortgage restrictions under the final version of NI 45-106.

## II. Mortgage Broker Act revamped – regulation is bolstered for syndicated mortgages

Also in 2004, along a similar timeline as that of NI 45-106, Ontario's Minister of Finance (the **Minister**) published a consultation paper (the **MBLA Draft Consultation**) which contained a proposal to overhaul and improve Ontario's Mortgage Broker Act (**MBA**) by replacing it with a new *Act*, MBLA. At the time, the MBA did not impose any additional disclosure requirements on mortgage brokers dealing in syndicated mortgages.

The MBLA Draft Consultation specifically contemplated lender protection concerns relating to syndicated mortgages including whether the mortgage exemption under the existing MBA (at the time of consultation) provided adequate protection to lenders given the potential complexity of a syndicated mortgage.

In the MBLA Draft Consultation the Minister requested specific comments from the public on whether syndicated mortgages should be subject to the registration and prospectus requirements of the Securities Act (Ontario) or, in the alternative, improvements to the registration and lender disclosure requirements in the MBA could be made to address syndicated mortgages.

Importantly, in the MBLA Draft Consultation the Minister mentioned the concurrent development of NI 45-106 by the Ontario Securities Commission and the CSA. Moreover, the Minister specifically stated that if the final version of NI 45-106 resulted in the removal of the OSA Mortgage Exemption as a result of lender protection concerns relating to syndicated mortgages then the Minister would not propose dual regulations be contained in the new MBLA. Ultimately, MBLA came into force in 2008 and contained new requirements relating specifically to mortgage syndicates as well as new and robust disclosure requirements including a form of disclosure statement to be provided to lenders.

NI 45-106 came into force around that same time and carved out Ontario syndicated mortgages from its purview. The problematic prospect of dual regulation over syndicated mortgages was successfully resolved.

### III. NI 31-103 introduced - syndicated mortgages remain exempt from new registration requirements in Ontario

In 2007, the CSA issued a request for comments regarding the proposed introduction of a new national instrument, National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103)*, which would govern registration requirements (and exemptions thereto) with respect to the trading of securities in Canada. It would complement NI 45-106, which would apply only to govern prospectus exemptions. Similar to the evolution of NI 45-106, the initial draft of NI 31-103 provided an exemption under which mortgages sold by persons registered or exempt from registration under applicable mortgage brokerage legislation would be exempt from the registration requirements proposed under NI 31-103. Similar to the initial draft of NI 45-106, the initial draft of NI 31-103 initially reflected the more restrictive exemption from British Columbia's securities legislation. Importantly, however, notwithstanding the proposed more restrictive exemption in the initial draft, in 2007 the CSA noted that if there is another regulatory regime in place that adequately addresses the regulatory risk associated with the subject activity then there should be an exemption from the CSA's regulation of that activity. The CSA noted in their response to comments that the exemption for dealing in mortgages by registered mortgage brokers serves as a particular example of a case of another regulatory regime (MBLA), governed by another regulator (FSCO), being able to sufficiently and adequately address the risks and lender protection concerns associated with the trading of mortgage securities.

Like NI 45-106, the final version of NI 31-103, which came into force in 2009, provided a carve-out for Ontario (and various other Canadian jurisdictions) from registration requirements for those dealing in mortgages, including both syndicated and non-syndicated mortgages. Prior to the adoption of NI-31-103 in 2009, FSCO had introduced Form 1 – *Investor/Lender Disclosure Statement for Brokered Transactions*, a Form for prescribed disclosure under MBLA. Again, the prospect of unnecessary and dual regulation of syndicated mortgages was successfully resolved in Ontario.

### IV. BC issues order exempting mortgage investment entities from the dealer registration requirements

As mentioned, when the initial draft of NI 45-106 was published for comment, British Columbia securities legislation at the time excluded trades in syndicated mortgages from the registration exemption in British Columbia. Notwithstanding the genesis of that restriction, in 2012, the British Columbia Securities Regulators issued an Order (now BC Instrument 32-517) providing an exemption from the dealer registration requirements for trades in securities of mortgage investment entities where the trade is made in reliance on an exemption from the prospectus requirement.

