December 23, 2015

VIA EMAIL

To: Cooperative Capital Markets Regulatory System

Re: Comments on New CMRA Regulation 71-501 and Policy 71-601 relating to Distributions of Securities Outside the CMR Jurisdictions

Dear Sirs and Mesdames:

This letter is on behalf of a group of Canadian institutional investors, Alberta Investment Management Corporation, Ontario Teachers' Pension Plan Board and RBC Global Asset Management Inc., and U.S. broker-dealers, Citigroup Global Markets Inc., Goldman, Sachs & Co. and J.P. Morgan Securities LLC, to provide comments on proposed CMRA Regulation 71-501 *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions* (**Reg 71-501**) and CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions* (**Policy 71-601** and, together with Reg 71-501, the **Proposals**). The group was formed to make submissions regarding requirements that may unnecessarily impede the access of Canadian institutional investors to cross-border investment opportunities.

Our overriding concern is that the Proposals would act as an obstacle to cross-border capital flows. A broad range of Canadian issuers seeking to raise capital outside Canada would be handicapped by the proposed provisions even though the provisions fail to further the purposes of the Capital Markets Act (**CMA**). They also would restrict the access of Canadian institutional investors to investment opportunities where the issuer has a connection to a **CMR Jurisdiction**, currently Ontario, British Columbia, New Brunswick, Saskatchewan, Prince Edward Island and the Yukon.

The Proposals restate British Columbia's existing approach modelled on U.S. requirements of the 1960s that imposed an extraterritorial application of the registration requirement under section 5 of the U.S. Securities Act of 1933 (the **1933 Act**). They do not take account of subsequent changes in international capital market practice and regulation, including greater integration of Canadian and U.S. capital markets following implementation of the multijurisdictional disclosure system (**MJDS**) in 1991, the growing importance of continental European and Asian capital markets, and the sophistication of the regulation of markets outside Canada, the United States and the United Kingdom.

Policy 71-601 Would Impose Inappropriate Duplicative Regulation

Policy 71-601 would require an issuer with sufficient connection to a CMR Jurisdiction wishing to distribute its securities to investors outside a CMR Jurisdiction without filing a prospectus in the CMR Jurisdictions to ascertain that, not only is the private placement made in accordance with the requirements of the investor's jurisdiction, but also pursuant to an exemption from the prospectus requirement of the CMA. Thus, an underwriter of an offering made under Rule 144A under the 1933 Act (**Rule 144A**) by an issuer in a CMR Jurisdiction would have to ascertain both that the U.S. investor is a qualified institutional buyer (**QIB**) as defined in Rule 144A and an accredited investor under the CMA. These requirements would constitute not just duplicative regulation because rules to protect investors already exist in the United States, but inappropriate extraterritorial application of the CMA. Issuers in CMR Jurisdictions accessing the

U.S. exempt market would incur the additional cost not imposed on issuers in the United States or elsewhere of filing post-trade reports under the CMA in respect of sales of securities to U.S. investors.

Dealing with the accredited investor exemption and imposition of hold periods on resales by U.S. investors would be even more problematic in the context of a public offering made into the United States by an issuer in a CMR Jurisdiction. We submit that if a biotech issuer based in British Columbia chooses to do an IPO solely in the United States with a listing on Nasdaq, the Proposals should not require the issuer to file a prospectus in the CMR Jurisdictions in order to sell its shares to investors in the CMR Jurisdictions. The issuer would not be eligible to use the MJDS so the prospectus prepared in accordance with the CMA would be additional to a registration statement on Form F-1 prepared in accordance with U.S. requirements. Further, the issuer would have to prepare both an Annual Information Form and annual report on Form 20-F on an ongoing basis. The size of the Canadian retail investor base may not justify the additional expense.

An issuer using the MJDS for a U.S.-only offering could avoid this problem by filing a non-offering prospectus in the CMR Jurisdictions, but what is the benefit of filing a prospectus that will not be delivered to investors? For a U.S.-only at-the-market offering of equity inter-listed in the United States, imposing effective restrictions on resale over the Toronto Stock Exchange (**TSX**) to prevent flowback into the CMR Jurisdictions is unworkable. Further, it would not be possible to determine the status of the U.S. purchasers as accredited investors because their identities would be unknown.

Section 1 of the CMA states that its purposes are to:

- Provide protection to investors from unfair, improper or fraudulent practices;
- Foster fair, efficient and competitive capital markets in which the public has confidence; and
- Contribute to the stability and integrity of the Canadian financial system.

It is appropriate that the Capital Markets Regulatory Authority (**CMRA**) exercise its jurisdiction to take action against an issuer in a CMR Jurisdiction that acts fraudulently or otherwise in an improper manner in a distribution of its securities solely outside the CMR Jurisdictions that may bring the capital markets of the CMR Jurisdictions into disrepute. In so doing it would further the purposes of the CMA. However, why does the CMRA need to know the accredited investor category of a U.S. purchaser, or why should a U.S. purchaser that is a QIB even need to be an accredited investor? We respectfully submit that would not protect investors from unfair, improper or fraudulent practices, but only serve to make capital markets less efficient by imposing duplicative regulatory requirements. The principal purpose of the CMA is to protect investors in the CMR Jurisdictions, not foreign investors otherwise protected by their own regulators. Further, capital markets would become less competitive because this duplication of regulation would apply to the distribution of securities outside the CMR Jurisdictions, but not within the CMR Jurisdictions. Competitiveness of capital markets is a purpose of the CMRA not stated, for example, as being a purpose of the *Securities Ac*t (Ontario). Capital markets would not be fairer nor would the stability and integrity of the Canadian financial system be enhanced.

