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December 23, 2015

SENT BY E-MAIL (commentonlegislation@ccmr-ocrmc.ca)

To: The applicable legislative working groups of the Governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, Yukon and Canada

Dear Sirs/Mesdames:

Comments on the *Capital Markets Act* and the Regulations

Osler, Hoskin & Harcourt LLP welcomes the opportunity to comment on the consultation drafts of the Provincial *Capital Markets Act* ("CMA") and the CMRA Regulations, and the Capital Markets Regulatory Regime (the "Regime"), more generally.

General Observations and Key Messages

Osler continues to support the objectives of fostering efficient and competitive markets through a harmonized and streamlined approach to capital market regulation on a national basis. We applaud the efforts of all jurisdictions participating in this initiative. Osler maintains the view that the following considerations are critical to this initiative's success, and to ensuring that your efforts improve, and do not inadvertently cause harm to the effectiveness of the current system.

- **For an effective transition, the Regime should maintain the substance of existing securities laws, rules, policies and practices. Changes should be made only where necessary to achieve harmonization among the participating jurisdictions**. Beyond changes necessary for harmonization, Osler urges no material changes to securities laws or current practices during this transitional period. Any potential change should be deferred until after the Regime is established. This will ensure that proposed changes can be properly proposed, considered, examined and debated within the open policy-making approach promised by the proposed governance model. The cost to market participants will be significantly increased if they are required to make material changes to their practices, including their compliance programs, to accommodate substantive changes and new rules without adequate opportunity to assess them. In the annexes to this comment letter, we identify examples of proposed changes which, in our view, go far beyond what is necessary for harmonization and are potentially prejudicial to market participants. Many of these have not been specifically identified in the accompanying commentary or been the subject of dialogue with market participants.

- **Changes that are necessary to achieve harmonization should be clearly identified and the policy rationale should be provided for selecting one approach over another. Any changes should be the subject of careful consideration and dialogue with the legal and market communities**. We understand that certain substantive changes in the law are necessary to achieve harmonization of legal requirements across the participating jurisdictions. We agree that harmonization is desirable. We recognize that where there are differences between laws in participating jurisdictions, care should be taken to minimize changes to prevailing practice, and any changes should be limited to the extent necessary for harmonized rules to prevail. We are concerned, however, that the CMA abandons several important protections without any principled rationale. For example, in response to our comment in our initial comment letter about the CMA failing to adopt section 175(3) of the Regulations ("OSA Regulations") to the Ontario *Securities Act* ("OSA"), the only response we've seen is: "This provision does not exist in CMR Jurisdictions other than Ontario." Given the importance of this protection to many market participants, we are of the view that a more detailed discussion is required to explain the policy choice.

- **The participants in the Regime should clarify how participating jurisdictions will interact with non-participating jurisdictions in a way that promotes coordination and cooperation, and will not be less harmonious than the system that exists today**. This is one of the primary concerns that we hear whenever we discuss the Regime with any market participant. It is unclear how participating jurisdictions will interact with non-participating jurisdictions in a manner that does not prejudice market participants or disrupt non-participating jurisdictions. We urge you to provide guidance and provide market participants with an appropriate opportunity to participate in dialogue about this crucial aspect of the initiative.

- **The transition to the Regime should be as seamless as possible**. The remaining regulations, rules and transitional provisions must ensure that current exemptions and practices are available and accommodated under the CMA. Continuity measures should be transparent and subject to public comment and consultation. We have reviewed the summary of the transition approach that was posted to the website on December 7, 2015 and outlines some general principles. We intend to comment further on these transitional provisions as they are developed with more specificity and we urge you to provide further guidance and provide market participants with an appropriate opportunity to participate in dialogue about this crucial aspect of the initiative.

- **The transition to the Regime should recognize the importance of preserving the ability of Ontario issuers to continue to be able to access U.S. and other**

foreign capital markets without disruption, both under the Multijurisdictional Disclosure System and otherwise. As you will see from our detailed comments in Annex D, we are gravely concerned that adopting the British Columbia regime for "distributions out" of a CMR Jurisdiction will be extremely disruptive to the operation of the Ontario capital markets. Although we recognize that the regime currently in place in British Columbia has operated there for many years, the number of major multinational issuers located in British Columbia represents only a small portion of Canada's multinational issuers, most of which are headquartered in Ontario. Likewise, the number of pension funds and other significant institutional investors located in Ontario far exceeds the number located in British Columba. If market participants in Ontario were to become subject to the British Columbia regime, we believe that a majority of Canada's capital markets participants would be faced with a change in the applicable legal requirements for distributions outside their jurisdiction that will significantly impede their current ability to raise capital outside of Canada and realize returns on their investment in securities of non-Canadian issuers.

Premature to Fully Assess and Comment on the Substance of the Regime

Until the full Regime – including the lines of accountability, the composition of the Board (which we understand will be responsible for making regulations) and the decision making process proposed for the Board and the council of Ministers – is fully articulated in legal instruments, we are not able to fully comment on the substance of the legal framework and its requirements. We therefore hope to have the opportunity to comment on *all* aspects of the Regime, including the CMA and CMSA again, once the entire Regime has been proposed.

Similarly, we reserve comment on the structure and composition of the Tribunal. We understand that the Tribunal members will be selected through a merit-based selection process overseen by a nominating committee. We support this approach. It is critical to ensure that the Tribunal and its members are independent and have the necessary expertise.

Specific Comments on the CMA and the CMRA Regulations

Notwithstanding our concern that some of the changes in the CMA cannot be fully assessed in the absence of the important transitional provisions and other guidance, we have provided specific comments on the CMA and the proposed CMRA Regulations in the following annexes to this comment letter:

Annex	CMA	Regulations	Topic
A	Part 4	Series 3	Registration
B	Parts 5, 7, 8	Series 4 - 6	Prospectus Requirements, Disclosure, Take-over Bids and Issuer Bids
C	-	MI 51-105	Issuers Quoted in the U.S. Over-the-Counter Markets
D	-	Series 7	Securities Transactions Outside the Jurisdiction
E	Parts 9 - 13	-	Market Conduct, Enforcement, Civil Liability
F	Part 6	Series 9	Derivatives
G	-	-	Responses to Questions in the Commentary

We ask for greater guidance on the concerns set out in these annexes and an opportunity to engage with appropriate persons to exchange views and consider ways that concerns can be addressed.

Investors, Market Participants and their Legal Advisors Should Have Greater Engagement and Ongoing Input

It is critical that more meaningful dialogue between participating jurisdictions and the market, including in-person meetings and consultations, be encouraged and facilitated before the legal framework establishing the Regime is settled. As this process evolves, we hope that there will be greater opportunity for more direct dialogue and consultation with market participants, investors and legal professionals on the proposed approach. Since it is imperative that the existing legal requirements, duties and obligations remain largely unaffected by the evolution to the proposed new regime, a degree of vigilance is required to ensure that what may appear to be nuanced wording changes, and attempts to harmonize, do not undermine that imperative. For this reason, we feel that it would be useful, going forward, to have a more consultative approach.

Osler suggests the establishment of an advisory body made up of knowledgeable legal experts to assist with the development and implementation of the legal framework.

Proposed Enforcement and Adjudication Protocols Need to Be Clarified

Significant changes in the areas of enforcement are contained in the draft legislation. Some of these include:

(a) establishing a separate, expert Tribunal to adjudicate matters under both the CMA and the CMSA and make decisions in the "public interest";

(b) creating a common database of information obtained from surveillance, complaints, compliance reviews and administrative investigations for use across the country;

(c) introducing a restitution power to directly address investors' losses in certain circumstances; and

(d) relaxing the confidentiality protections over information obtained using the Authority's investigative powers.

Some of these changes are understandable to enhance and improve the Authority's enforcement capabilities but, as we explained in our initial comment letter, clarity is needed so that we can understand how the Authority will collect, store and share information in practice. We note that there are also broadened information-sharing protocols among agencies and internationally, including the ability to share compelled testimony without the consent required under the current Ontario regime. We are concerned that important rights of affected persons will be diminished by some of these changes. We are therefore reiterating our request for greater guidance on how these powers will be used, and an opportunity to engage with appropriate persons to exchange views and consider ways that concerns can be addressed.

Selecting the Right Leaders and their Timely Appointments

Osler welcomes the proposed design of the Regime, including the structure of the Regulatory Divisions and a separate Adjudication Tribunal, all supervised by an expert Board. We support the use of the "Policy Forum" as a means to enable disparate parts of the Authority to have face-to-face interactions, provided that the Policy Forum in no way compromises the independence or integrity of the Adjudication Tribunal. This, and other creative mechanisms, will be necessary to ensure consistency among those exercising a "public interest" jurisdiction on behalf of the Authority (which will include the Tribunal and Chief Regulator, depending on the circumstances). We recognize that the legal framework for the organizational governance protocols is not currently available as it is intended to be contained in a separate instrument (or series of instruments).

It will be essential to select and appoint appropriate persons to key governance and leadership positions within the Regulatory and Tribunal divisions, including the Board

members, the Chief Regulator, Chief Adjudicator and Deputy Regulators. Having the right people managing, administering and performing these important functions is crucial. Many in the legal community and market participants remain confused about whether the CMRA will simply be a merger of existing regulators, or whether the articulated vision of a fresh regulatory authority with a new, harmonized approach to regulation of the Canadian capital markets can be realized. We urge the participating jurisdictions to engage in a rigorous exercise to identify the strongest, most effective leaders of the Authority, including the Regulatory Division and the Tribunal, at the earliest opportunity. The sooner those key individuals are identified and given an opportunity to meaningfully contribute to this project at the integration stage, the sooner and more effectively a sustainable, positive culture can be cultivated and enhanced within the new organization.

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We thank you again for the opportunity to provide comments. We look forward to providing our further comments on all aspects of the Regime once the entire Regime has been proposed.

We would be pleased to meet with you or your staff to discuss any of our comments, and would also be pleased to contribute in any way we can to the ongoing debates and discussions as you work to implement the Regime. If you would like to discuss this matter further, please contact J. Mark DesLauriers at 416.862.6709 or mdeslauriers@osler.com, Jeremy Fraiberg at 416.862. 6505 or jfraiberg@osler.com, Lawrence Ritchie at 416.862.6608 or lritchie@osler.com, or Robert Lando at 212.991.2504 or rlando@osler.com.

Yours very truly,

"Osler, Hoskin & Harcourt LLP"

Osler, Hoskin & Harcourt LLP

ANNEX A

Registration

(*Part 4 of the CMA, Series 3 of the CMRA Regulations*)

We agree with the approach of maintaining, in all material respects, the current registration regime applicable to dealers, advisers and investment fund managers (“**IFMs**”) across Canada under National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations (“NI 31-103”).

We note that the revised draft of the CMA has added a fourth registration category – large derivatives participant – to the registration requirement. We assume that detailed registration requirements for large derivatives participants, which have not been specified in the revised draft of the CMA or the proposed CMRA Regulations, will be developed by the CSA Derivatives Committee as part of the ongoing OTC derivatives regulatory reform project. In our view, the federal government has an important role to play in the regulation of trading in OTC derivatives and should have input in these proposed registration rules, and potential exemptions for large derivatives participants. In particular, if the intention in regulating large derivatives participants is to guard against systemic risk, then we would submit that this risk could be better addressed in the *Capital Markets Stability Act*, rather than imposing a registration requirement under the CMA.

A number of exemptions which are currently included in local and multilateral instruments, rules, blanket orders and policies relating to registration in force in one or more participating jurisdictions (“Local Rules”) have not been carried forward in new Regulation 31-501 Registration Requirements, Exemptions and Related Matters (“Regulation 31-501”) or otherwise. In general, we do not have concerns with the approach, however, the Regime should be more transparent as to the reasons why exemptions found in Local Rules have not been carried forward. For example, we assume that the decision not to carry forward the exemption for non-resident advisers to advise the pension fund of an affiliate currently set out in OSC Rule 35-502, s. 7.6 is based on the CCMRS’ policy view that generally, investment advice between affiliates in a corporate group should not be considered registerable activity. However, it would be helpful for the CCMRS to confirm this policy position, which differs from the OSC’s view that, absent the foregoing exemption, non-resident affiliates of Canadian pension plans would be required to register in order to provide investment advice to the Canadian plans.

