BY E-MAIL December 23, 2015

Cooperative Capital Markets Regulatory System
comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Revised Consultation Draft *Capital Markets Act* ("CMA"), its Draft Initial Regulations and Proposed National Instruments

We submit the following comments in response to the notice and request for comments published by the Cooperative Capital Markets Regulatory System (the "**CCMRS**") on August 25, 2015 related to the CMA, the Draft Initial Regulations (the "**Regulations**") and the Proposed National Instruments (collectively, the "**Proposed Legislation**").

We have organized our comments below with reference to the relevant sections of the Proposed Legislation to which our comments relate. All references to parts and sections are to the relevant parts or sections of the applicable rule, regulation, policy or form. Where we use comparisons to current securities legislation, such comparisons are to the *Securities Act* (Ontario) (the "**OSA**"), unless otherwise noted, the regulations and the National and Multilateral Instruments associated therewith. Where we have responded to a specified question from the Capital Markets Regulatory Authority (the "**CMRA**"), we have noted this and included the question in our letter.

Thank you for the opportunity to comment on the Proposed Legislation. This letter represents our personal comments and is submitted without prejudice to any position taken or that may be taken by our firm on its own behalf or on behalf of any client.

1. General

(a) Inclusion of Derivatives

As a general comment we note that including derivatives under the securities regulatory regime needs to be considered carefully, taking into account the impact of concepts that are securities specific and not particularly relevant in the context of derivatives. While we understand the need to try to include derivatives in a comprehensive manner, we note that the application of such securities legislation to derivatives may not be relevant or necessary in all respects, particular with respect to matters outside of registration and prospectus requirements. Further, the application of such legislation to derivatives may need to be specifically tailored to the particular requirement or prohibition, such as insider trading or civil liability, given the differences between derivatives and securities and in how they are traded

or transacted. While we have noted some of these instances below, there are many areas where we believe that simply including derivatives in the CMA (through the definition of "trading" for example) and the regulations leads to inapplicable and or inappropriate results, including the imposition of restrictions or other requirements that would be impractical or not possible to comply with.

2. Capital Markets Act

(a) Section 2 – *Definitions*

(i) "*market participant*"

The definition of "market participant" has been expanded to include a person exempted from the requirement to be registered, a person distributing or purporting to distribute securities in reliance on an exemption from the prospectus requirement and a person who is a director, officer, control person or promoter of a person relying on such an exemption. The inclusion of these types of actors in the definition of "market participant" was a recent change to the OSA and, we submit, extends the jurisdiction of the Authority in a broad manner over actors whose connection to Canadian capital markets is arguably too tenuous to justify the application that is sought.

One consequence of this broader application is that actors relying on exemptions from registration, such as the international dealer exemption or the international advisor exemption, are subject to the record keeping requirements in the CMA which, as is further discussed below, imposes an uncertain requirement that is overly broad, vague, and arguably potentially overreaching in light of the "market participants" sought to be regulated. Such record keeping requirement provides the Chief Regulator with the ability to requisition any "records that are necessary for the proper recording of [a market participant's] business transactions and financial affairs and of the transactions that it executes on behalf of others; and any other records that are reasonably required to demonstrate compliance with capital markets laws." In our view, those relying on exemptions should not be subject to such broad authority as it arguably undermines the purpose of the exemption. Importantly, exempted actors' conduct in the Canadian market is fundamentally limited by the terms of their respective exemptions and in many cases may be premised on regulation in their own jurisdiction. A non-Canadian private company, for example, relying on a private placement exemption in order to distribute its securities has very limited interaction in Canada and should the regulator need authority to obtain records, etc. from those actors, we believe that such records should be narrowly circumscribed so that actors know exactly which records they are required to keep and which records they may need to produce. We do not believe that the Chief Regulator should be granted such a broad basis to requisition essentially any document related to a market participant's business if the term "market participant" is to be so broad.

(ii) ***"related financial instrument"***

As currently proposed, the definition of "related financial instrument" raises difficulty in interpretation with respect to derivatives and other securities. We understand that "vary materially with the market price" may have been removed from the definition of "related financial instrument" to address issues with the relevant threshold of materiality. However we believe some qualifier is still necessary in the definition as there are securities or derivatives whose market price may be considered to be derived from, referenced to or based on the market price of another security but which second security forms a relatively small component of, or represents a relatively insignificant position in relation to, the first. In particular, this gives rise to issues with respect to trading in or through indices, derivatives or other types of direct or synthetic exposures where a subject reporting issuer's securities may represent a small portion, or otherwise have a non-material impact on the price, value, etc., of the instrument that is actually traded. This may disadvantage market actors from engaging in capital markets activities that do not otherwise offend the policy rationale underlying the prohibition. As such, we believe an appropriate materiality qualifier should be reintroduced into this definition, along with guidance as to the appropriate threshold in the context of derivatives in particular.

