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BY E-MAIL
(commentonprovincialandterritoriallegislation@comr-ocrmc.ca)

Cooperative Capital Markets Regulatory System

Dear Sirs/Mesdames:

Re: Cooperative Capital Markets Regulatory System (the Cooperative System)
Comments on draft Capital Markets Act and Initial Regulations

Thank you for the opportunity to comment on the revised consultation draft of the provincial and territorial *Capital Markets Act* (the **CMA**) and the draft initial regulations (the **Initial Regulations**) published on August 25, 2015 by the provinces of Ontario, British Columbia, New Brunswick, Prince Edward Island and Saskatchewan and the Yukon Territory (the **Participating Jurisdictions**). We also refer in this letter to the Cooperative System's response to the September 2014 CMA Consultation Draft: *Summary of Comments received and Ministerial/Regulatory Responses* published by the Cooperative System on October 20, 2015 (the **Responses**). The terms "Authority", "Chief Regulator" and "Tribunal" used in this letter have the meanings set out in the CMA.

CMA Comments

1 *General*

We are concerned that the September 2014 Consultation Draft of the CMA introduced substantive amendments to securities laws (most notably in the Province of Ontario) without significant consultation. Several commenters on the earlier draft of the CMA indicated that the introduction of the CMA should not be used as a platform to introduce substantive changes to the regulation of Canada's capital markets. These commenters felt that further discussion of the issues which introduced substantive changes was warranted. Despite these comments many of the same changes are reflected in the new draft of the CMA. We are also concerned about the brevity and lack of explanation contained in the Responses with respect to changes of a substantive nature.

We respectively submit that the Responses do not provide extensive comfort that full consideration was given as to why the laws of one or more Participating Jurisdiction(s) were adopted over the laws of another jurisdiction. Many of the Responses state that the provisions are "consistent with current securities laws in [a Participating Jurisdiction]" and in many instances do not discuss the substantive issues raised by the person commenting nor do they provide any explanation as to why the approach was adopted. In addition in at least one instance, a new offence is introduced without corresponding defences or limitations and the Response indicates that defences will be considered at a later date pursuant to the Cooperative System's regulation-making authority. That approach makes it difficult for readers to assess the impact of the provision.

Currently when substantive changes are made to securities rules by the Canadian Securities Administrators (the **CSA**) they are first published for public comment and accompanied by a description of the rationale for the proposed changes. A cost-benefit analysis may also be included. Initial public comment periods that result in material changes to the originally proposed rule are typically accompanied by a description of the reasoning behind any material revisions to the proposed changes and subjected to a further round of comments. This approach provides comfort to the public that there has been robust consultation with the public and response by the CSA.

While the CMA is to be commended for reaching a harmonization of legislation in the Participating Jurisdictions we caution that potentially substantive changes in the law in individual Participating Jurisdictions are proposed to be made without significant explanation.

2 ***Definition of Subsidiary***

Section 2 of the CMA provides that "subsidiary" means an issuer who is controlled by one or more other issuers and includes a subsidiary of a subsidiary." One commenter questioned the broadening of the definition to include an issuer who is "controlled by one or more other issuers" and suggested that guidance on the application of this concept is required. The commenter supported the inclusion of a "jointly or in concert" concept.

The response to the foregoing comment was that the proposed definition is consistent with current securities legislation in BC, PEI and Yukon and intended to capture the same relationships that are generally contemplated by current securities legislation, but broader than some provincial securities acts which only capture companies rather than issuers. The response misinterprets the comment to question the use of the term "issuer" in place of the term "company" and, further, is incorrect with regard to the existing securities legislation in BC, PEI and Yukon.

The proposed CMA definition is in fact not the same as in the current securities legislation of BC, PEI and Yukon.

- The *Securities Act* (British Colombia) provides that ""subsidiary" means an issuer that is controlled by another issuer".
- The *Securities Act* (Prince Edward Island) and the *Securities Act* (Yukon) provide that ""subsidiary" means an issuer that is controlled directly or indirectly by another issuer and includes a subsidiary of that subsidiary".

The CMA definition adds the concept that an issuer will be a subsidiary if is controlled *by one or more other issuers*. The concern raised previously is that there is no guidance in the legislation as to how or when an issuer will be controlled by more than one issuer. As drafted, it is unclear whether an issuer can be the subsidiary of, for example, two other issuers that each hold 30% of the outstanding voting shares of the first issuer, even if those other issuers are not acting jointly and in concert. The suggestion, which we support, is that the inclusion of an acting jointly and in concert concept is required.

