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BY E-MAIL: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

We thank Staff of the Co-operative Capital Markets Regulatory System ("**CCMR**") for the opportunity to comment on the latest version of the draft provincial/territorial Capital Markets Act (the "**CMA**") and the regulations made under that statute ("**Regulations**").

We have divided our letter into comments on the CMA and comments on the Regulations.

The members of our working party are listed at the end of this letter.

Comments on the Revised Capital Markets Act

1. Scope of "market participant" definition in section 2 – we agree with the proposed change contained in the responses to various comments received on the CMA.[1] The proposal to adopt a regulation cutting back the recordkeeping requirements so that they do not apply to a control person or a party who has distributed a security in reliance on a prospectus exemption is a sensible change.

2. We recommend that the definition of the term "insider" be revised to reflect the way in which the term is used for purposes of the insider reporting and insider trading requirements of Canadian securities legislation rather than being broadly cast with reference to any issuer. We are aware of your response to a similar recommendation previously made but do not think that the adoption of the broader definition because it is currently being used in other jurisdictions is an acceptable rationale for not taking advantage of this opportunity to tailor the definition to reflect its actual use. In our view, the term "insider" should be defined with reference to a reporting issuer and any issuer whose securities are publicly traded. We would also recommend that the term "publicly traded" be defined in much the same way that the term "published market" has been defined for purposes of the private agreement exemption from take-over bid requirements. The consequences of any failure to comply with insider reporting and insider trading requirements can be significant and the relevant legislative provisions should therefore be precise to preclude any related uncertainty or confusion.

3. With respect to Part 4, the response that has been made to comments requesting that a section equivalent to section 35.1 of the OSA be added to the CMA is puzzling. The implication of the response is that if a bank wants the same benefit as currently afforded by s 35.1, it can apply for exemptive relief under section 94 of the CMA. This seems to be at odds with the CCMR Staff position on amending the CMA to include an equivalent

[1] http://ccmr-ocrmc.ca/wp-content/uploads/2015-10-13-CMA-Comments-Chart.pdf

permission. Why would there be an expectation that the relief would be granted on application if CCMR Staff had rejected it in a public comment process and why would it be desirable to have multiple applications for relief that has already been given statutory effect for a long time?

CCMR Staff rightly acknowledges that the transition to the new system should be accomplished in a manner that minimizes disruption to market participants and their businesses. As such, and in accordance with this guiding principle, when existing rules among CMR jurisdictions are different, as a default harmonization approach the least onerous regime should be carried forward under the CCMR. It is unclear how removing a long-standing Ontario exemption would be in keeping with this principle. Merely pointing out that jurisdictions other than Ontario do not currently have this exemption is not a satisfactory response. As a general observation, CCMR Staff often dismisses comments that express concern with a CMA provision that introduces a new requirement or increases the regulatory burden in a jurisdiction by merely pointing out that an equivalent provision exists in the current securities acts of other jurisdictions. At a minimum, a response to such concerns should explain the need for, and expected benefits and costs of, introducing any new requirement, especially in circumstances where the existing equivalent provision from another CMR jurisdiction may not be well understood by market participants and has very little if any associated jurisprudential history.

4. The observation in the commentary as to section 52 that prior regulatory decisions are anticipated to have significant persuasive value but will not be binding on the Tribunal may create more uncertainty than is intended or desirable. There has to be more certainty about the way that prior decisions will operate in the future and it would be even more desirable to have something about this written out in the statute. The current response does not propose anything like this.

5. Section 55 setting out the standard for registrants to deal fairly, honestly and in good faith with clients has been revised to include “other such standards as may be prescribed”, apparently as a regulation-making placeholder in respect of the possible future introduction of a best interest standard. CCMR Staff correctly acknowledges that the introduction of such a standard is beyond the scope of the current CMA project (and is the subject of a separate and justifiably comprehensive consultation process with industry stakeholders), yet nonetheless modifies the well-understood and established standard with a broad and open-ended qualifier. This addition is not necessary and may introduce unintended confusion, especially considering the substantially unconfined regulation-making authority the CCMR already has under Part 15 of the CMA “for carrying out the purposes and provisions” of the Act.

6. With respect to the possibility of “double jeopardy” under section 66, there have been cases in Ontario where a remedy granted against a respondent in a public interest discipline has been used as the basis for a subsequent criminal proceeding. The idea that there could be double jeopardy in these circumstances is potentially controversial and should be specifically addressed in the statute and not simply justified on the basis that it is consistent with the current securities legislation.