### V. MBLA creates a new Form that augments disclosure for syndicated mortgages

In July of 2015, FSCO brought into force a new *Form 1.1 - Investor/Lender Disclosure Statement For Brokered Transactions – Addendum for Construction and Development Loans Including Syndicated or Non-Syndicated Mortgages*. We would note parenthetically, that this new Form illustrates the market specific approach adopted by FSCO with respect to the regulation of trading in mortgages, including syndicated mortgages which approach recognizes, first and foremost, that a syndicated mortgage is in fact a subset or species of mortgage, the regulation of which requires not only attention to its syndicated nature (that is to say, the number of lenders) but also, and equally importantly, the purpose or type of mortgage in question. Prior to updating the current *Investor/Lender Disclosure Statement for Brokered Transactions*, FSCO consulted with industry associations and members of FSCO's Mortgage Industry Working Group.

### VI. CCMR introduces Draft CMA proposing to repeal the mortgage exemption in respect of syndicated mortgages

In August of 2015, CCMR published the Draft CMA which proposes to eliminate the OSA Mortgage Exemption (which currently remains in effect) in respect of syndicated mortgages and which will introduce dual regulation of syndicated mortgages in Ontario.

## Position

Our client is firmly of the view that the OSA Mortgage Exemption should remain in effect (for all mortgages, including both syndicated and non-syndicated) and the *Capital Markets Act* (and the regulations thereunder) should not impose dual regulation on syndicated mortgages which are already regulated under MBLA.

To date, the OSA Mortgage Exemption has remained in effect alongside NI 45-106, NI 31-103 and MBLA. Our client is of the view that the securities regulators who developed NI 45-106 and NI 31-103, as well as the regulators who developed MBLA (including FSCO and the Minister of Finance), thoroughly contemplated the issue of the regulation of syndicated mortgages, and in particular, potential lender protection concerns, in relation to syndicated mortgages. In our client's view, the fact that the securities regulators deliberately chose not to include provisions in NI 45-106 and NI 31-103 that would restrict the OSA Mortgage Exemption indicates that the securities regulators concluded that there was already another regulatory regime in place that adequately addresses the regulatory issues associated with trading in syndicated mortgages (i.e., that FSCO and the Ministry of Finance adequately address lender protection concerns through MBLA (and the regulations and Forms thereunder)).

In our client's view, maintaining the current OSC Mortgage Exemption is the appropriate regulatory course of action with respect to the regulation of syndicated mortgages in Ontario, which pays appropriate deference to MBLA and the experience and expertise of FSCO and the Minister of Finance to regulate such industry-specific transactions. Not only is FSCO actively engaged in updating the applicable regulatory requirements in consultation with industry participants, as demonstrated by the 2015 updates to the *Investor/Lender Disclosure Statement For Brokered Transactions – Addendum for Construction and Development Loans Including Syndicated or Non-Syndicated Mortgages*, but FSCO's mandate includes a program of continuous oversight, monitoring, and reporting to industry participants as reflected in its Market Conduct Symposiums most recently conducted for the Mortgage Brokering Sector in November 2015. The effect of the changes to the OSA Mortgage Exemption proposed under the Draft CMA would impose new requirements in respect of syndicated mortgages and would result in a dual regulatory regime by introducing additional registration (and prospectus) requirements under applicable securities laws for loans and trades in syndicated mortgages. In light of Ontario's experience to date in having developed a proactive market specific approach to regulation, it is difficult for our client to see what benefit could be achieved by the imposition of an additional generic regulatory regime.

## Additional Rationale for Position

Below are some additional policy-based reasons that support our client's position that the OSA Mortgage Exemption should be maintained in the Capital Markets Act and draft initial regulations thereunder:

### **i) Dual regulation is problematic and should remain with FSCO exclusively**

- Each of FSCO and the CSA is a highly specialized regulatory body with expertise in their respective areas and as such, each regulatory body has a distinct role.
- Because each of the above regulators has a distinct role based on its particular respective area of expertise, regulatory duplication should be avoided.
- The regulatory regime for mortgages should be cost effective and efficient to administer and should utilize and leverage existing resources and regulatory expertise.
- As the MBLA was developed and has been administered under FSCO, the regulation of mortgages and mortgage brokers in Ontario should remain exclusively under the proficient purview of FSCO.
- Regulatory duplication should also be avoided from a compliance perspective because it could create confusion among industry participants and result in unnecessary additional costs to participants, including the costs of dual registration, dual disclosure, additional filing fees and additional compliance costs generally.