Further, Section 4 of the CMA provides that "For the purposes of capital markets law, a person controls another person (a) if the person beneficially owns or exercises control or direction over, directly or indirectly, voting securities of the other person ...and the votes carried by those voting securities, if exercised, entitle the person to elect a majority of the other person's directors ...." [underlining added].

The meaning of "control" under the CMA differs from existing securities legislation. For example, the *Securities* Act (Ontario) (the **OSA**) currently provides that "Except for the purposes of Part XX, a company shall be deemed to be controlled by another person or company or by two or more companies if, (a) voting securities of the first-mentioned company carrying more than 50 per cent of the votes for the

election of directors are held ...by or for the benefit of the other person or company or by or for the benefit of the other companies; and (b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the first-mentioned company" [underlining added].

Based on Sections 2 [definition of "subsidiary'] and 4 [meaning of "control"] of the CMA, an issuer could be considered a "subsidiary" of another issuer for purposes of capital markets law (i.e. for purposes *other* than in the context of take-over bids) simply because the second issuer has a right of first refusal or option over voting securities of the first issuer. The potential implications of such interpretation under continuous disclosure and other CMA requirements could be considerable. More careful consideration of the implications of the proposed changes to the definition of "control" is required.

3 ***Take-over Bid Definition***

The definition of take-over bid in section 2 of the CMA is confusing to readers as it does not include a threshold and suggests that the acquisition of any number of shares could be a take-over bid. The Responses on the Initial Regulations indicate that the CMRA is adopting Multi-lateral Instrument 62-104 which contains a full definition of "take-over bid" and includes the 20% threshold. Including different definitions in the CMA and the National Instrument will only lead to confusion for readers. The full definition can remain in the Multi-lateral Instrument if it is being adopted or, in the alternative, it should be removed from the Multi-lateral Instrument and included in the CMA.

4 ***Reporting Issuer Definition***

The definition of reporting issuer does not include an issuer whose securities are listed on a recognized exchange. We note that this arm of the definition has now been prescribed in section 5 of CMRA Regulation 11-501. We question why the definition would be split in two parts as it creates more confusion for readers. This aspect of the definition of reporting issuer is unlikely to require regulatory flexibility to amend.

5 ***Prospectus Requirement***

The prospectus requirement set out in section 27 is confusing as it states "A person must not distribute a security unless...". There is no definition of "distribute" in the CMA. The trigger should be referenced to "distribution" which is a defined term.

6 ***Listing Representation Prohibition***

This prohibition is unnecessary and not necessary to protect investors.

7 ***Auditor and Auditor Oversight Organizations***

The CMA gives the Authority a direct supervisory function over recognized auditor oversight organizations, which would include the Canadian Public Accountability Board **(CPAB)** and a residual supervisory function over auditors of issuers and registrants. These provisions have the potential to fundamentally change the current relationship between the securities regulators and auditors. Currently, NI 52-108: *Auditor Oversight* provides that only participating firms that are in compliance with any remedial action ordered by CPAB may prepare audit reports with respect to the financial statements of reporting issuers and imposes certain notice requirements on participating firms. The Ontario Securities Commission (the **OSC**) current rule making authority as it relates to auditors is restricted to prescribing requirements "in respect of financial accounting, reporting and auditing" for purposes of the OSA, the regulations and rules and does not extend to oversight of the auditing profession as it relates to the capital markets.

The CMA on the other hand provides the Authority with broad power to make regulations "for carrying out the purposes and provisions of this Act" governing auditors of issuers or registrants.

The CMA provisions relating to recognized auditor oversight organization may, without adequate consultation, disrupt the regulatory scheme embodied in the *Canadian Public Accountability Act* (**CPAB Act**) and may undermine the independence of the accounting profession. Any provisions regarding regulation of CPAB and auditors should ensure:

- The confidentiality obligations contained in the CMA should be consistent with those in the CPAB Act. The CPAB Act provides that the Board may require the provision of information or documents that are subject to solicitor-client privilege if absolutely necessary to the purpose of the review, but such disclosure does not constitute a waiver of privilege.

- The CMA should extend confidentiality to bring it in line with current duties of confidentiality prescribed in the CPAB Act. Confidentiality should extend in the CMA to all deliberations of the board of CPAB, its employees and agents in connection with an inspection, investigation or review panel proceeding carried out by the Board under its oversight program. The CPAB Act provides such information cannot be disclosed without the written consent of all persons whose interests may reasonably be affected by disclosure or a court order. This affords some measure of protection to auditors who are subject to the CPAB review process that the decision of the Board is not automatically available to litigants in the event of civil litigation There is currently no parallel protection in the CMA regime.