We support the amendment in NI 31-103 which permits non-Canadian firms relying on the international dealer and international adviser exemptions from registration to operate across Canada but appoint a local agent for service in only one Canadian jurisdiction. We note that the same approach has been adopted for non-resident IFMs relying on the

"permitted client" exemption under Section 8 of Regulation 31-501. This approach should simplify the administrative and client disclosure requirements associated with reliance on registration exemptions by international firms.

ANNEX B

Prospectus Requirements, Disclosure, Take-over Bids and Issuer Bids

(*Parts 5, 7 & 8 of the CMA; Series 4 - 6 of the CMRA Regulations*)

Series 4, 5 and 6 Regulations

With respect to reporting issuer regulation in Series 4, 5 and 6 of the proposed CMRA Regulations, we are supportive of the approach proposed to largely maintain the substance of existing securities laws, rules, policies and practices. We believe that this approach will provide certainty to capital markets participants with respect to the transition to the Regime and limit costs to market participates relating to their existing compliance practices and programs that would otherwise be required should the participating jurisdictions propose substantive changes. We reiterate our position that changes to the status quo should be made only where necessary to achieve harmonization among the participating jurisdictions.

We note that the current proposed CMRA Regulations do not yet include regulations relating to prospectus exemptions and first trades in securities – current National Instruments 45-106 and 45-102. These instruments will obviously be critical to capital market participants and we are unable to fully comment on the substance of the legal framework and its requirements until such instruments are published for comment. We also note that the proposed CMRA Regulations reflect instruments, forms and policies and amendments that were effective on, or for which Canadian securities regulatory authorities had published advance notice of implementation before, March 2, 2015. Accordingly, they do not reflect subsequent amendments, such as the changes made to National Instrument 51-102 – Continuous Disclosure Obligations, National Instrument 41-101 – General Prospectus Requirements, and National Instrument 52-110 – Audit Committees concerning venture issuers that came into force on June 30, 2015. We look forward to the participating jurisdictions publishing for comment revisions to the CMRA Regulations to reflect these changes and acknowledge that the participating jurisdictions have indicated a plan to adopt such changes.

We are supportive of the approach to harmonize the take-over bid regime through the adoption of Multilateral Instrument 62-104.

Section 117 of the CMA / National Instrument 41-101

Section 117(1) of the CMA provides that a purchaser will be deemed to have relied on a misrepresentation if it was a misrepresentation "at the time of purchase". Although the participating jurisdictions note the intention to harmonize this provision with the current wording of the corresponding provision in British Columbia and New Brunswick, we

note that the reference to "at the time of purchase" has deliberately been removed from the OSA through amendments made by the Budget Measures Act (Fall), 2004 (formerly Bill 149). We question why it is now considered appropriate to revise the change deliberately made by the Ontario Legislature in connection with the adoption of the CMA in Ontario.

The participating jurisdictions note that the proposed changes to Companion Policy 41-101CP are intended to clarify that in participating jurisdictions the statutory right of action for damages under subsection 117(1) of the CMA will continue to apply when convertible securities are purchased under a prospectus and are later converted into the underlying securities. This represents a departure from current law. Although 41-101CP currently states that contractual rights should be granted to purchasers of certain types of convertible securities, the applicability of this guidance is limited. Absent the granting of a contractual right of action, no prospectus liability currently arises in respect of the issuance of an underlying security that is not itself qualified by the prospectus. For this reason, we believe that the status quo should be preserved for purposes of the initial regulations, pending careful consideration and dialogue.

Commentary regarding NI 45-106

We acknowledge that the participating jurisdictions have elected not to publish for comment at this time a version of NI 45-106. We look forward to providing our comments in due course.

We understand that the Canadian Securities Administrators have stated that they are proposing changes to the private placement trade reporting requirements in order to gather more information about the Canadian exempt market, with the ultimate objective of using that information to help facilitate capital raising while concurrently protecting the interests of investors. However, with respect, we believe that the benefit of gathering this additional information about the operation of the Canadian exempt market will be significantly outweighed by the additional compliance burdens being imposed. Accordingly, we strongly urge the participating jurisdictions to defer making any of the changes to the Canadian exempt trade reporting regime currently proposed by the Canadian Securities Administrators.

National Policy 47-201

For the reasons noted below with respect to the proposed adoption of CMR Policy 71-601, we are not supportive of the adoption of the proposed changes to NP 47-201 to expand the requirements of Section 2.3 of the National Policy to other participating jurisdictions.

CMRA Regulation 11-501

We support the proposed adoption of BC Instrument 11-502 within CMRA Regulation 11-501 to provide a mechanism for voluntary surrender of reporting issuer status. Although the other provinces and territories have adopted a simplified process to apply for termination of status as a reporting issuer, we believe that the time and expense of requiring a formal application is generally more burdensome than the process ought to require.

CMRA Regulation 41-501

We note that the proposed approach to trust indenture requirements set forth in Part 3, Section 7 may inadvertently disrupt certain aspects of the Multijurisdictional Disclosure System. Please see our comments below in Annex D.

CMRA Regulation 51-501

Part 2 of this Regulation imposes a requirement that, if the issuer is not a reporting issuer in Canada, the issuer is required to file certain information about becoming listed or quoted on a market place within ten days after the listing or quotation. One concern is that an issuer's securities may start trading on the "pink sheets" or "grey market" U.S. over-the-counter markets without the issuer's knowledge or consent. For this reason, we would propose that any requirement to file information relating to a new listing or quotation should be triggered by the issuer's actual knowledge of a listing or quotation, and not the fact of becoming listed or quoted itself.

ANNEX C

Issuers Quoted in the U.S. Over-the-Counter Markets

(*Multilateral Instrument 51-105*)

Multilateral Instrument 51-105 ("MI 51-105") has been adopted in all provinces except Ontario. The CCMR is proposing to adopt MI 51-105 in all participating jurisdictions, including Ontario. The intended purpose of MI 51-105 was to impose regulatory oversight on issuers that trade on the over-the-counter securities markets in the United States, but are not listed on a Canadian or U.S. stock exchange. It has been the object of much criticism because of the unintended (and very draconian) consequences that it can have on an issuer and the issuer's shareholders.

An "OTC issuer" is an issuer with a class of securities quoted on an over-the-counter market in the United States, including the "pink sheets" or grey market, unless the issuer also has a Canadian or U.S. stock exchange listing. An OTC issuer is "transformed" into a reporting issuer, despite possibly having no public company disclosure record or desire to create or maintain one, if: (a) its business is directed or administered from a province where MI 51-105 applies; (b) promotional activities regarding its securities have been conducted in or from a province where MI 51-105 applies; or (c) the issuer distributed a class of securities to an investor in a province where MI 51-105 applies before its securities began trading with a "ticker symbol" on any other exchange or market, and the issuer's securities later start trading on a U.S. over-the-counter market before the issuer's securities become listed on a Canadian or U.S. stock exchange. In addition to imposing reporting issuer requirements on the issuer and its insiders involuntarily (at significant expense to the issuer, ultimately borne by its shareholders), once an issuer has been designated as an "OTC issuer", it is subject to a number of unique requirements, including resale restrictions being imposed on its shareholders, which continue so long as the issuer remains an "OTC issuer", even if it already is a conventional reporting issuer, or later becomes a conventional reporting issuer.

We believe that the Ontario Securities Commission acted prudently and wisely in not adopting MI 51-105 in Ontario. The regulatory burden that it can impose on issuers that are not listed on a Canadian or U.S. stock exchange is unfair and disproportionate to the regulatory objective that was sought to be achieved. The proponents of MI 51-105 may not have been aware that a U.S. broker-dealer can initiate trading in securities of a company on the U.S. over-the-counter market (whether through the "pink sheets" or grey market trading) in most cases without the issuer's prior knowledge or approval. Consider the following example of the hardships that could arise as a result of the adoption of MI 51-105 in Ontario as part of the CCMR initiative:

- an Ontario issuer conducts a public offering of its securities in a foreign country, without any intention of becoming a reporting issuer in Canada;

- the Ontario issuer distributes some of its equity securities to employees in Ontario under an option plan, and sells some of its securities to an institutional investor under an Ontario prospectus exemption;

- several months after the foreign offering, a U.S. broker-dealer decides on its own initiative to start trading the securities (which were offered publicly outside Canada and may be trading freely there) on the "grey market" over-the-counter market in the United States. The issuer's involvement is not required, nor is it within the issuer's power to stop this from happening;

- as a result of the U.S. broker-dealer's action, the issuer automatically becomes an "OTC issuer", and is deemed to be a reporting issuer in Ontario because of the earlier private placements of securities in Ontario. The issuer may not be aware for months, or years, that its securities have started trading on a U.S. over-the-counter market, but it will be delinquent all the while in complying with its Canadian public company reporting obligations. The issuer's insiders will also be delinquent in complying with the insider reporting obligations that apply to them;

- when the issuer becomes aware that its securities have started trading on the U.S. "grey market", it will have to take all of the steps necessary to comply with reporting issuer requirements, effectively forcing it to undertake the same measures it would have had to take to prepare for and complete a Canadian IPO, rectify its reporting deficiencies for the period it was unknowingly in default, and thereafter comply with Canadian continuous disclosure requirements;

- the Ontario shareholders who acquired securities will not be able to resell their securities at all unless and until the issuer cancels and reissues all outstanding share certificates to add a special resale restriction legend prescribed by MI 51-105; if and when that legend is added, the Ontario shareholders will still be subject to special restrictions on the ability to resell the securities, including the requirement that resales can only be made by a Canadian securities dealer executing the sale on a U.S. over-the-counter market – and not in the foreign market where the public offering was initially conducted. Note that these same restrictions on the Ontario shareholders would also apply even if the issuer in this example was already a reporting issuer in Ontario at the time of the foreign public offering, unless in addition to being a reporting issuer it was also listed on a Canadian or U.S. stock exchange. Further, the same restrictions on the Ontario shareholders would apply even if the issuer had filed a prospectus in Ontario

concurrently with the foreign offering, unless the issuer had also listed its securities on a Canadian or U.S. stock exchange.

We believe that MI 51-105 was a misguided regulatory initiative that should not be introduced in Ontario through the CCMR initiative. Despite the many exemptions that have been adopted to MI 51-105 in most provinces through exemption orders, which the CCMR initiative also proposes to bring forward into Ontario, significant fundamental defects with the regime remain.

In our view, the Regime should not carry forward MI 51-105 in any participating jurisdiction and should instead pursue other, and more appropriate, means of addressing any perceived abuses that arise as a result of trading U.S. over-the-counter quoted securities in Canada.

ANNEX D

Securities Transactions Outside the Jurisdiction

(*Series 7 of the CMRA Regulations*)

General

Currently, the Province of Ontario and the Province of British Columbia have dramatically different policies, practices and procedures governing the application of the prospectus requirements for "outbound" distributions of securities – that is, sales of securities by an issuer that is headquartered or has other certain connections to that province which are made to investors located outside Canada (an "Outbound Distribution").

When an issuer headquartered in, or that has certain other connections to, the Province of British Columbia (a "British Columbia Issuer") proposes to issue securities in an Outbound Distribution, that issuer is currently required either to prepare and file a prospectus with the British Columbia Securities Commission in order to qualify the Outbound Distribution by prospectus, or alternatively must comply with an available exemption from the British Columbia prospectus requirements, and purchasers outside Canada become subject to the attendant Canadian resale restrictions that will apply to those securities (we refer to this approach as the "British Columbia Regime").

