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December 23, 2015

Dear Sirs/Mesdames:

Re: Cooperative Capital Markets Regulatory System – Revised Consultation Draft of the Capital Markets Act and Draft Initial Regulations

We are writing in response to the invitation of the Governments of British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island and Yukon to comment on the revised draft Capital Markets Act ("CMA") and draft initial regulations under the proposed Cooperative Capital Markets Regulatory System ("CCMRS") published on August 25, 2015. These comments are provided by the partners of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We strongly support the proposed CCMRS and congratulate the governments that have achieved the level of cooperation and vision it represents. In our view, the revised draft CMA and draft initial regulations are significant steps towards building a securities regulatory system that is national in scope and application. We also recognize and appreciate both the quality and quantity of work that went into publishing this large group of documents for public comment.

We believe that the most important objective of the CCMRS should be to create a securities regulatory system in Canada that is superior to our existing system in terms of national harmonization. In light of this objective, we have the following comments on the revised draft CMA, the draft initial regulations and the summary of the proposed transition approach published on December 7, 2015.

1. *Harmonization Among Participating Jurisdictions.* We appreciate that minimal substantive changes have been proposed to existing securities regulations in the participating jurisdictions. We hope that this same approach will be taken in respect of topics that have not yet been published for comment, including the exempt market regime and the various matters that are currently addressed in local policies, interpretation notes and staff notices.

2. *Enforcement.* We support the inclusion in the CMA of Part 9, dedicated to market conduct, and to the creation of specific violations of securities law not already expressly incorporated into Ontario securities law, such as manipulating benchmarks and front-running. However, Part 9 would benefit from additional work to ensure it is coherent; for example, it is unclear how specific violations such as front-running relate to the general prohibition against market manipulation. With respect to the investigation and prosecution of violations of the CMA, we support the express reference to mediation as a means of resolving disputes and, in section 89, the CMA rightly preserves the public interest jurisdiction as the main mechanism for administrative enforcement, augmenting the existing powers in section 127 of the Ontario *Securities Act* by creating an express power to order compensation or restitution to third parties. In our view, however, to

foster transparency for all market participants, the CMA or the regulations should include a framework to guide the application of the public interest jurisdiction in circumstances where there is no breach of the CMA.

3. *Regulation of* Offshore *Transactions.* We recognize the jurisdiction of the Capital Markets Regulatory Authority ("CMRA") to regulate and, in appropriate circumstances, take action in respect of a distribution of securities by an issuer with connections to a CMR jurisdiction, even where the initial purchaser is not located in a CMR jurisdiction. However, given the inherent potential for extra-territorial effect, any such regulation should be limited in a manner that achieves the stated purposes of the CMA without impeding the ability of Canadian issuers to access foreign capital markets. We also recognize that, in developing a proposed regulatory framework for the participating jurisdictions, it has been necessary in some areas to choose from significantly differing approaches that are currently in place in those jurisdictions. The proposed regulation of offshore transactions, including draft regulation 71-501 and draft policy 71-601 (the "offshore distribution rules"), and the proposed adoption of Multilateral Instrument 51-105 ("MI 51-105") in respect of OTC issuers, would both represent significant changes in practice for market participants in Ontario. We note that these areas have not previously been the subject of harmonized regulation across the Canadian jurisdictions, due to different regulatory perspectives as to the perceived risks or harm to the Canadian capital markets, the need for a regulatory solution, and whether that regulatory solution was appropriately tailored and capable of being effectively implemented by market participants from a cost/benefit perspective. We respectfully submit that the proposed approach to the regulation of offshore transactions is not reflective of current market practices and includes exemptions or "solutions" that will either not be practical or will impose unnecessary compliance burdens and costs on market participants, without meaningfully advancing investor protection goals (e.g., where investors in foreign jurisdictions have purchased Canadian securities in a bona fide offshore offering in accordance with the requirements of applicable local laws). For example, imposing Canadian legend requirements and exempt distribution report filing obligations (at least where each purchaser is to be individually identified) could have significant implications on the ability for Canadian issuers to efficiently access foreign markets, and appear duplicative or unnecessary where the distribution is to purchasers located in a jurisdiction with a comparable regulatory scheme. Similarly, we question whether the compliance burden and market uncertainty created by MI 51-105 has been proportionate to the policy concern that it was intended to address; we note that, subsequent to its introduction, it has been supplemented by policies or notices in many jurisdictions attempting to refine or clarify its scope, and that applications have been required in certain cases to exclude unintended regulatory consequences. In this case, we believe it would be advisable to defer the adoption of the offshore distribution rules and MI 51-105 pending the development of a more clear and targeted regulatory approach to this segment of the Canadian capital markets.

4. *Interface with Non-Participating Jurisdictions.* To provide greater transparency to market participants, we encourage the participating jurisdictions to provide an update regarding the expected interface between the CCMRS and the non-participating jurisdictions. We note in this regard that the summary of the proposed transition approach does not address the operation of the passport system under the CCMRS. In particular, no indication has been given as to whether the CMRA is considering joining the passport system. In our view, doing so would be a clear step forward in terms of harmonization and would perhaps reduce barriers to non-participating jurisdictions

joining the CCMRS. By contrast, if the CMRA does not join the passport system, market participants will, more often than now, have to deal with two regulatory authorities - and that is assuming that the non-participating jurisdictions will agree to treat the CMRA the same way they currently treat Ontario. Accordingly, we believe that publishing information about the expected impact of the CCMRS on the passport system is an important step in the overall process of adopting the CCMRS, and market participants should be given a reasonable opportunity to analyze and comment on this matter.

5. *Timing for Implementation.* An impressive amount of work has been done in respect of the draft CMA and initial regulations, but in light of what still needs to be done, particularly in terms of harmonizing the exempt market rules and publishing the proposed interface regime between participating and non-participating jurisdictions, it does not appear to us that implementation in 2016 will be feasible. We believe that stakeholders would appreciate being provided with a revised expected timeline for implementation.

6. *Federal Government Commitment.* The recent election of a new federal government - which has not made public its intentions with respect to the CCMRS - has resulted in uncertainty among stakeholders about the overall status of the initiative. While the federal government's commitment is clearly required before further progress can be made on the proposed Capital Markets Stability Act, the same is not necessarily the case with respect to the provincial aspects of the initiative, and it is our understanding that these can be pursued regardless of the federal government's participation. It would be helpful in order to reduce uncertainty on this point if the participating jurisdictions provided an update, to the extent possible, about the current status of any dialogue with the federal government.

Yours truly,

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