- Under the CPAB Act, appeals from a decision of the CPAB review panel are directly to the Divisional Court, not the OSC. We are of the view that the Divisional Court is the appropriate appeal body. Appeals from a decision of a recognized auditor oversight organization under the CMA are to the Tribunal and may be initiated by persons directly affected by the decision, by the recognized auditor oversight organization or by the Chief Regulator. On appeal, the Tribunal may confirm the decision under review or "make another decision that it considers appropriate". Appeals from a final decision of the Tribunal are to the provincial appeal court, which is not yet defined. Judicial review of decisions of the Chief Regulator and of the Tribunal are expressly precluded. The Chief Regulator should not have the ability to initiate an appeal from a decision of a CPAB review panel. Any appeal from a decision of the CPAB review panel should continue to be to the Divisional Court and access to judicial review preserved. To include an interim right of appeal to the Tribunal (which is unlikely to have any particular expertise in audit related issues) only serves to add additional expense to the person affected by an adverse decision of CPAB.

- The CPAB Act expressly contemplates that the CPAB shall be independent from, but accountable to, the Government of Ontario. This approach should be maintained. The OSC exercises oversight by its receipt of CPAB's annual report. If there are issues arising from it that require action, a copy of the report is provided to the Minister responsible for the administration of the Act with the OSC's recommendations, and the Minister shall lay the report and the OSC's recommendations before the legislative assembly. However, the OSC has no statutory right to other information from CPAB or to intervene in its affairs.

8 ***Part 7 – Proxies and Disclosure: Section 45 – Compelling Information from Directors etc.***

Section 45 contains a broad power enabling the chief regulator to compel a director, officer, promoter or control person of an issuer to give the Authority any information, record or thing in that person's possession or control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets, without an investigation order. This power has the potential for abuse and could be used as a disguised power of investigation, without any protections for the person being

compelled to produce the information. In addition while section 195 has been amended to provide that nothing in the CMA shall be construed to affect solicitor-client privilege, it does not extend to other types of applicable privilege.

In addition the power to compel information extends to all issuers, not reporting issuers notwithstanding that Part 7 generally imposes obligations on reporting issuers. The Responses indicate that it is consistent with current securities legislation in British Columbia which does not address the comments raised.

9 ***Part 8: - Market Conduct***

(a) *New Market Offences*: Part 9 creates several new market conduct offences which are described below. We are concerned that several employ vague standards of conduct, such as "unjust deprivation", "unfair practices" and what a "reasonable investor" would consider important. These concepts are not defined nor do they have a commonly understood meaning in Canadian securities laws. The penalties for breaching these provisions are significant as they constitute offences under section 112 which are punishable by a maximum of $5 million fine and/or up to 5 years in jail. For some offences the maximum fine is the greater of $5 million and three times the profit made or loss avoided.

(b) *Section 65 - Unjust Deprivation:* Section 63(1) introduces a prohibition on "unjust deprivation", which is broader than the Criminal Code offence of fraud which requires proof of dishonesty. A person is prohibited from engaging in conduct that results in an "unjust deprivation", or a risk of unjust deprivation of a person's money, property or value of the person's money. We note that currently there is no offence based on a prohibition of unjust deprivation in the securities legislation of any province or territory of Canada. In our view the scope of this prohibition is uncertain and unduly broad. The Responses indicate that the concept of unjust deprivation is derived from case law interpreting fraud in current securities legislation. However, decisions of the hearing panels of the provincial securities regulators have interpreted the regulatory fraud offence as requiring proof of dishonesty.

(c) *Sections 64 and 65 – Benchmark Manipulation:* The prohibition on providing misleading information for the purpose of determining a benchmark, and on conduct relating to a benchmark that improperly influences the determination of the benchmark, does not contain any statutory defences. The Responses indicate that this is similar to the approach taken on market manipulation and other prohibitions introduced, including unjust deprivation. The initial Draft Regulations do not provide any defenses or limitations. It is difficult to determine the potential effect of these prohibitions where no limitations are introduced. We suggest that these additional prohibitions together with any applicable defences and limitations should be introduced as a comprehensive initiative.