The current situation in the Province of Ontario is very different, and is governed by Ontario Interpretation Note 1, which replaced former Ontario Securities Commission Policy 1.5 (the "OSC Interpretation Note") and has been in effect for more than 30 years. An issuer headquartered in, or that has certain other connections to, the Province of Ontario (an "Ontario Issuer") is subject to Ontario prospectus requirements for an Outbound Distribution only if there would be a reasonable basis for a concern that the securities sold would indirectly be purchased by investors in the Province of Ontario during the course of their distribution (that is, "flow back" into the hands of Ontario purchasers), because they did not come to rest in the hands of good faith purchasers outside Canada before the distribution had been completed (this approach being referred to as the "Ontario Regime").

The difference between the British Columbia Regime and the Ontario Regime is fundamentally a different understanding of the purpose and jurisdictional limitations of the prospectus requirements. Staff of the British Columbia Securities Commission view themselves as regulators of the conduct of British Columbia Issuers, and believe that the protections afforded by the prospectus requirements of the British Columbia Securities Act (the "B.C. Act"), and the attendant procedural requirements and limitations, should apply to all investors worldwide that acquire securities from a British Columbia Issuer.

On the other hand, Staff of the Ontario Securities Commission have, through the Interpretation Note and subsequent guidance developed under it, clearly articulated their view that the purpose of the prospectus requirements of the Ontario Securities Act (the "Ontario Act") is to protect investors located or resident in the Province of Ontario, rather than to extend those protections, and their attendant procedural requirements and limitations, to all investors worldwide that acquire securities from an Ontario Issuer, recognizing that those non-Canadian investors will already be entitled to the substantive and procedural protections of the securities laws of the country in which they are located or resident.

Under both the British Columbia Regime and the Ontario Regime, the same principles governing the prospectus requirements for Outbound Distributions also apply to a securityholder that is selling securities held by it in a transaction which is a distribution (a "Distributing Securityholder"), whether because the securityholder is a "control person" of the issuer, or because the sale of the securities is deemed to be a distribution as a result of "hold period" restrictions applicable to the securities being sold.

The British Columbia Regime has been described as a "catch and release" regime. The prospectus requirement of the B.C. Act is considered to apply to all distributions of securities by any issuer or securityholder that is located in British Columbia and thereby subject to British Columbia's jurisdiction. Specific exemptions are then necessary in order to relieve market participants of the consequences of the application of the prospectus requirement, in circumstances where it imposes a burden that is disproportionate to any offsetting benefit. The Ontario Regime, in contrast, uses a principles-based approach to determine in the first instance whether or not the Ontario prospectus requirement should apply in a particular situation, taking into account the public policy objectives of the prospectus requirement of the Ontario Act and the appropriateness of imposing Ontario requirements in the given circumstances.

The difference between the British Columbia Regime and the Ontario Regime has significant practical consequences for issuers and securityholders. At present, for example:

Initial Public Offerings

- Ontario – An Ontario Issuer may choose to conduct an initial public offering and listing only in the United States, without also filing a prospectus under the Ontario Act or becoming a reporting issuer in the Province of Ontario or any other province of Canada. The securities sold by the Ontario Issuer in the United States or elsewhere outside Canada will not be subject to the prospectus requirement of the Ontario Act because the securities will "come to rest" in the hands of good faith purchasers outside Ontario, and it will be reasonable to conclude that those

securities will not "flow back" into the Province of Ontario, as there will be no resale market for those securities in Canada. Assuming they are not "control persons", investors in the United States who acquire those securities will not be subject to any Canadian resale restrictions, as the first trade in those securities will not be a deemed distribution, since no Canadian prospectus exemption was required or utilized in connection with the Outbound Distribution from the Province of Ontario.

- British Columbia – In contrast, absent discretionary relief, a British Columbia Issuer is not able to conduct an initial public offering in the United States or elsewhere outside Canada without also filing a prospectus under the B.C. Act and becoming a reporting issuer in British Columbia. This is because the only manner in which the securities may be sold in the United States under the British Columbia Regime without filing a prospectus under the B.C. Act is by relying on a prospectus exemption. Exemptions based upon the nature or accreditation of the U.S. purchasers will generally be unavailable, as there is no effective way to restrict the types of investors participating in a U.S. initial public offering that has been registered under the U.S. Securities Act of 1933, as amended (the "1933 Act") and is intended to be made available to retail investors as well as institutional purchasers. Further, any prospectus exemption that would require placing a Canadian legend regarding resale restrictions on the security is unworkable, as U.S. stock exchanges (like Canadian stock exchanges) will not accept delivery of a legended or restricted security as good settlement on the exchange.

Follow-on Offerings of Debt or Equity Securities

- Ontario – An Ontario Issuer may generally conduct any type of public or private offering involving sales to investors outside Canada without preparing and filing a prospectus under the Ontario Act or relying on an exemption from the prospectus requirements, and the purchasers outside Canada will not be subject to resale restrictions, so long as it is reasonable to conclude that the securities will "come to rest" in the hands of good faith purchasers outside Canada so as to alleviate any "flow back" concern. This principle broadly applies to all securities, including those which are listed on the Toronto Stock Exchange or another Canadian exchange or market, subject to any reasonable precautions that may be appropriate to address the "flow back" concern, consistent with the guidance given under the OSC Interpretation Note and subsequently by Ontario Securities Commission Staff.

- British Columbia – A British Columbia Issuer is generally not able to sell securities in a registered or public offering in the United States, or any other

country outside Canada, without also preparing and filing a prospectus under the B.C. Act. This is because it is not generally possible to ensure that restrictions based on the nature or accreditation of the purchaser, as required under Canadian securities laws, can be applied to the U.S. or other foreign purchasers in an offering that is being conducted as a public offering in that other country. Further, any requirement to legend the securities in connection with Canadian resale restrictions will generally be unworkable, as legended or restricted securities cannot be traded through the foreign exchanges or markets on which those securities would trade. A British Columbia Issuer may sell securities in an unregistered offering or private placement in the United States or other jurisdictions, but only by complying with a number of fairly burdensome requirements to ensure compliance with an available British Columbia prospectus exemption. For example, assume that a British Columbia Issuer wishes to sell securities in the United States in a Rule 144A offering under the 1933 Act. The purchasers in the offering must be limited to investors that qualify as a "qualified institutional buyer" as defined under Rule 144A and also qualify as "accredited investors" under the definition of that term in National Instrument 45-106, *Prospectus Exemptions* ("NI 45-106"). In addition to bearing the restricted legend required under the 1933 Act, the securities must also bear the legend prescribed by Section 2.5 of National Instrument 45-102 *Resale of Securities* ("NI 45-102") in order to preserve the ability to become freely tradeable in Canada in the future. Finally, the British Columbia Issuer must include in its report of exempt distribution all of the same information about all purchasers in the United States and elsewhere outside Canada as would be required to be included in that report for purchasers in Canada, a requirement that may soon become even more burdensome if the additional information requirements for private placement trade reports that have recently been proposed by the Canadian Securities Administrators (the "CSA") should come into effect.

Resales of Securities

- Ontario – Institutional investors and other "permitted clients" in Ontario often acquire securities being sold in a U.S. or other non-Canadian offering by a non-Canadian issuer under the "accredited investor" exemption, or another Canadian prospectus exemption resulting in a hold period. These purchases were traditionally made under a Canadian "wrapper" and, more recently, are made pursuant to the much welcome and progressive changes to the Canadian private placement regime for such securities which now makes the need for a Canadian wrapper unnecessary in most circumstances. Typically, the issuer of these securities is not a reporting issuer in any jurisdiction of Canada, so the hold period applicable to the security will be permanent. An Ontario investor is presently able to rely on the OSC Interpretation Note to resell those securities on an exchange or

market outside Canada, without that resale transaction being subject to the prospectus requirements of the Ontario Act or the need to comply with a Canadian prospectus exemption, which would often be difficult if not impossible to do. Many of these Ontario investors depend upon the OSC Interpretation Note as their means to access the foreign, liquid resale market for these securities that will allow them to realize the return on their investment.

- British Columbia – Under the British Columbia Regime, an investor that acquires securities which are subject to a Canadian hold period under NI 45-102 may only resell those securities pursuant to a prospectus filed under the B.C. Act or pursuant to a Canadian prospectus exemption. In the case of U.S. or other non-Canadian issuers selling securities into Canada on a private placement basis, the applicable hold period will generally be a permanent one, because the issuer will not be a reporting issuer in Canada. As the issuer will typically never have any intention of filing a prospectus in Canada to facilitate resales, a British Columbia securityholder will need to rely on a prospectus exemption under NI 45-106 or a resale exemption under NI 45-102 in order to make resales of the securities, even if the resale is being made to a purchaser outside of Canada, or on an exchange or market outside of Canada. The securityholder may be able to rely on Section 2.14 of NI 45-102, but only if the conditions of that exemption were satisfied at the time the securityholder originally acquired the security. Those conditions include requirements relating to the maximum percentage of beneficial ownership of the class of securities by Canadian holders and the maximum percentage of beneficial holders of the class that are Canadian, after giving effect to the distribution in which the securities were sold to the Canadian purchaser. This is not information that it will typically be within the securityholder's ability to obtain from the issuer or otherwise. In fact, the issuer itself is often unable to ascertain whether the conditions of Section 2.14 of NI 45-102 are satisfied, in part because the issuer does not have current information about the extent of its Canadian beneficial securityholders, and in part because Section 2.14 requires taking into account all securities being sold into Canada by all of the dealers involved in the offering. In the event that Section 2.14 is not available, or its availability cannot be confirmed, the securityholder would have to know the identity of the non-Canadian purchaser in the resale in order to ensure that non-Canadian purchaser is an accredited investor, or otherwise be able to establish the availability of another prospectus exemption under NI 45-106. As a result, under the British Columbia Regime, institutional investors in British Columbia are often unable to recognize returns on their investments in foreign securities through resales made on exchanges or markets outside of Canada to the same extent that Ontario investors are currently able to do so under the Ontario Regime.

The CCMR is proposing to adopt the British Columbia Regime in all of the CMR Jurisdictions, including Ontario. We are gravely concerned that imposing the British Columbia Regime on issuers, investors and other market participants in Ontario will be extremely disruptive to the operation of the Ontario capital markets. While it is true that the British Columbia Regime has been operating in British Columbia for many years, the number of major multinational issuers located in British Columbia represents only a small portion of Canada's multinational issuers, most of which are headquartered in Ontario. Likewise, the number of major pension funds and other significant institutional investors located in Ontario far exceeds the number located in British Columbia.

If market participants in Ontario were to become subject to the British Columbia Regime, a significant majority of Canada's capital markets participants would be faced with a change in the applicable legal requirements for an Outbound Distribution that will significantly impede their current ability to raise capital outside Canada and realize returns on their investment in securities of non-Canadian issuers.

We believe that from the perspective of Ontario market participants, adopting the British Columbia Regime in Ontario is likely to be criticized as the adoption of a new and unwarranted regulatory regime in Ontario, imposing additional burdens on issuers and investors which force them to change their longstanding and well established financing and investing practices, without any demonstrated corresponding investor protection benefit.

We strongly urge the CCMR to reconsider its decision to propose the British Columbia Regime rather than the Ontario Regime for adoption in the CMR Jurisdictions. Alternatively, the CCMR should adopt sufficiently broad prospectus exemptions relating to Outbound Distributions that Ontario market participants will not be forced to make unnecessary and prejudicial changes to the practices and procedures they currently follow, with no evident offsetting investor protection benefit. In other words, if the CCMR were to impose the British Columbia Regime's "catch and release" approach in the CMR Jurisdictions, we believe it is crucial to Ontario market participants that the prospectus exemptions currently proposed for Outbound Distributions be significantly broadened.