- Regulatory duplication could create confusion among lenders who would receive different disclosure materials (under MBLA and securities laws) with respect to the same mortgage loan.

**ii) The relevant lender protection concerns are already addressed by MBLA**

- In 1992, the Ministry of Finance in Ontario implemented mandatory disclosure requirements and provisions relating to the administration and servicing of mortgage loans and those disclosure requirements have since been bolstered under the MBLA.
- The MBLA is modern and robust and currently provides a registration regime for brokers that would substantially overlap with a registration regime for dealers under securities laws. Specifically, under the MBLA, FSCO already oversees the registration and licensing of mortgage brokers pursuant to a regulatory regime which requires mortgage brokers to meet certain proficiency and education requirements, requires mortgage brokers to address the suitability of each loan for lenders and make prescribed disclosure to clients.
- The MBLA requires prescribed disclosure to be made to lenders relating to mortgage loans, including syndicated mortgages (for which, as mentioned, there is both the Form 1 and the Form 1.1 under MBLA). MBLA requires disclosure as to fees and compensation paid to mortgage brokers, disclosure of material risks related to the mortgage loans, disclosure as to conflicts of interest matters, and more.
- The MBLA imposes a duty of suitability on mortgage brokers to take reasonable steps to offer only suitable mortgage loans to lenders.
- FSCO currently proactively monitors the mortgage brokering sector including that component of the sector represented by syndicated mortgages.
- In addition to FSCO's ongoing day-to-day engagement in and oversight of the sector, the MBLA contains a mandatory provision (Section 57) for periodic five-year reviews of the Act and recommendations arising from those reviews, thereby ensuring that its regulatory regime is responsive to changing market conditions and consumer requirements. On January 6th 2014, the first five-year review report, as mandated by Section 57 (the **Five-Year Review Report**), was issued to the Minister of Finance. The full text of the Five-Year Review Report may be accessed at <http://www.fin.gov.on.ca/en/mortgage-brokerages-lenders>. For the purposes of these submissions it is note-worthy that the Five-Year Review Report describes the public consultation process that led to the enactment of the MBLA in the first instance, and the public consultation process that led to the recommendations contained in the report itself. The Five-Year Review Report examines the changes to the marketplace since the enactment of the MBLA and makes five key recommendations. It is instructive that the Five-Year Review Report did not recommend changes to the regulation of syndicated mortgages. It is reasonable to conclude that, having regard to the nature and purpose of the review process and the consultations in connection with it, had changes been required with respect to the regulation of syndicated mortgages, those changes would have been reflected in the recommendations contained in the Five-Year Review Report.

**iii) Negative market impact**

- Lenders, borrowers and the real estate development community in Ontario have all been very well served by the status quo and significant changes to the regulatory regime could have an adverse effect on Ontario's economy and the real estate industry in Ontario.
- As there does not seem to be any public request or fact based policy initiative to support a change in how syndicated mortgages and mortgage brokers are regulated, a change in legislative policy is not necessary and would have the potential of unnecessarily adversely impacting the real estate development industry and the portion of Ontario's economy that the industry supports. In particular, our client is unaware of any market specific studies having been undertaken in connection with proposed

changes to the existing regulatory regime, nor has there been any form of consultation process on which to guide a change in policy. In this regard it is instructive to note that in considering NI 45-106, the CSA concluded that further study would be required prior to implementing any changes to the regulation of syndicated mortgages in the Province of Ontario. Since further studies have not, to our client's knowledge, been undertaken, any proposed regulatory change would, at the very least, be premature. The absence of any studies or consultation with respect to a proposed regulatory change in so far as it affects syndicated mortgages stands in sharp contrast to the ongoing review and consultation processes mandated under the MBLA to ensure that the existing regulatory regime under the supervision of FSCO is responsive to market and consumer requirements.

- Changing the rules for mortgage loans (from the current long-standing approach) potentially would make capital more difficult to obtain for commercial real estate development which is dependent in large part on syndicated mortgage financing and the current access to that capital from mortgage brokers as market intermediaries. It is anticipated that the required studies would address all potential impacts of a proposed change including access to capital.

Yours very truly,

*"Michael Sabusco"*

Michael Sabusco  
Partner

MS/dt