(d) *Section 66 - Insider trading and tipping prohibition, and definition of "special relationship"*: Like recent amendments to section 76 of the OSA, the prohibition on insider trading and tipping now extends beyond trading securities of a reporting issuer to trading securities of an issuer "whose shares are publicly traded". This is not a defined term. Is this an extension of Canadian securities law jurisdiction and an attempt of the CMA to regulate foreign trading of securities? The uncertainty about its scope will make it difficult to design appropriate compliance procedures. The term "Issuer whose shares are publicly traded" should be defined.

(e) *Section 66(4) – Recommending:* The prohibition against "recommending or encouraging" the purchase or trade of a security could significantly restrict private placements in circumstances where the size, terms or use of funds are considered to be non-public material facts. Consideration should be given to a "necessary course of business" exception. The response to similar comments previously raised suggests that regulators could use the CMRA's regulation-making authority to establish a defence if the policy need for such a defence is established. In our view, whether the defence is available should be determined at the outset as it is especially important in the context of private placements and the design of compliance programs. A wait and see approach to the issue is not optimal.

(f) *Section 67 – Prohibition of front-running*: The CMA introduces a new prohibition on front-running material order information, tipping another with material order information or while in possession of material order information relating to a security recommending or encouraging someone else to trade the security. This prohibition is broadly worded. We submit this is appropriately addressed under the supervision of self-regulatory organizations such as IIROC which has issued rules applicable to accounts and supervisory obligations to detect such activities.

(g) *Section 70 – Unfair Practice*: A new prohibition on engaging in an "unfair practice" in relation to a trade has been introduced. There is no guidance in the CMA as to what constitutes unfairness. The IIROC rules cover unfair practices in the rules applicable to its members. We question what this prohibition might cover in respect of an issuer's activities which is not otherwise addressed by other prohibitions, the statutory liability regime and other duties imposed by the CMA.

(h) *Section 72 – False or Misleading Statements*: The CMA introduces a prohibition on making a misstatement about something that a "reasonable investor" would consider "important" in deciding whether to trade or maintain a trading or advising relationship with the person. Although the standard of the "reasonable investor" is also used in OSA, its application is uncertain. Investors are not all alike. Will the standard be applied having regard to whether the investor is a retail or institutional investor?

(i) *Section 76 – Obstruction:* We are concerned as to how this obligation will be applied to counsel appearing at a hearing or dealing with the Authority.

(j) *Section 82 - Contravention by directors, officers, etc.*: This section provides that if a non-individual contravenes capital markets law, directors and officers as well as employees or agents of the non-individual who authorized, permitted or acquiesced in the contravention of capital markets law are also liable for the breach. We suggest that the scope of persons who are liable is too broad.

(k) *Section 83 – Contravention regarding actions of employees, agents, etc.*: The extension of vicarious liability to securities regulation without any limitations similar to those contained in the Criminal Code is unwarranted.

10 ***Part 9: Orders, Reviews and Appeals***

(a) *Section 89-90 - Tribunal and Chief Regulator's Sanction Powers*

The power to prohibit a person from acting in a consultative capacity is overly broad as it could have the effect of allowing the Tribunal to prohibit professionals regulated by other self-governing bodies from engaging in professional activities relating to the capital markets.

The Chief Regulator is empowered in section 89 to make interim orders for up to 15 days, including an order terminating or suspending a person's registration or recognition, denying exemptions, prohibiting a person from holding certain positions, and requiring a market participant to make changes to its practices and procedures, without first giving an opportunity to be heard if delay "could be prejudicial to the public interest". Notice of the order, once made, must be given. The Tribunal may extend the order beyond the initial 15 day period. The OSA currently allows the OSC (not staff) to make such interim orders. It is undesirable to allow a senior staff member, rather than the Tribunal, a quasi-judicial body, to make interim orders with potentially significant ramifications for affected persons. This problem is further exacerbated by section 173, which permits the Chief Regulator to impose "conditions, restrictions or requirements in his or her decisions" which could expand the breadth of such orders without notice.

(b) *Section 93 - Appointment of a Receiver*

Section 89 expands the grounds upon which the superior court may order the appointment of a receiver, receiver-manager, trustee or liquidator currently provided for in section 129 of the OSA to include where it is "expedient for assisting in the administration or enforcement of securities or derivatives law or the regulation of capital markets of another jurisdiction". The section allows the court to admit hearsay that it considers reliable and oral or written statements which it considers relevant.

We submit that necessity, rather than mere "expedience" should be required where an appointment is being sought at the request of another regulator in another jurisdiction. Hearsay and other unsworn statements should only be admissible where it is impossible or impracticable to obtain sworn evidence, or where it is corroborative of sworn evidence filed on the application. Subsection (2) should also clarify that hearsay is admissible in response to the application.