The Exemptions in Reg 71-501 Would Unnecessarily Restrict Market Activity

Reg 71-501 provides two alternative prospectus exemptions that remove the need to verify that foreign investors are accredited investors as defined in Canadian securities legislation, though retaining the requirement to file a post-trade report. Both of these exemptions are based primarily on the distribution not being made to any purchaser resident in a CMR Jurisdiction and set out specific requirements for ensuring that the securities come to rest outside a CMR Jurisdiction. If there are legitimate regulatory concerns for ensuring that investors in a Rule 144A offering made by an issuer in a CMR Jurisdiction are accredited investors, how would those concerns be addressed through the alternative exemptions set out in Reg 71-501? We respectfully submit that restricting a distribution only to investors outside the CMR Jurisdictions does not address these concerns because the exemptions bear no relation to them. The burden of ensuring the accredited investor status of non-Canadian purchasers is removed, but at the cost to the issuer of having to structure a second concurrent offering to investors in the CMR Jurisdictions using the accredited investor or another exemption. Absent that supplemental Canadian offering, the issuer may lose a significant market for the securities being distributed, while institutional investors in the CMR Jurisdictions would not have access to the securities at the offering price and be required to purchase in the secondary market. In contrast, Regulation S under the 1933 Act enables simultaneous offerings of securities both within and outside the United States.

An exemption specifically for Eurobond offerings may have been appropriate in the 1980s, when Canadian issuers were active in the Eurobond market, and securities were represented initially by a temporary global certificate and typically listed on the Luxembourg Stock Exchange. The Proposals do not reflect current capital market practice in this respect.

Other Specific Issues

Prospectus Certificate Exemption for Foreign Underwriters (subsection 4(3)). Reg 71-501 provides foreign underwriters that offer securities qualified by a prospectus filed in a CMR Jurisdiction to investors solely in the United States and United Kingdom with an exemption from signing an underwriter certificate in the Canadian prospectus. This exemption is unnecessary because the underwriter certificate requirement would not apply to those foreign underwriters, which are not acting as underwriters of securities sold in Canada. Further, why limit sales by the foreign underwriters to purchasers in the United States and United Kingdom, precluding sales to investors in continental Europe and Asia?

Purchaser Acknowledgement of Inapplicability of Statutory Rights (subparagraph 4(1)(c)(5)). One of the acknowledgements of a purchaser required as a condition to the prospectus exemption for a distribution of securities outside the CMR Jurisdictions is that the purchaser has been advised it does not have the benefit of certain rights and remedies under the CMA because the issuer is relying on an exemption from the prospectus filing requirement of the CMA. This acknowledgement is based on the premise of Reg 71-501 that if a prospectus had been filed under the CMA, the foreign investor would receive a CMA prospectus and have the benefit of statutory rights of rescission and damages under the CMA. In a cross-border public offering made into the United States, for example, U.S. investors receive just a U. S. prospectus, not a Canadian prospectus.

Exemptions from Registration Requirements (subsections 4(1) and 4(4)). Reg 71-501 provides for registration exemptions that parallel the prospectus exemptions. As reflected in the changes to National Instrument 45-106, the name of which was changed from *Registration and*

Prospectus Exemptions to *Prospectus Exemptions*, registration exemptions that parallel the prospectus exemptions are no longer needed as a result of the dealer registration requirement being based on engaging in the business of trading in securities rather than trading securities.

Definition of CMR Jurisdictions. "CMR Jurisdiction" is not defined in the Proposals, the CMA, CMRA Regulation 11-501 *Definitions, Procedure, Civil Liability and Related Matters*, or National Instrument 14-101 *Definitions*.

CONCLUSION

The Eurobond market is no longer a primary focus for Canadian companies offering debt securities outside Canada. Global certificates are registered in the name of a nominee company of the clearing agency; definitive certificates are not registered in the names of individual purchasers. Underwriting syndicates rarely have separate banking and selling groups. U.S. trading volumes of many securities inter-listed on exchanges in both Canada and the U.S. have substantially increased.

The CMR Jurisdictions to do not constitute a capital market; the capital market is Canada, not the particular provinces and territories that choose to participate in the CMA. The principal trading market for equity securities of most issuers from all Canadian provinces, whether or not they are CMR Jurisdictions, is the TSX. The dichotomy created by Reg 71-501 between provinces that are CMR Jurisdictions and those that are not is too artificial to be meaningful. If an Ontario issuer distributes its equity securities listed on the TSX only into provinces that are not CMR Jurisdictions, reasonable restrictions in the regulations under the CMA on flowback into Ontario will not realistically impact whether that flowback does or does not occur.

Notwithstanding the specific comments provided in this letter, in light of the incompatibility with the purposes of the CMA and the imposition of an unnecessary burden on Canadian capital markets once the British Columbia approach is expanded to all the CMR Jurisdictions, we respectfully submit that the CMRA analyze carefully how global offerings are made today and develop rules that reduce the extraterritorial impact of the CMA and facilitate capital raising with an appropriate level of investor protection, focused on the protection of investors in the CMR Jurisdictions.

Thank you for consideration of our comments.

Alberta Investment Management Corporation
Ontario Teachers' Pension Plan Board
RBC Global Asset Management Inc.
Citigroup Global Markets Inc.
Goldman, Sachs & Co.
J.P. Morgan Securities LLC