The following are our specific comments on the Series 7 regulations and related documents, and national and multilateral instruments. They include a number of technical comments, as well as comments from a policy perspective addressing the manner in which we believe that the prospectus exemptions relating to Outbound Distributions must be expanded in order to avoid significant turmoil in the Ontario capital markets as a result of a transition to the British Columbia Regime.

Comments on Regulations and Related Documents, and National and Multilateral Instruments Included in Draft Regulations and Related Documents

1. CMRA Regulation 71-501 *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions*

(A) Definition of "Canadian Underwriter"

This definition refers to a person registered under the laws of a jurisdiction of Canada to act as an underwriter. As "underwriter" is not a separate category of registration, we suggest that the definition should refer to "…a person registered under the laws of a jurisdiction of Canada as a dealer in a manner which permits that person to act as an underwriter in that jurisdiction."

(B) Definition of "foreign jurisdiction"

This definition is limited to the United Kingdom of Great Britain and Northern Ireland and the United States. We submit that there is no reason in logic or public policy that the prospectus exemptions provided in CMRA Regulation 71-501 in connection with transactions in a foreign jurisdiction should be limited to those two countries. The term "foreign jurisdiction" should be defined to include any country other than Canada.

(C) Definition of "genuine market"

We believe that the reference to the International Securities Market Association should be updated to refer to the International Capital Market Association (the "ICMA") to reflect the name change that occurred in connection with its 2005 merger with the International Primary Market Association.

(D) Definition of "qualified market"

This definition is limited to certain specified Canadian and U.S. stock exchanges or markets and the London Stock Exchange Limited. Again, we submit that there is no principled basis for limiting the term "qualified market" to those listed, and propose that the term should be defined to mean any Canadian or non-Canadian stock exchange, market or quotation system.

(E) Section 3(3) - Underwriter certificates for MJDS southbound offerings

Section 3(3) of CMRA Regulation 71-501 provides an exemption from the requirement to include a certificate of a Canadian underwriter in a "southbound" prospectus under the U.S. / Canada Multijurisdictional Disclosure System ("MJDS") if the prospectus is not used to qualify a distribution of securities to a purchaser in Canada. This exemption is

helpful in that it will provide a standing, automatically available exemption from the Canadian underwriter certificate requirement for MJDS-eligible issuers, allowing them to qualify a distribution of securities in the United States under the CMRA prospectus requirements for a U.S.-only distribution without requiring the participation of a Canadian underwriter in the offering.

This exemption, however, is not broad enough to address the needs of capital markets participants.

In any situation where an issuer in a CMRA jurisdiction wishes to conduct an Outbound Distribution, and qualify that distribution by prospectus rather than relying on a prospectus exemption, the issuer should be welcomed and encouraged to do so without requiring the services of a Canadian underwriter, if no securities are to be sold in Canada under that prospectus. For example, an Ontario issuer that wishes to conduct an IPO exclusively in the United States, but also wishes to qualify the Outbound Distribution by prospectus in order to comply with the CMRA prospectus requirements and become a reporting issuer, should not be required to involve Canadian underwriters in the offering solely to comply with the Canadian underwriter prospectus certificate requirement.

Further, as a technical matter, we believe that the reference to subsection 5.9(1) of NI 41-101 in Section 3(3) creates unnecessary complexity and confusion. Proposed Companion Policy 71-501CP exists solely for the purpose of clarifying that the reference to subsection 5.9(1) is intended to apply to all Canadian underwriter prospectus certificate requirements, including those applicable to a short form prospectus, a shelf prospectus and a post-receipt pricing prospectus.

We would propose the following:

- Insert a new definition: "underwriter certificate requirement" means the requirement to include a certificate of an underwriter in a prospectus, including for greater certainty subsection 5.9(1) of NI 41-101 or any other specific underwriter certificate form requirements of NI 41-101, National Instrument 44-101 *Short Form Prospectus Distributions*, National Instrument 44-102 *Shelf Distributions*, National Instrument 44-103 *Post Receipt Pricing*, or any successors to those requirements.

- Revise Section 3(3) to read as follows: "An issuer in a CMR Jurisdiction that files a prospectus in respect of a distribution of securities to be made in any country or countries other than Canada is exempt from the underwriter certificate requirement if that prospectus is not used to qualify a distribution of securities to a purchaser located or resident in Canada."

(F) Section 4(1) - Distribution of securities to purchasers outside the CMR Jurisdictions

The purpose of this exemption is to permit an issuer in a CMR Jurisdiction to distribute securities in an Outbound Distribution without the need to prepare and file a prospectus in the CMR Jurisdiction to qualify the Outbound Distribution, or to comply with dealer registration requirements in connection with the Outbound Distribution. We believe that this is a very helpful exemption, but does not go far enough to implement the intended principle that an issuer in a CMR Jurisdiction should not have to qualify a distribution by prospectus (unless it wishes to do so) or comply with one of the generally available prospectus exemptions in NI 45-106 in order to make an Outbound Distribution.

Our specific comments on the subparagraphs in Section 4(1) are as follows:

(a) "the distribution is not made to a purchaser located or resident in a CMR Jurisdiction" – we believe that the jurisdictional basis for the application of the CMRA should be geographic. In other words, it should be the physical presence of the purchaser in a CMR Jurisdiction which triggers the application of the investor protections of the CMRA. We appreciate that, in addition to physical presence, there are also public policy considerations weighing in favour of the protection of residents of a CMR Jurisdiction, even if not physically present in the jurisdiction at the time an investment is made. Therefore, we believe that the two-prong test of both location and residence is the appropriate test, and is consistent with the approach taken by other jurisdictions (such as the United States) in the tiers of Regulation S that are applicable to distributions of securities by U.S. domestic issuers.

(b) We believe that it is appropriate to seek these confirmations, either through certifications or deemed representations, as proposed. For the reasons noted above, we suggest that Section 4(1)(b)(i) should refer to the purchaser not being located or resident in a CMR Jurisdiction.

(c) We also agree that it is appropriate to seek the confirmations in Section 4(1)(c)(i) through (iii), except that: (A) the reference to a securities commission or similar regulatory authority in (i) should specifically refer to a Canadian authority, as a foreign authority may well have reviewed or passed on the securities; and (B) the reference to there being no government or other insurance in (ii) should not be required if in fact there is government or other insurance covering the securities – for example, the securities may be debt securities issued or guaranteed by the Province of Ontario or the Government of Canada.

We do not agree with the proposed confirmation in Section 4(1)(c)(iv), for reasons that will be discussed below in our comments on Section 4(2).

We also do not agree with the proposed confirmation in Section 4(1)(c)(v), as worded. This confirmation warns the non-Canadian investor that it will not be able to rely on the protections afforded by the prospectus requirements of Canadian securities laws because the issuer is relying on an exemption from those requirements. This wording presupposes that investors in the United States or elsewhere outside Canada would have a jurisdictional basis to make a claim for damages, rescission or other remedies had a prospectus been filed in the CMR Jurisdiction to qualify the Outbound Distribution. We are unaware of any judicial authority for that proposition, and would strongly urge against making this supposition in the absence of judicial authority. For example, consider an issuer in a CMR Jurisdiction that conducts a cross-border IPO in both Canada and the United States concurrently, qualifying the Outbound Distribution into the United States under the Canadian prospectus as well as the distribution in Canada. In that situation, even though the Outbound Distribution has been qualified by prospectus, we would consider it unreasonable to expect that U.S. investors in the IPO should be entitled to claim statutory rights of rescission or damages under the CMR Act when they have made their purchase under the concurrent 1933 Act registration statement and should reasonably expect that their rights and remedies will be limited to those available under U.S. federal securities laws. It would be absurd to suggest that U.S. investors should be entitled to exercise Canadian prospectus withdrawal rights, running for two business days from their receipt of the Canadian prospectus, when the Canadian prospectus is never delivered to them, nor do they have any reasonable expectation of being able to exercise such rights. The consequence of this position would be that all Canadian issuers who have previously conducted cross-border offerings where securities sold outside Canada were qualified by the Canadian prospectus are effectively subject to the risk of "permanent" withdrawal rights being exercised against them by the foreign investors who did not receive a copy of the Canadian prospectus.

Were it the case that U.S. and other non-Canadian investors could claim statutory rights of rescission or damages under the CMRA solely as a result of a prospectus qualifying the Outbound Distribution to them, there would be an urgent need for the addition to the CMRA of an exemption from the two-day statutory right of withdrawal for non-Canadian purchasers.

For these reasons, we propose that the confirmation in Section 4(1)(c)(v) be reworded to say: "the issuer has advised the purchaser that the purchaser will not be entitled to rely on certain protections, rights and remedies provided by the Act, including statutory rights of rescission or damages, that would be available to a purchaser in Canada acquiring securities under a prospectus prepared in accordance with Canadian prospectus requirements from a dealer registered in accordance with Canadian dealer registration requirements."

(d) We strongly disagree with the imposition of a requirement that the issuer must have equity securities listed or quoted on a qualified market as a condition of this exemption. An issuer's ability to distribute securities from a CMR Jurisdiction in an Outbound Distribution without the need to qualify the distribution by prospectus should not be contingent on the issuer having a public trading market for its equity securities in Canada or any other country. It is not clear what policy objective this requirement is intended to address. If the concept is that the issuer should be subject to Canadian reporting issuer requirements or similar requirements in another jurisdiction in order to provide some investor protection benefit for the foreign purchaser, then that is the condition that should be imposed. Whatever rationale may explain the purpose of this restriction, the narrow list of markets included in the definition of "qualified market" does not appear to have any logical basis or serve any public policy interest, given the many other exchanges and markets around the world that exact the same or higher standards for their listed companies.

Finally, we further note that, as worded, this restriction would not permit a debt-only issuer to utilize the exemption, even if the debt securities were guaranteed by a parent that did have the required listing of equity securities.

(e) Under the Ontario Regime, an Ontario-based issuer that makes an Outbound Distribution relying on the OSC Interpretation Note is not required to file any report of exempt distribution with respect to purchasers outside Canada. In those circumstances where we have been involved in an Outbound Distribution by a British Columbia Issuer, collecting the necessary information to prepare and file a trade report under the British Columbia Regime has been extremely problematic. Several of our major U.S. investment bank clients ask at the outset of an engagement whether trade reporting for sales to U.S. and other non-Canadian purchasers will be required, owing to their concerns about needing to keep track of the required information regarding the dozens, hundreds or potentially thousands of purchasers that may have to be reported. Imposing a trade reporting requirement for Outbound Distributions on Ontario issuers will dramatically increase the number of Canada/U.S. cross-border offerings for which trade reporting is required, and dramatically increase the burdens associated with these reports. It is not clear what purpose is served by requiring an issuer to provide to Canadian securities regulators a detailed list of all non-Canadian purchasers in an Outbound Distribution under a prospectus exemption, or what that information would be used for. The compliance burden presented by this requirement would be further increased if the amendments to the trade report form recently proposed by the CSA are adopted, as the proposed amended form will require significantly more detailed information. We would propose that the trade reporting filing requirement in Section 4(1)(e) should be removed, or alternatively replaced with a requirement to file a different type of summary report which does not require detailed information about each non-Canadian purchaser, but only a report of certain details of the Outbound Distribution on

an aggregate or consolidated basis. Further, if any trade reporting requirement for an Outbound Distribution is retained, we propose it would be appropriate to clarify, and codify, that no trade report filing fees will be payable in connection with securities that were distributed outside Canada in an Outbound Distribution.