(c) *Section 100(6) - Appeal of Tribunal Decision to Appeal Court*

The CMA allows The Tribunal to make a further decision "despite a direction of the appeal court" in a particular matter "on new material" if there is a significant change in the circumstances,. This subsection deprives a respondent of finality in the tribunal's disciplinary process.

11 ***Part 10 - Administration and Enforcement***

(a) *Section 102 - Order to Provide Information*

Notwithstanding the Responses, we support the prior comments that this section gives the Chief Regulator broad powers. There is no evidentiary standard for the exercise of the power, such as expedience or necessity and no wrongdoing need be suspected or threatened. There is no requirement that the order specify what the order relates to. All of this increases the risk of arbitrary use of the power. In addition, there is no protection for the market participant concerning the use that can be made of the information provided, or any ability to object to the breadth of the demand or the cost of compliance.

(b) *Section 103: Review of Market Participant*

Notwithstanding the Responses, we support the prior comments that this section allows reviewers designated by the Chief Regulator to review the business and conduct of a market participant. No grounds for conducting a review are specified, other than for purposes of the administration or enforcement of capital markets law or the regulation of the capital markets. There is no requirement that an order set out the scope or purpose of the review.

A reviewer has broad powers to enter the business premises of a market participant during business hours to examine anything and use electronic devices to examine information stored electronically. There is no requirement that the information examined relate to the purpose for which the review is being conducted. However, the reviewer may make inquiries of any person under review or its employees, agents, officers, directors or control persons "concerning conduct that reasonably relates to the review".

This provision is vulnerable to Charter challenge. At a minimum, the appointment of reviewers by the Chief Regulator should identify the matter under review. Otherwise it is impossible for a person required to respond to inquiries to determine whether the inquiries concern conduct that reasonably relates to the review. The exercise of the powers of entry and examination also must be required to reasonably relate to the matter under review.

The power to require a market participant to pay fees for the privilege of having been reviewed should be deleted, or restricted to circumstances where there has been a lack of cooperation with the reviewer. The imposition of fees by the Chief Regulator or his designees should be a decision that can be appealed to the Tribunal.

(c) *Section 104: Investigation Orders*

We submit that section 104(6) should be amended to track the wording of section 13(4) of the OSA which provides that a person compelled to give evidence "may claim any privilege to which the person or company is entitled". We acknowledge that section 195 provides that nothing in the CMA shall be construed to affect solicitor-client privilege in relation to information or records that are subject to that privilege (and that consent to disclosure of information or a record that is subject to privilege does not waive the privilege for other purposes), there is no statutory protection for other privileges recognized by law, such as spousal or litigation privilege.

Section 104(8) may be vulnerable to challenge as the Chief Regulator is not a judicial officer independent of the staff members who will be appointed to investigate and search. The grounds upon which an order to enter, search and remove may be made appear to be lower than what is required under s. 487(1)(b) of the Criminal Code, which requires information under oath of reasonable grounds that search afford evidence with respect to the commission of an offence.

Unlike s. 16 of the OSA, there is no automatic prohibition on disclosure of information relating to the existence of the investigation, or testimony or information compelled during the course of the investigation. Instead, under section 104(11), the Chief Regulator **may** make an order prohibiting a person from communicating for a specified period some or all of the information related to the investigation to another person except the person's lawyer.

The removal of a blanket assurance of confidentiality is inconsistent with a long line of jurisprudence about the importance of the s. 16 OSA confidentiality requirement relating to Commission investigations. As the Divisional Court observed in Coughlan v. WMC International Ltd. [2007], O.J. No. 5109, confidentiality is essential to facilitate securities commission investigations, and to avoid prejudice to a person's reputation when the results of the investigation do not support a regulatory proceeding, or prejudice to a person's right to a fair hearing when they do. "The effective functioning of the OSC depends upon the reliance which parties affected by its operations can place upon the confidentiality of the OSC's administrative proceedings." The CMA should incorporate a blanket prohibition on disclosure like that contained in section 16(1) of the OSA, and permit disclosure where in the public interest on only if the affected person has had an opportunity to be heard on the issue.

(d) *Sections 109 and 110: Order to Preserve Information and for Production of Names*

The power to seek a variation or revocation of such orders should extend to persons directly affected by the orders.