7. Part 12 of the CMA would shift the burden of proof in a civil action to the defendant to prove that a reasonable investigation had been conducted, that they had no reasonable

grounds to believe that there was a misrepresentation and that the defendant did not believe a misrepresentation existed. This reverse burden of proof would be a marked departure from the current Ontario framework, would stray beyond the limited harmonizing scope of the CMA project, and should be subject to a separate comprehensive stakeholder consultation process.

8. Section 181(1) of the CMA refers to the power of a court of a CMR jurisdiction to endorse an arrest warrant issued by a court of "another jurisdiction" in certain circumstances. The equivalent OSA provision (section 125(1)) requires that the original arrest warrant be issued by a court of "another province or territory of Canada" whereas section 181(1) of the CMA only refers to a court of "another jurisdiction". We interpret this not as an attempt to somehow expand the scope of this provision to allow the endorsement of a non-Canadian arrest warrant in a CMR jurisdiction, but a clarification of this point may be helpful.

9. Under section 197, the Authority will publish notices, rules and other regulatory materials on its website. An advanced and flexible "search" function should be made available to allow market participants and other stakeholders to effectively, efficiently and reliably search regulatory content online. Query whether an official weekly online CCMR "Bulletin" publication is contemplated.

10. Under section 200, the Chief Regulator may collect unpaid regulatory sanctions from a third party who owes money to a person who owes money to the Authority, if the Chief Regulator receives information that the third party is "or is about to become", indebted to the person. Additional guidance around the formulation "about to become" may be helpful and may deserve further consideration. While we understand that CCMR Staff responded to previously-submitted comments and questions on this provision, which would be new to Ontario, by pointing out that it is consistent with an equivalent provision in British Columbia, that equivalent provision does not appear to have substantial, if any, associated jurisprudential treatment and the rationale for expanding its application across all CMR jurisdictions is not immediately clear.

11. Section 201(4) appears to be missing the word "against" after "commenced". We suggest making the following drafting change for consistency and completeness

> "No action for damages lies, and no action may be commenced, **against** any person for any act done or omitted to be done as a result of compliance with ~~this Act or any decision of the Authority, Tribunal or Chief Regulator~~ **capital markets law**."

We also note that the equivalent OSA section 141(2) currently refers to acts done "in compliance with" securities laws, whereas the CMA refers to acts done "as a result of compliance". Some guidance as to whether the CMA formulation intends to expand or otherwise modify the scope of the current OSA protection would be helpful.

Comments on CMA Regulations

1. We agree with the decision made to incorporate substantially in their present form several important National Instruments (e.g. NI 23-103, NI 81-105) and Multilateral Instruments (e.g. MI 61-101, MI 62-104). The decision to adopt these with little more

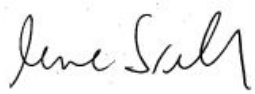
than conforming changes as outlined in part III to the commentary on the draft Regulations is sensible. Indeed, this approach should be the default approach followed in all of the Regulations until there is more experience with the cooperative system. In this way, fewer resources will be devoted to making people familiar with the new rules than making the system work efficiently.

2. It is proposed that Multilateral Instrument 51-105 – *Issuers Quoted in the U.S. Over-the-Counter Markets* apply in all CMR jurisdictions, including Ontario, and be amended so as to limit some unintended consequences of the original 2012 instrument. The proposed amendments to MI 51-105 to exempt certain private placements of foreign securities to permitted clients is a sensible approach and necessary to limit some unintended consequences of this regulation which have already been the subject of blanket orders in British Columbia, Alberta and Quebec. Instead of introducing with retroactive effect prior to the CCMR launch date certain sections of MI 51-105 in Ontario (e.g. section 11), a transition period after the CCMR launch date should be provided to allow Ontario market participants to become compliant with the new rule.

3. The combined effect of draft CMRA Policy 71-601 and CMRA Regulation 71-501 (collectively, the "**Extra-territorial Regulations**") would be to impose a general prospectus requirement for a distribution made from a CMR jurisdiction to a person outside of the CMR jurisdictions, then make available certain carve outs and exemptions from this general requirement. This marked departure from the well-established and effective approach currently set out by OSC Interpretation Note 1 would impose significant regulatory complexity and expense without clear corresponding benefits to Canadian investors or market participants. This approach may also have the effect of expanding the registration obligation for participants in extra-territorial offerings who would not necessarily be aware that they required registration in Canada to effect such offerings. In keeping with the principle that the transition to the CCMR should aim to minimize disruptions to market participants and should not serve as an opportunity to introduce significant regulatory changes or additional requirements, we question why the approach set out by OSC Interpretation Note 1 was not selected as the model for the Extra-territorial Regulations instead.

Please direct any questions you may have to Rene Sorell (416-601-7947 or rsorell@mccarthy.ca).

Yours truly,



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