(G) Section 4(2) - Distribution of securities to purchasers outside the CMR Jurisdictions

The imposition of section 2.5 of NI 45-102 resale restrictions on securities sold in an Outbound Distribution is problematic for a number of reasons. First, as a practical matter, it will not be possible to segregate the securities sold in the Outbound Distribution from any other previously issued securities of the same class unless the securities bear the legend prescribed by section 2.5. Second, unless those securities bear the prescribed legend, they will never become eligible for resale in accordance with section 2.5 even if the issuer is a reporting issuer in Canada and the required four month hold period has lapsed, because the presence of the legend is a condition of the ability to utilize the section 2.5 resale regime. Finally, we note that securities that are made subject to section 2.5 of NI 45-102 remain subject to permanent restrictions which prohibit unusual efforts to prepare the market or payment of unusual compensation in connection with their sale, even after a resale transaction (whether within Canada or outside Canada) in which the Canadian legend has been removed. These restrictions become virtually impossible to monitor and comply with after the securities have been distributed outside Canada.

Legending requirements cannot be complied with in an Outbound Distribution that involves a registered offering of securities in the United States or similar public offering in another country. Investors in those other countries expect the securities they acquire to be free of any legends or resale restrictions. If the securities are listed for trading on a non-Canadian stock exchange or market, they cannot be legended, as they could not then be delivered as good settlement on that exchange or market.

We do not believe that the prospectus requirement should apply to a non-Canadian investor (other than a control person) that has acquired securities in an Outbound Distribution, even if the Outbound Distribution was not qualified by a Canadian prospectus. We submit that if the securities are sold to a good faith purchaser outside of Canada, who acquires with investment intent and not for the purpose of making an indirect distribution in Canada, the first trade of those securities should not be deemed to be a distribution. We note that this is the approach that currently applies to first trades of securities sold under the Ontario Regime in an Outbound Distribution relying on the OSC Interpretation Note. We also note that this is also the result that applies when securities are distributed by a Quebec-based issuer in an Outbound Distribution from the Province of Quebec under Section 12 of the *Securities Act* (Quebec), which is considered a "final exemption" removing the securities from the "closed system".

In light of these difficulties, we propose that Section 4(2) should be deleted, so that the exemption in Subsection 4(1) does not impose resale restrictions, consistent with the Ontario Regime and the Section 12 regime in Quebec. As an alternative, we propose that it should be sufficient to require the first non-Canadian purchaser in the Outbound Distribution to agree not to make a resale to a purchaser in Canada, or on an exchange or market in Canada, but that subsequent non-Canadian holders should be relieved of any ongoing resale restrictions.

We propose for your consideration the following revision to Section 4(2):

> "A trade in a security acquired by the seller under subsection (1) above or under any predecessor instrument is subject to section 2.5 of NI 45-102 unless:
>
> (a) the purchaser certifies in the subscription agreement or similar document that the purchaser will not, or if no such document is being used, the purchaser is given notice that, by purchasing the securities, the purchaser will be deemed to have agreed that the purchaser will not, except pursuant to an exemption from Canadian prospectus requirements:
>
> (i) resell the security on an exchange or market in Canada, or
>
> (ii) resell the security to any person located or resident in Canada, provided that a resale made on an exchange or market outside of Canada will be deemed not to have been made to a person located or resident in Canada, in the absence of actual knowledge or reason to believe that the security is being resold to a person located or resident in Canada."

(H) New Exemption for Selling Securityholders

We propose that a new exemption should be added to Part 3 of CMRA Regulation 71-501 to allow selling securityholders to make resales of securities to a purchaser outside of Canada, or on an exchange or market outside of Canada.

While Section 2.14 of NI 45-102 provides some assistance in this regard, its conditions are currently very difficult, if not impossible, for a shareholder to comply with as they require knowledge of information about Canadian ownership levels of the issuer's securities that not even the issuer may know.

At a minimum, we submit that a permitted client that acquires a security of a foreign issuer for which there is no public market in Canada should be permitted to resell that security: (1) to a purchaser outside of Canada, or (2) on an exchange or market outside of Canada, provided only that the seller has not knowingly prearranged the sale with a Canadian purchaser, and does not know or have reason to believe that the purchaser is a

Canadian purchaser. This exemption should be available without regard to the percentage ownership level of the security in Canada or by Canadian holders, or the requirement to satisfy other similar conditions that may be difficult or impossible to satisfy, or be able to confirm are satisfied. Without such an exemption, Ontario institutional investors currently relying on the OSC Interpretation Note for liquidity in transactions outside of Canada will find themselves "locked in" to existing shareholdings that they had a legitimate expectation of being able to sell on public markets abroad. They will also be dissuaded from making new investments in foreign securities owing to what, from their perspective, will be new and onerous restrictions on the ability to dispose of foreign securities in foreign transactions. We do not see how imposing such resale restrictions serves any demonstrable Canadian investor protection benefit in the case of foreign securities that do not have any public market in Canada and for which there should be no "flow back" concerns.

(I) Section 4(3) - prospectus certificate exemption for foreign underwriters

As noted previously, we believe that the references to subsection 5.9(1) of NI 41-101 should be replaced with a new broader defined term, "underwriter certificate requirement".

As presently drafted, this exemption is only available to a "foreign underwriter", meaning an underwriter in the United Kingdom of Great Britain and Northern Ireland, or the United States. It is not clear what purpose is served by limiting the exemption in such a manner. Take, for example, an Ontario issuer that wishes to conduct a global offering of equity securities in Canada, the United States, Great Britain, Japan and Australia concurrently. In this example, the underwriters in the United States and Great Britain will not have to sign a Canadian underwriter prospectus certificate, but the underwriters in Japan and Australia will be required to sign the Canadian prospectus certificate together with the Canadian underwriters – an absurd result, particularly given that the underwriters in Japan and Australia are not registered or authorized to act as underwriters in Canada.

Another example might be an Ontario reporting issuer that is interlisted on the Toronto Stock Exchange and the Australia Stock Exchange. This issuer wishes to sell equity securities concurrently in public offerings in both Canada and Australia, engages underwriters in both countries and prepares a Canadian prospectus to qualify the Outbound Distribution. Under Section 4(3) as drafted, the Australian underwriters would be required to sign the Canadian prospectus certificate because they are not "foreign underwriters" as defined (being underwriters in a country other than Great Britain or the United States).

If the British Columbia Regime is to be imposed in all CMR Jurisdictions, issuers should be encouraged to comply with the prospectus requirements of the CMRA, especially if sufficiently broad exemptions from the prospectus requirements for Outbound Distributions are not adopted. Requiring a non-Canadian underwriter to sign a Canadian prospectus, when not qualified to act as an underwriter in Canada, is effectively imposing a requirement that cannot be complied with.

We propose that Section 4(3) should be redrafted, to say simply,

> "The underwriter certificate requirement does not apply: (i) to any underwriter that is not a Canadian underwriter; and (ii) to any prospectus if the securities qualified by the prospectus are offered and sold exclusively to purchasers outside Canada."

(J) Section 4(4) – Exemption for Eurobond Offerings

While it may be helpful to have a specific exemption aimed at Outbound Distributions that qualify as Eurobond offerings, we believe that some of the conditions and restrictions in Section 4(4) will be problematic.

First, we believe that an exemption of this nature should apply to any offering of debt securities, and not be restricted solely to one occurring on a "genuine market". We note, for example, that in the United States, Regulation S under the 1933 Act provides more relaxed requirements for foreign distributions of debt securities than it does for equity securities, on the basis that there should be less of a regulatory concern present. For example, under Regulation S, the "distribution compliance period" for a debt security of a U.S. issuer (during which resales into the United States are restricted) is only 40 days, while the distribution compliance period for equity securities is a full year.

Second, as noted above we believe that the requirement to file a report of exempt distribution for Outbound Distributions is onerous and problematic, and have difficulty understanding the public policy benefit achieved by imposing this requirement.

Third, Subsection 4(4)(f) requires the securities to be distributed initially in "temporary form" exchangeable for definitive securities 40 days after completion of the distribution, on certification by the holder that the definitive securities are not beneficially owned by residents of a CMR Jurisdiction. This requirement to undertake what is effectively an exchange procedure after 40 days is somewhat onerous, and we question whether it remains appropriate in the modern context. We note that the same requirement applies in the United States under Category 3 of Regulation S, but only for issuers that are not subject to reporting requirements under the U.S. Securities Exchange Act of 1934, as amended. We propose that it should be sufficient to require that the underwriters agree to observe a 40-day restriction on resales in Canada, as well as giving the purchaser notice

of the same restriction, and requiring any distributor or dealer to whom the underwriters sell the securities to follow the same restriction and give the same notice to the purchaser. Please note that if the requirement for a temporary form of securities is retained, then Subsection 4(4)(f) should be revised to allow a beneficial owner resident in a CMR Jurisdiction to obtain the definitive securities upon establishing that the securities were acquired by it in the CMR Jurisdiction with the benefit of a Canadian prospectus exemption.

(K) Section 4(5) – Trades in Securities Issued Under Subsection 4(4)

As noted above, we believe that securities sold outside of Canada in an Outbound Distribution should exit the closed system, and should not be made subject to deemed distribution provisions at the time of a resale into Canada. However, if resale restrictions are to be applied, the proposed exemption in Subsection 4(5) for trades back into Canada is certainly preferable to imposing the usual resale restrictions of Section 2.5 of NI 45-102, which would include the legending requirement that may be difficult to comply with in the context of a security trading in the Eurobond market. We also agree that an abbreviated 40-day "hold period" for non-Canadian purchasers in an Outbound Distribution of securities of a Canadian reporting issuer sold in the Eurobond market is preferable to the 4-month hold period that would normally apply for resales of securities of a reporting issuer sold under other prospectus exemptions. We suggest, however, that having the issuer impose contractual restrictions on resales into Canada for 40 days should be sufficient.

2. 71-501CP *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions*

As noted above, we believe that this Companion Policy should be replaced by the introduction of the defined term "underwriter prospectus requirement" in CMRA Regulation 71-501. Doing so will eliminate the need for this Companion Policy.

3. CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions*

We have already noted above our general concern that adopting the British Columbia Regime in the Province of Ontario will cause significant disruption to the Ontario capital markets.

More specific comments regarding the drafting of CMRA Policy 71-601 are set forth below:

(A) Application of Resale Restrictions to Securities Distributed Outside a CMR Jurisdiction

We believe that securities distributed outside a CMR Jurisdiction under a prospectus exemption should not be subject to a hold period. Unless those securities bear a Canadian legend, it will be difficult, if not impossible, to trace those securities and ensure compliance with a Canadian prospectus exemption if the securities are sold back into Canada at a future time, especially if the securities are fungible with other securities of the same class that may be held outside Canada and are not subject to Canadian resale restrictions (including securities previously distributed under a Canadian prospectus qualifying an Outbound Distribution, or acquired by U.S. investors through purchases on an exchange or market in transactions that are not a distribution). However, imposing a Canadian legend requirement will prevent the security from being freely tradeable on an exchange or market outside Canada.

Provided that the securities come to rest in the hands of a good faith initial purchaser outside of Canada, we do not believe that, as a policy matter, the subsequent resale of the security by the non-Canadian purchaser should be deemed to be a distribution requiring a Canadian prospectus or prospectus exemption.

(B) Indirect Distribution Into a CMR Jurisdiction – 4 Month Hold

We suggest that the references to the "period during which a domestic purchaser of securities of a reporting issuer would be required to hold the security" should be revised to clarify that the point intended to be conveyed is that four months would be a reasonable period of time for "flow back" restrictions to apply, but that none of the other resale conditions of Section 2.5 would apply. Importantly, the securities issued in this situation will not, and typically could not, bear the legend prescribed by Section 2.5 and so the conditions of Section 2.5 could not literally be satisfied. An appropriate revision might be: "…may be well advised to take steps to ensure that the securities remain outside of CMR Jurisdictions for the period during which a domestic purchaser of securities of a reporting issuer would be required to hold the security (i.e., 4 months), without regard to any of the other conditions that would apply to a resale of securities in such circumstances.