12 ***Part 12 - General***

(a) *Section 176: Appeal of Decisions*

The provisions providing that decisions of the Authority are final and except for judicial review, cannot be the subject of an appeal limits challenges to issues of jurisdiction only. Decisions of the Chief Regulator may be reviewed by Tribunal, and final decisions of the Tribunal may be appealed to the court, but neither can be the subject of judicial review. This is more restrictive than the appeal provisions in the OSA, which permits appeals from decisions of the OSC and does not prohibit judicial review applications. The rationale for this change is unclear.

(b) *Section 192: Publication of List of Non-Compliant Persons*

This is problematic, particularly for persons with names similar to those of non-compliant persons, or if mistakes are made or the list not updated daily. This should be deleted.

(c) *Section 193-196 - Confidentiality and Disclosure*

The broad exceptions to confidentiality contained in subsections 193(2) and (3) renders the confidentiality obligation of the Authority contained in subsection 193(1) illusory. The only safeguards are contained in section 194, which requires that the Authority have entered into an agreement with any person or authority outside Canada to which it discloses information, in section 195, which provides that nothing in the CMA shall be construed as overriding solicitor-client privilege, and in section 196, which requires the Chief Regulator to provide an opportunity to be heard to a person whose compelled testimony may be disclosed unless the disclosure is in a proceeding under the CMA or in an examination of a witness, or if the Tribunal authorizes the disclosure on an application to it by the Chief Regulator without notice if the Tribunal considers it to be in the public interest.

Unlike section 17 of the OSA there is no opportunity for parties who provided compelled non-testimonial information to the Authority to object to disclosure, except in section 196. There is also no absolute prohibition on the use of compelled testimony in a criminal or quasi-criminal proceeding as under section 18 of the OSA. It is also unclear pursuant to section 193 whether it is the Authority or the Chief Regulator that has the ability to override the confidentiality requirement and permit disclosure.

These provisions should be amended to provide notice and an opportunity to be heard in any circumstance where compelled information may be disclosed to another person, except in the context of a proceeding under the CMA. It is important that persons who provide compelled information have the opportunity to object to disclosure of the information, or to advocate for restrictions on its use if it is to be disclosed. This is of particular importance where the information could end up in the hands of police authorities in another country where the same protections against self-incrimination available in Canada may not apply. As the OSC observed in Re Y (2009), 32 OSCB 7188, the extraordinary nature of the OSC's power to compel testimony require that it consider the reasonable expectations of the witness who provides compelled testimony, any potential harm and prejudice as a result of disclosure, and whether disclosure impinges on the witness' right to protection against self-incrimination or the integrity of the OSC's investigative powers when asked to decide whether to permit its disclosure. The CMA does not address the importance of safeguarding the constitutional rights of the individual when decisions about disclosure of compelled information are being made.

Initial Draft Regulations

We commend the adoption of the National Instruments by the CMRA. We have the following comments on the Initial Regulations:

1 ***CMRA Regulation 11-501***

The definition of reporting issuer should be in either the CMA or the Initial Regulations. The hybrid definition is confusing. An exemption for internal organizations should also be included in the definition and exemptive relief should not be necessary.

2 ***CMRA Regulations 71-501 and 71-601***

(a) We are of the view that a Canadian issuer who is undertaking a public offering only to U.S. purchasers should not be subject to the Canadian prospectus requirements.

(b) While adopting the BC approach to trades outside a CMR jurisdiction provides some certainty as to where a trade occurs, we have the following concerns:

1) it should be clarified that first trades in securities outside a CMR jurisdiction will not be "distributions" in a CMR jurisdiction;

2) alternatively, no greater hold period should be imposed on distributions outside a CMR jurisdiction than would be applicable to a similar trade in a CMR jurisdiction; and

3) it should not be a condition of the exemption in CMRA Regulation 71-501 that a form 45-106 F6 should be filed. It is not a condition currently of prospectus exemptions and will cause confusion as to the enforceability of the trade.

3 ***Derivatives***

We would recommend that the CMRA work with other members of the CSA (include Quebec where legislation has been in place for a number of years) to develop a harmonized approach to derivatives regulation before finalizing any regulations on derivatives. Initiatives are on-going in this developing area.

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This letter has been prepared by the securities and securities litigation practice groups of Norton Rose Fulbright Canada LLP. It does not, however, necessarily reflect the views of each of the members of such groups. Please contact Tracey Kernahan if you seek further clarification of these comments.

Yours truly,

Norton Rose Fulbright Canada LLP

Norton Rose Fulbright Canada LLP