(C) Section 10 of CMRA Regulation 81-501 and Section 11.1 of NI 51-102

The Policy contains statements describing the requirements of Section 10 of CMRA Regulation 81-501 and Section 11.1 of National Instrument 51-102. It is unclear why these statements have been included in the Policy, or how they relate to the topic under discussion in that particular paragraph of the Policy.

(D) Distribution by person other than issuer

As noted above, we are deeply concerned that institutional investors in the Province of Ontario will be seriously prejudiced by the adoption of the British Columbia Regime, as they will be unable to continue to utilize the OSC Interpretation Note in order to resell securities on an exchange or market outside Ontario in circumstances where the exemption afforded by Section 2.14 of NI 45-102 is not available, or its availability cannot be established. The difficulty in establishing satisfaction with the conditions required by Section 2.14 has been the subject of past comment letters, but the CSA has not perceived a need for urgency in addressing those concerns. We believe that the only reason a significant number of Ontario market participants have not vocalized an urgent and compelling need for reform to Section 2.14 of NI 45-102 is because the OSC Interpretation Note has been available as an alternative approach in Ontario. If this alternative is to be removed by adopting the British Columbia Regime in Ontario, we strongly urge that an alternative exemption to Section 2.14 of NI 45-102 should be adopted immediately, such as we have proposed above, which will allow institutional investors to liquidate previously made (and future) investments on an exchange or market outside Canada without the need to seek out often unobtainable information regarding Canadian ownership levels of the class of securities being sold.

(E) Filing a Prospectus to Qualify an Outbound Distribution

In the Province of Ontario, there has been much uncertainty for quite some time regarding whether an Ontario issuer could voluntarily file a prospectus to qualify an Outbound Distribution under the Ontario Act even if not required to do so under the OSC Interpretation Note.

We propose that if the British Columbia Regime is to be adopted in the CMR Jurisdictions, it is of fundamental importance to make clear that issuers always have the option of filing a prospectus solely for the purpose of qualifying an Outbound Distribution. Without the ability to voluntarily file a prospectus, an issuer would be prohibited from making an Outbound Distribution if it is unable to comply with the conditions of an available prospectus exemption, or is unwilling or unable to issue securities in the Outbound Distribution that will be subject to Canadian resale restrictions that would apply as a result of using a prospectus exemption that may be available.

Further, it is difficult to see what public policy objective would be served by preventing, or impeding, compliance with the prospectus requirements of the CMRA by actually filing a prospectus rather than seeking to rely on an exemption from that requirement. Any issuer that wishes to file a prospectus should be rewarded for seeking to achieve the high water mark of regulatory compliance, and not frustrated in its efforts to do so with procedural or other impediments.

We suggest the addition of the following paragraph to CMRA Policy 71-601 would provide appropriate clarification:

> Issuers that wish to comply with the prospectus requirements of the CMRA by filing a prospectus solely for the purpose of qualifying a distribution of securities from a CMR Jurisdiction into any other jurisdiction are encouraged to do so. Qualifying a distribution of securities by prospectus is always an acceptable manner of complying with the prospectus requirements even if the securities are not being offered or sold in a CMR Jurisdiction. One advantage of filing a prospectus to qualify a distribution into other jurisdictions is that the securities will be freely tradeable thereafter in all of the CMR Jurisdictions. For greater certainty: (i) the prospectus need not name any original purchasers of the securities outside the CMR Jurisdictions as selling securityholders in connection with their potential future resales of the securities into a CMR Jurisdiction; (ii) no underwriters' certificate is required for any type of prospectus qualifying a distribution being made solely outside of all of the CMR Jurisdictions, whether filed under the Multijurisdictional Disclosure System or otherwise; and (iii) the prospectus delivery requirements, withdrawal rights and statutory rights of action provided in the CMRA for the benefit of purchasers of securities in the CMR Jurisdictions are not intended to apply to, or be available to, original purchasers of the securities outside of the CMR Jurisdictions as they will not actually be purchasing the securities pursuant to the prospectus (but rather pursuant to the securities laws of the jurisdiction in which they are located or resident), despite the fact that the distribution of the securities outside the CRA Jurisdictions is being qualified by the prospectus for the purpose of compliance with the prospectus requirement of the CMRA.

4. National Instrument 71-101 *The Multijurisdictional Disclosure System*

We note that references to Schedule 13E-4 and Schedule 14D-1 under the 1934 Act should now be replaced by references to Schedule TO, the successor form.

We also note that it may be timely to consider removing the alternative eligibility criteria for investment-grade debt contained in Section 3.1(a), in order to implement a reciprocal change to the repeal of Form F-9 by the U.S. Securities and Exchange Commission in 2012, which eliminated the ability to qualify for "southbound" MJDS on the basis of an investment grade rating as an alternative to meeting the public float requirements of Form F-10.

Finally, we believe it is appropriate to note here, in the discussion of the Multijurisdictional Disclosure System, a potential significantly disruptive and presumably unintended consequence of the proposed changes to the regulation of trust

indentures set forth in Part 3, Section 7, of CMRA Regulation 41-501. As noted in the commentary, it is intended that these provisions would replace the trust indenture requirements currently set forth in corporate legislation in the CMR Jurisdictions. In this regard, we note that Canadian issuers making use of "southbound" MJDS for registered offerings of debt securities in the United States typically rely on the exemption afforded by Rule 4d-9 under the Trust Indenture Act of 1939 (the "Trust Indenture Act"), as amended, in order to permit them to use a Canadian trust indenture as part of an MJDS registered offering without complying with most of the substantive provisions of the Trust Indenture Act. Rule 4d-9 provides an exemption from most Trust Indenture Act requirements so long as the trust indenture is subject to the requirements of one or more of the Canada Business Corporations Act, The Bank Act (Canada), the Business Corporations Act (Ontario) (the "OBCA") or the Company Act (British Columbia). Currently, any offering of securities that is qualified by a prospectus filed in the Province of Ontario is subject to the OBCA requirements, and as a result, the Rule 4d-9 exemption from the substantive requirements of the Trust Indenture Act is available for that indenture. We would strongly urge that no change be made to this regime without first securing an agreement from Staff of the U.S. Securities and Exchange Commission to confirm that the Rule 4d-9 exemption will continue to be available for trust indentures that comply with Part 3, Section 7, of CMRA Regulation 41-501 as successor legislation, or to undertake rulemaking to achieve that result. Otherwise, Canadian issuers currently dependent on the availability of Rule 4d-9 to utilize "southbound" MJDS for securities issued under existing (or future) Canadian trust indentures will no longer be able to do so.

5. 71-101CP *The Multijurisdictional Disclosure System*

If the revision to Section 3.1(a) proposed above to conform to the repeal of Form F-9, then conforming changes to the discussion of the investment grade eligibility criteria will be required.

We also note that the reference to Form F-9 in Section 4.3 should be removed, as that form has been repealed.

6. 71-101F1 *Forms of Submission to Jurisdiction and Appointment of Agent for Service of Process*

No comments.

7. National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*

No comments.

8. 71-102CP *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*

No comments.

ANNEX E

Market Conduct, Enforcement, Civil Liability

(*Parts 9-13 of the CMA*)

Although we applaud the participating jurisdictions for largely maintaining existing securities laws in the enforcement, market conduct and civil liability areas, we are concerned about some of the changes in the CMA that abandon important protections. We offer several recommendations below to protect market participants from unnecessary changes.

1. **The CMA should maintain the existing OSA onuses for primary market rights of action.** Shifting the onus of proving a reasonable investigation defence from the plaintiff to directors and experts is neither necessary for harmonization nor appropriate. It is misguided to suggest that the shift would bring the reasonable investigation defence in Part 12 in line with Part 13. Part 13 contains various checks and balances, including the leave test, to protect against unmeritorious litigation. If the participating jurisdictions were to import those protections into Part 12, then the shift in onus might be an acceptable compromise and would bring the two processes in line. But it is unfair to select one plaintiff-friendly aspect and ignore the important balancing that underlies Part 13.

2. **The CMA should adopt section 175(3) of the OSA Regulations for insider trading and front-running.** This provision allows a respondent that is seeking to rely on the "ethical walls" exemption in section 175(1) of the Regulations as a defence to insider trading allegations, to rely on the existence of reasonable policies and procedures designed to prevent contraventions of the insider trading rules. Where a respondent has established reasonable policies and procedures, the plaintiff or prosecution should have to establish that these policies and procedures were insufficient or circumvented.[1] Removing this protection would subject registrants to increased exposure to civil and quasi-criminal liability in the conduct of their day-to-day business. We therefore believe that it should be maintained, and also made available in responding to allegations of front-running.

   These protections are even more important given the CMA's expansion of civil liability for insider trading. Our concern is that, in an effort to exceed the Part 13 damages caps, plaintiffs' counsel may seek to proceed against insiders who traded

[1] The guidance in OSC Policy 33-601 is also helpful as it provides registrants and the courts with an expert authority's views on what would be considered "reasonable policies and procedures". If section 175(3) is not carried forward then the guidance in OSC Policy 33-601 will presumably also be discarded.

during the proposed class period – even if there is no evidence to suggest that the insider trading provisions have been breached. Adopting section 175(3) of the OSA Regulations would offset some of this risk.

3. **The CMA should not apply front running rules to derivatives trading until after conducting further study and consultation with derivatives market participants.** In the most recent draft of the CMA, market conduct provisions related to front running have been extended to derivatives trading. While we agree that derivatives market participants should be prohibited from engaging in abusive trading practices, we are concerned that the draft front running prohibition and statutory defences thereto are designed to apply only to securities trading and do not reflect some of the unique aspects of derivatives trading. We therefore recommend that further study be conducted, in particular comparisons to international approaches.

4. **The participating jurisdictions should clarify the proposed scope of the tribunal's power to order compensation or restitution.** The proposed powers under section 90(2) of the CMA could significantly change the risk profile and settlement dynamics for market participants facing parallel regulatory and civil proceedings. In our initial comment letter, we asked for clarification and consultation on the proposed scope of these powers. We do not think that these powers should be added without full clarification and consultation.

5. **The CMA should adopt the protections for compelled evidence in sections 17 and 18 of the OSA.** The right against self-incrimination is a cornerstone of our criminal law. The protections in sections 17 and 18 of the OSA are particularly important given the increase in self-represented respondents who may not be aware, for example, of the need to invoke the protections in the Evidence Acts. Section 196(a) of the CMA seems to suggest that evidence compelled in an investigation can be disclosed in a quasi-criminal proceeding. In our view, this should not be permitted.

6. **The CMA should maintain the costs rules for secondary market class actions in section 138.11 of the OSA.** The OSA rule was recommended by the Canadian Securities Administrators to help deter unmeritorious litigation. The CMA could provide that the successful party in a proceeding under Part 13 is entitled to costs in accordance with the applicable rules of the court in which the proceeding is brought, notwithstanding any class proceedings legislation to the contrary. That would be similar to the approach taken in section 166(4) of the CMA, which provides that parties may cross-examine on affidavits in accordance with the applicable rules of court.

7. **The participating jurisdictions should clarify the intended scope of, and avoid unnecessary changes to, the right of action for offering memorandum liability.** It appears that section 122 of the CMA applies to any type of document given to an investor in the course of a prospectus exempt distribution. This would be an expansion in all of the participating jurisdictions. The CMA also adds directors or signatories of the disclosure document as potential defendants and removes the requirement that the plaintiff acquire the security "during the period of distribution". In our view, this overhaul of the right of action is unnecessary.

   In response to your question, the revisions to section 117(1) of the CMA create confusion, particularly alongside the revisions to section 122. Section 117 was clearer when it referred directly to prospectus offerings under section 27(1)(b). It is difficult to understand the scope of terms like "prescribed offering document" and "prescribed disclosure document", including whether there could be any overlap, as the term "prescribed offering document" does not appear to have been defined for the purposes of section 117.

8. **The CMA should maintain the existing OSA knowledge requirement for market manipulation.** This is another change that goes beyond harmonization. Section 62 of the CMA should adopt the knowledge requirement in section 126.2(1) of the OSA.

9. **The obstruction offence in section 76 of the CMA is overbroad.** The offence should not include circumstances in which a person knows or ought to know that an investigation "is likely to be" conducted. That is not a harmonizing change. Similarly, adding the concept of "withholding" may – inadvertently or otherwise – impose positive obligations on persons whether or not they are potentially affected by the hearing, review or investigation. It is difficult to assess the potential consequences of these provisions without understanding how you intend to apply them.

ANNEX F

Derivatives

(*Part 6 of the CMA; Series 9 of the CMRA Regulations*)

We have provided comments on derivatives-related rulemaking throughout this comment letter. In addition, we have the following specific comments on Series 9 of the CMRA Regulations:

1. **Proposed International Dealer Exemption for Exchange Contracts (Part 3 of CMRA Regulation 91-501)**

In principle, we are supportive of the proposed international dealer exemption for exchange contracts; however, we believe that the exemption should not be limited to dealers registered in the United States or the United Kingdom. There is no explanation provided for this limitation, and it does not match the requirements of the international dealer exemption for securities in section 8.18 of NI 31-103 (on which this exemption is based). The international dealer exemption in NI 31-103 is not limited to dealers registered in "designed foreign jurisdictions". Sophisticated permitted clients should be able to choose to trade non-Canadian exchange contracts with a dealer based in continental Europe, Japan or Australia, for example. We cannot see a clear rationale for excluding dealers registered in these jurisdictions (all of which are IOSCO members and G-20 members) from the proposed exemption.

We also disagree with the proposal that a dealer relying on the proposed international dealer exemption for exchange contracts file a completed Form 91-501F2 Notice of Regulatory Action. If the intention is to pattern this exemption after the international dealer exemption in NI 31-103, then this regulatory reporting should not be required. The reporting obligation would be very burdensome, given that reporting is required for the dealer relying on the exemptive relief and any predecessors or specified affiliates. For global financial services companies with dozens or hundreds of operating companies (most of which have no connection to Canada), it would be impossible to collect regulatory and litigation information from global affiliates and file updates to that information within 10 days of a change. It is also unclear what the Authority would do with such information, if filed, given that the information would have very little or nothing to do with the Authority's mandate to regulate Canadian capital markets activity.

2. **Regulating OTC Derivatives as Securities for Prospectus Requirements**

We are concerned with s. 2(2) of 91-501, which proposes that derivatives are prescribed to be securities for purposes of Part 5 of the CMA [Prospectus Requirements] and related regulations. Derivatives are not the same as securities, and requiring the preparation and

filing of a prospectus does not make sense for a bilateral derivatives contract. For firms that wish to sell derivatives to retail investors (e.g. sales of OTC foreign exchange contracts), there is a precedent for CSA jurisdictions granting exemptive relief from the prospectus requirement, so long as the dealer provides a clear and plain language risk disclosure document. This precedent could be codified in 91-501 so that there is a clear, predictable and transparent option available for dealers that wish to trade OTC derivatives with parties in Canada that are not permitted clients or qualified parties.

3. **Trade Reporting Rules**

We note that the OSC has recently proposed amendments to the Ontario trade reporting rule, and that final trade reporting rules are soon expected in other participating jurisdictions. We would therefore expect that the proposed CMRA Regulation 91-502 governing trade repositories will be updated to reflect these recent developments. In light of the differences between the Ontario rule and the proposed rule in other jurisdictions, market participants should be given another chance to comment on the proposed final rule to be adopted by the CCMRS.

ANNEX G

Responses to Questions in the Commentary

The commentary that accompanied the draft initial CMRA Regulations includes a series of specific questions about changes that the participating jurisdictions propose to make. Our responses to these questions are set out below.

QUESTION FOR COMMENT ON COMPANION POLICY 41-101CP

We are interested in receiving comments on whether the revisions to subsection 117(1) of the CMA clarify how the statutory right of action will operate.

> ***Response*:** In our view, the revisions to section 117(1) create confusion, particularly alongside the revisions to section 122. Section 117 was clearer when it referred directly to prospectus offerings under section 27(1)(b). It is difficult to understand the scope of terms like "prescribed offering document" and "prescribed disclosure document", including whether there could be any overlap, as the term "prescribed offering document" does not appear to have been defined for the purposes of section 117.

QUESTION FOR COMMENT ON CMRA POLICY 71-601

1. In a cross-border prospectus offering, a Canadian issuer in a CMR Jurisdiction will file a Canadian prospectus with the Authority in compliance with the initial regulations and a U.S. registration statement with the SEC (to which a U.S. prospectus is attached) in compliance with U.S. securities litigation. Typically, the Canadian and U.S. prospectuses will contain substantially the same information.

   Given the approach to "distributions out" under CMRA Policy 71-601:

a) Should the Canadian issuer be specifically exempted from having to deliver a copy of the Canadian prospectus to U.S. purchasers, provided that the U.S. prospectus is delivered to those purchasers and the U.S. prospectus contains substantially the same information as the Canadian prospectus? In this scenario, if the issuer is not concurrently distributing in Canada, the distribution-out Canadian prospectus will be prepared for filing and review by the Chief Regulator only.

Response: There is no need to provide an exemption from the requirement to deliver a copy of the Canadian prospectus to U.S. purchasers, as there is no reason to believe that the Canadian prospectus delivery requirement, the two-day statutory withdrawal or rescission rights, or the civil liability provisions of Canadian securities laws could apply to purchasers of securities outside of Canada, even if the distribution of those securities was qualified by a prospectus filed in one or more provinces of Canada. Market practice for cross-border offerings for many decades has been to deliver only the U.S. prospectus, and not the Canadian prospectus, to U.S. purchasers in a cross-border offering. In the case of a cross-border initial public offering by a Canadian issuer, it has never been market practice to deliver a copy of the Canadian prospectus to U.S. investors, despite the fact that the Canadian prospectus will qualify all of the securities being sold in both countries, as the U.S. investors receive only the version of the prospectus that was included in the U.S. registration statement filed with and reviewed by their home country regulator, the SEC. Even in offerings conducted under the Multijurisdictional Disclosure System ("MJDS"), adopted by Canada and the United States in 1991, where U.S. investors receive a prospectus prepared solely in accordance with Canadian disclosure requirements, the version of the Canadian prospectus delivered to U.S. investors is expressly permitted by the instructions to Form F-10 (and, prior to its repeal, Form F-9) to omit disclosure of the Canadian statutory rights and remedies, except to the extent they apply to U.S. purchasers. Market practice of major law firms and investment banks has consistently been to omit that disclosure, on the basis that those statutory rights and remedies were not intended to, and did not, apply to purchasers outside of Canada. Further, in virtually all cross-border offerings conducted over the past several decades, the version of the prospectus delivered to U.S. investors does not include the Canadian cover page and Canadian prospectus certificates.

If the CMRA were to introduce an exemption from the application of any or all of these statutory rights and remedies in respect of purchasers outside of Canada, it will call into question whether all of the U.S. purchasers of securities in past cross-border securities offerings under the current regime may still be entitled to exercise withdrawal rights as a result of not having received at the time of the offering, and still not having received, exactly the same Canadian prospectus as was delivered to Canadian purchasers. This would create a turmoil of uncertainty for issuers and underwriters regarding potential exposure to the exercise of those rights by U.S. purchasers.

Indeed, what would be most helpful would be an acknowledgement (perhaps in the form of discussion in a companion policy) that the statutory rights and remedies afforded to purchasers of securities under the CMA, and under the predecessor Securities Acts of the CMR Jurisdictions, are not and were never intended to extend to purchasers outside of Canada, even if those purchasers were acquiring securities that had also been qualified for distribution by a Canadian prospectus.

b) Should the Canadian issuer be specifically exempted from having to comply with prospectus marketing rules under the initial regulations in respect of marketing activities to prospective U.S. purchasers, provided that the Canadian issuer and its U.S. underwriters comply with U.S. securities legislation when dealing with U.S. purchasers?

Response: In our view, the prospectus marketing rules currently apply only to marketing activities that take place in Canada, and not to marketing activities that take place in the United States even if the securities being sold in the United States have also been qualified for distribution by a prospectus filed in Canada. We believe our view is consistent with the view taken by other major Canadian law firms, and consistent with the market practice followed by major Canadian underwriters. To adopt an express exemption from the application of the Canadian marketing rules would, in our view, improperly call into question the market practice currently being followed. We believe what would be most helpful is an acknowledgment (perhaps in the form of discussion in a companion policy) that the prospectus marketing rules under the CMA, and under the predecessor Securities Acts of the CMR Jurisdictions, were not intended to and do not apply to marketing activities taking place outside of Canada given that those activities will be subject to the corresponding rules of the jurisdictions where those marketing activities are taking place.

c) Section 30.1 of Form 41-101F1 and other prospectus rules require that statutory rights of withdrawal and rescission be disclosed in the Canadian prospectus. Should the Canadian issuer be specifically exempted from providing statutory rights of withdrawal and rescission to U.S. purchasers, provided that those U.S. purchasers receive similar rights under U.S. securities legislation? In terms of legal remedies where a prospectus contains a misrepresentation, is it relatively more difficult to pursue a Canadian issuer in the U.S. under U.S. securities legislation than in Canada under Canadian legislation? Is it relatively easier for U.S. plaintiffs to recover damages from a Canadian issuer in Canada than in the U.S.?

Response: Please note our comments above in section (a) above, where we discuss both the prospectus delivery requirement and the statutory rights of withdrawal and rescission.

We believe that in most cases U.S. investors in a cross-border public offering would pursue an action for a material misstatement or omission in a U.S. court based on the rights and remedies afforded under Section 11 and Section 12 of the Securities Act of 1933, as amended, and Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934, as amended. Typically, the Canadian issuer in such offerings is required to provide a submission to U.S. jurisdiction. In our view, U.S. investors in a cross-border offering would not expect to be able to pursue rights and remedies under Canadian securities laws in respect of purchases taking place in the United States, and are more than adequately protected by the corresponding provisions of the U.S. federal securities laws.

d) Where a U.S. registration statement is filed with the SEC, in which circumstances should the Canadian issued be specifically exempted from the civil liability provisions in sections 117 and 118 of the CMA in respect of cross-border prospectus offerings to U.S. purchasers?

Response: Please note our comments in section (a) above, where we discuss both the prospectus delivery requirement and the civil liability provisions of Canadian securities laws. Please also note our comments in section (c) above regarding the adequacy of the protections afforded under U.S. federal securities laws. In our view, an express exemption should be unnecessary in light of the established market practice of not providing disclosure of these statutory rights to U.S. investors, on the basis of an accepted understanding that these rights are not available to U.S. investors. Again, guidance supportive of this analysis would be helpful for market participants going forward, without calling into question whether or to what extent U.S. investors in cross-border offerings under the current regime may unexpectedly be entitled to Canadian civil liability remedies.

2. Should CMRA Policy 71-601 or the new CMRA Regulations clarify any matters with regard to how securities are distributed to U.S. purchasers under a Canadian prospectus filed with the Authority are freely tradeable in CMR Jurisdictions under the CMA (subject to paragraphs (c) and (f) of the definition of "distribution" in section 2 of the CMA)?

Response: Such clarification should not be necessary, as a first trade in those securities would not be deemed to be a distribution by any existing

provision of National Instrument 45-102 *Resale of Securities* ("NI 45-102"). Accordingly, it should already be clear that securities distributed outside of Canada may be freely resold into Canada, except in a "distribution" as defined, whether the original outbound distribution took place pursuant to a prospectus filed in Canada or pursuant to the existing analysis under the Ontario Interpretation Note replacing former OSC Policy 1.5 (the "Interpretation Note"), to the effect that the prospectus requirements do not apply. Again, confirmatory statement to that effect in a companion policy or similar guidance may be helpful without calling into question existing market practice through the introduction of a new exemption.

3. Where a U.S. underwriter solely acts as underwriter under the U.S. prospectus of a Canadian issuer in a CMR Jurisdiction and does not otherwise carry on business in a CMR Jurisdiction, should the U.S. underwriter be specifically exempt from the dealer registration requirement in CMR Jurisdictions, provided that the U.S. underwriter is only selling to U.S. purchasers and complies with applicable U.S. securities legislation?

Response: In our view, the dealer registration requirement should not apply to the U.S. underwriter in this circumstance, as the dealer would not be engaging in conduct that falls within "the business of trading in securities" in Canada (or holding itself out as such) given that all sales to be made by that dealer will take place in the United States. The U.S. dealer will be registered as a dealer with the U.S. Securities and Exchange Commission and applicable state securities regulators, and will also be subject to regulation by FINRA. This regulatory oversight should be amply sufficient to ensure the protection of the U.S. investors purchasing securities from the U.S. underwriter. We also note that, for greater certainty, a U.S. dealer could take the necessary steps to qualify as an "international dealer" and, under Section 8.18(2)(a) of National Instrument 31-103, would be permitted to engage in an activity, other than a sale of a security, that is reasonably necessary to facilitate a distribution of securities that are offered primarily in a foreign jurisdiction (if in fact the offering were being made primarily outside Canada).

We do believe that it would be helpful to provide guidance to the effect that a dealer acting as an underwriter for a Canadian issuer is not engaged in the business of trading in securities in Canada (or holding itself out as such), and as a result such activities would not be subject to the dealer registration requirement at first instance.

4. CMRA Policy 71-601 notes that where a distribution is made under a prospectus exemption to an initial investor, either within or outside of a CMR Jurisdiction, any subsequent trade of those securities in a CMR Jurisdiction will be deemed a distribution subject to the prospectus requirement. In these circumstances, the resale requirements in NI 45-102 *Resale of Securities*, including hold periods, must be compiled with, unless a prospectus exemption is available (subject to the guidance in the Policy, under the section on "Indirect Distribution into a CMR Jurisdiction"). In the case of distributions to persons outside of Canada, will any undue hardship or negative market impact result from the application of resale requirements in NI 45-102, such as the four-month hold period or the legend requirements in section 2.5? As notes in question 1(a) above, if a Canadian issuer is permitted to file a distribution-out prospectus (with no delivery requirements to U.S. investors), how will issuers view the distribution-out prospectus in the sense that the securities will not have a four-month hold period or be subject to a legend requirement? In this context, do market participants consider it necessary to revise the guidance contained in section 1.6 of Companion Policy 45-102 for the CMR Jurisdictions?

    ***Response*:** We note that a reporting issuer that wishes to ensure the securities it is distributing outside Canada will be immediately freely tradeable back into Canada may, in accordance with CMRA Policy 71-601, elect to qualify the "outbound" distribution by prospectus. This would eliminate any concerns that might otherwise arise regarding compliance with legending requirements or other procedural requirements in connection with the use of a private placement exemption. We do not believe that there should be any policy concern regarding the absence of a hold period or legend where the securities have already been qualified for distribution by a Canadian prospectus, even if that prospectus was not required to be delivered to purchasers outside of Canada.

    The adoption of CMRA Policy 71-601 in the CMR Jurisdictions will not have any impact on the private placement or legending requirements that already apply when securities are sold using a private placement exemption. What will be different is that, for issuers in Ontario, it will no longer be possible to distribute securities outside Canada in a transaction that is not subject to the prospectus requirements, such that no prospectus or prospectus exemption is required. Currently, securities distributed outside Ontario by issuers relying on the Interpretation Note are not qualified by prospectus, but are also not subject to a "hold period" (or legending requirement) under NI 45-102 because there is no provision of NI 45-102 which deems a first trade in securities to be a distribution. So, in effect, the adoption of CMRA Policy 71-601 in Ontario will take away

from Ontario investors their existing ability to sell securities outside Canada on a non-prospectus qualified basis without the need for complying with an Ontario prospectus exemption or the NI 45-102 legending requirements.

We do not believe that the legending requirements in Items 3 and 3.1 of subsection 2.5(2) of NI 45-102, or the guidance given in section 1.6 of the Companion Policy, are appropriate for the needs of the Canadian capital markets in connection with either domestic or foreign offerings. If as a policy matter the CMR Jurisdictions consider it necessary or appropriate to adopt legending requirements, we strongly urge that compliance with those requirements should be made into a condition of relying on a prospectus exemption, rather than conditions of eligibility for resale. The current regime under NI 45-102 penalizes the investor, not the issuer, in the event that the legending requirements are deliberately or inadvertently not followed. Further, a requirement to legend a security is out of touch with the modern trend toward direct registration systems, and the longstanding book-based depository system, the combined effect of which is that investors rarely receive a physical security. We acknowledge that the addition of Item 3.1 was intended to provide an alternative to a conventional legend for direct registration systems, but it has confused market participants and created a trap for the unwary who do not recognize that physical certificates are still typically issued for securities held through a depository system (in which case a legend is still required on the certificate held by the depository, as the requirements in Item 3 and Item 3.1 are cumulative, not alternative, conditions for resale eligibility). Finally, the prescribed wording of the non-reporting issuer legend is actually not a correct statement of the law in most circumstances, as it was not amended after the introduction of the exemption in Section 2.7 and thus overstates the applicable hold period by four months for a company that becomes a reporting issuer by filing a prospectus, as most do.

Accordingly, we propose that the CMR Jurisdictions should not adopt the legending requirements of NI 45-102, but instead should impose a disclosure-based requirement under which issuers, through appropriate means, would be required to disclose the existence of applicable Canadian resale restrictions to private placement purchasers.

Note: Please also see our additional general comments on CMRA Policy 71-601 which appear in Annex D.

QUESTIONS FOR COMMENT ON CMRA REGULATION 71-501

1. Subsection 4(1) of CMRA Regulation 71-501 provides an exemption from the registration requirements and the prospectus requirement for certain distributions outside of the CMR Jurisdictions. In this regard, will any undue hardship or negative market impact, or any investor protection benefit, result from:

    a. limiting the exemption to issuers that have equity securities listed or quoted on a "qualified market" (defined in section 1 of the Regulation); or

       Response: As discussed in greater detail in our comments on CMRA Regulation 71-501 which appear in Annex D, we believe that this limitation will impose significant undue hardship and negative market impact. The narrow list of markets included in the definition of "qualified market" does not appear to have any logical basis or serve any public policy interest, given the many other exchanges and markets around the world that exact the same or higher standards for their listed companies.

    b. requiring the issuer to list non-Canadian purchasers in the report of exempt distribution required by paragraph 4(1)(e)?

       Response: As we discuss in greater detail in Annex D, this trade reporting requirement imposes a significant hardship on non-Canadian investment banks that would need to keep track of the required information for trade reporting purposes regarding the dozens, hundreds or potentially thousands of purchasers that may have to be reported. It is not clear what purpose is served by requiring an issuer to provide to Canadian securities regulators a detailed list of all non-Canadian purchasers in a distribution.

2. Subsection 4(4) of CMRA Regulation 71-501 provides an exemption from the registration requirement and the prospectus requirement for certain Eurobond offerings. In this regard, will any undue hardship or negative market impact, or any investor protection benefit, result from:

    a. limiting the exemption to debt listed on a "genuine market" (defined in section 1 of the Regulation); or

       Response: We believe that an exemption of this nature should apply to any offering of debt securities, and not be restricted solely to one

occurring on a "genuine market". Please see our more detailed comments which appear in Annex D.

b. requiring the issuer to list non-Canadian purchasers in the report of exempt distribution required by paragraph 4(4)(c)?

Response: Yes, for the reasons noted above in response to Question 1(b), and in further detail in our comments appearing in Annex D.

QUESTION FOR COMMENT: Section 10 [Registration and prospectus exemptions] of CMRA Regulation 91-501 provides that the registration and prospectus requirements applicable to an OTC derivatives trade do not apply where each party to the trade is a permitted client or a qualified party and where each party is acting as principal. Given the G-20 commitment to require OTC derivatives to be traded on an electronic trading platform, we expect many OTC derivatives trades in the future to involve agents who provide access to the platforms on behalf of the beneficial parties to the trades. Should the registration and prospectus exemptions in section 10 apply where the trade involves an agent acting on or behalf of one or both beneficial parties to the trade where the beneficial parties are permitted clients or qualified parties?

***Response*:** Many OTC derivatives trades today involve an agent acting on behalf of one or both parties to a trade, and this trend will continue as more trades occur on electronic trading platforms. We are therefore supportive of expanding the proposed registration and prospectus exemptions for trades involving permitted clients and qualified parties to apply where the trade involves an agent acting on behalf of one or both parties.

QUESTION FOR COMMENT: Do you agree with the approaches to the unsolicited trade and higher exemptions? We ask commentators to consider in their analyses the business trigger for the dealer registration requirements in the CMA.

Response: We agree with the approach to do away with the unsolicited trade and hedger exemptions, provided that interpretive guidance on the business trigger factors for registration in NI 31-103 make it clear that a hedger is not in the business of dealing in securities. In this regard, the proposed guidance in NI 31-103 should be expanded to make it clear that a commercial user of derivatives that is engaged in hedging activities is not a dealer in respect of those hedging activities, even if the commercial user: (a) solicits and intermediates trades or (b) is remunerated or compensated for the activity.

Companion policy guidance should also clarify that accountants, consultants, lawyers and other professionals should not be required to register when providing advice on derivatives to clients, even though these professionals are compensated for the activity.

QUESTION FOR COMMENT: Should the Authority regulate market conduct in all types of Exempt Derivatives or should some or all types of Exempt Derivatives be entirely excluded from capital markets regulation?

Response: All exempt derivatives should be entirely excluded from capital markets regulation. Gaming contracts, insurance contracts, spot currency contracts, spot commodity contracts and bank deposits are either: (a) appropriately regulated by other governmental authorities or (b) commercial contracts that do not require capital markets regulatory oversight because there are not investor protection or systemic risk concerns.

QUESTION FOR COMMENT: What is the appropriate threshold for exemption from reporting in relation to a trade in a derivative that is a contract for commodity (other than cash or currency)? We encourage commenters to explain their suggestions and provide analysis (including data or other information) to support their suggestion.

Response: No comment.

QUESTION FOR COMMENT: Subsection 25(h) [Application of this Part] of proposed CMRA Regulation 91-502 provides that Part 3 [Data reporting] of that regulation does not apply to a contract or instrument used by an issuer or an affiliate of an issuer solely to compensate an employee or service provider or used as a financing instrument where the underlying interest of the contract or instrument is a share or stock of that issuer or its affiliate.

Currently, in the *Securities Act* (New Brunswick) and in amendments to *The Securities Act*, 1988 (Saskatchewan) that have been passed but not yet proclaimed, the definition of "derivative" excludes a contract or instrument if the contract or instrument is an interest in or to a security and a trade in the security under the contract or instrument would constitute distribution. As these contracts or instruments are not derivatives, they would not be subject to trade reporting in those jurisdictions. As a result, certain contracts or instruments not used for compensation or financing purposes would be exempt from trade reporting in New Brunswick and Saskatchewan, but would not be exempt under subsection 25(h) as proposed.

Should the subsection 25(h) exemption so that it is not limited to contracts or instruments *used solely to compensate an employee or service provider or used as a financing instrument* but also to include any contract or instrument that is an interest in or to a

security where a trade in the security under the contract or instrument would constitute a distribution?

Response: Subsection 25(h) should be kept as is. We believe that it is appropriate to exempt contracts or instruments used solely to compensate an employee or service provider or used as a financing instrument. This concept is clear and easy to understand. The alternative New Brunswick and Saskatchewan approach is less clear and would likely be misunderstood by market participants.