As an example, given the lack of a materiality threshold in the definition of "related financial instrument", a person in a special relationship with an issuer may be prohibited from trading in a security because such person knows of a material fact or material change relating to such issuer and the issuer's securities are a seemingly immaterial component of another security (for example, an index fund). In such circumstance, section 66 would arguably prohibit the person from trading in the index fund's securities (i.e., the "related financial instrument") because of the material non-public information the person has about the first issuer's securities. This may be particularly problematic for large investment funds, such as pension funds and other asset managers who carry out broad investment mandates.

(iii) ***"trade"***

The definition of "trade" currently included in the CMA excludes a transfer, pledge or encumbrance of securities for the purposes of giving collateral for a "debt" made in good faith, except where it is a transfer, pledge or encumbrance of securities from the holdings of a control person if collateral for a "debt" made in good faith. We would suggest that the definition of "trade" exclude transactions in securities constituting collateral for a "debt or other obligation" (i.e., not only "debt"). Securities (from a control block or otherwise) may collateralize obligations under OTC derivatives, particularly those where the securities are the underlying interest of the derivative. The obligation secured may be a delivery obligation or an obligation to pay a net termination amount on default. We believe that the intention of the exemption is to allow such securities to be used as collateral generally. Making this change to the definition would not result in any policy change and would resolve any uncertainty on the point.

(b) Section 4 – *Control*

The concept of "control" has been expanded from that found in the OSA and the securities acts in the other participating jurisdictions to include, in the case of a partnership other than a limited partnership, the person who holds more than 50% of the interests in the partnership and in the case of a limited partnership, the general partner. While we understand this concept exists in certain securities instruments or rules, we respectfully submit that given it is proposed to be imported into the Proposed Legislation as a whole, such change should be carefully considered in each context to which it will apply in light of the possibly broad implications it may have.

In addition, for the purpose of clarity, in our view, subsections (b) and (c) should include the word "first" before "person" in the second half of the clause (see e.g., section 1.4 of National Instrument 45-106 *Prospectus Exemptions*).

(c) Section 5 – *Beneficial Ownership*

The definition of "beneficial ownership" in the CMA is broader than what currently exists in the OSA. We respectfully submit, that to the extent a change is made to a fundamental concept in Canadian capital markets law, particularly when considered together with the broader definition of "control," such change should be carefully considered in each context in which it will apply. Further, with respect to both sections 4 and 5, we do not believe it is appropriate to provide for other circumstances as may be "prescribed." These are both concepts that have fundamental implications for market actors and should be clearly identified in the legislation so that those choosing to participate in capital markets activity have certainty over the application of the law and related restrictions or obligations. For example, the broader concepts may have a significant impact on insider reporting or other disclosure obligations and market actors should have certainty regarding these obligations.

(d) Section 45 – *Information from directors, etc.*

We note that this section of the CMA is, in our view, overly broad and requires that directors, officers, promoters or control persons of an issuer provide the Authority with any information, record or thing in such person's possession or control relating to the administration, enforcement or regulation of capital markets. Guidance will be required as to what such records or things may be.

(e) Section 54 – *Requirement to keep records*

This section requires that "market participants" keep records that are necessary for recording their business transactions and financial affairs as well as "any other records that are reasonably required to demonstrate compliance with capital markets law". This revised language broadens this record keeping requirement to include not only records that are actually required by law but those that reasonably demonstrate compliance with law, which we consider to be a vague and ambiguous standard. In addition, as noted above, given the broad definition of

"market participant", actors with little connection to Canadian capital markets will now be required to comply with this record keeping standard. For those actors relying on an exemption from either registration or the prospectus requirement, this may effectively undermine the exemption and dissuade their participation in Canadian capital markets in CMR Jurisdictions. Based on our experience, most actors will want to know with greater certainty the types of records they are required to keep and may be required to provide. This is important for reasons of certainty but also to design an effective compliance function. Similarly, because of the broad reaching nature of the Chief Regulator's authority under this section, issuers relying on exemptions from the prospectus requirement that are unlisted and non-public issuers would be subject to broader record keeping requirements. This includes small private companies to large private funds who have chosen to remain unlisted and/or non-public and could have significant implications that are not commensurate to the capital markets activity in which they engage. Information from such entities is already obtained through the exempt distribution report mechanism, which is, in our view, adequate and more suitable given the certainty and timing of the reporting.

(f) Section 55 – ***Duty to Client***

Section 55 requires that registrants deal fairly, honestly and in good faith with its "clients". We recognize that this language mirrors that currently found in OSC Rule 31-505 *Conditions to Registration*. However, OSC Rule 31-505 applies only to registered dealers and advisors with respect to securities and not derivatives. As currently drafted, we believe that the reference to "clients" is vague and ambiguous in the context of OTC derivative transactions and the expansion of the registration trigger to cover derivatives. In these circumstances, dealers will often be dealing with other dealers and there may not be a party that can be considered a traditional "client". As noted above, this is one example of where the inclusion of derivatives generally in the Proposed Legislation needs to be particularly considered and tailored.

We further note that traditionally the banker-customer relationship is not one of fiduciary and beneficiary. While it may be unpalatable to take a position that counterparties should not treat each other fairly, honestly and in good faith, there could be unwelcome implications to the introduction of an express statutory duty to act "fairly" in the context of, for example, derivatives counterparties. We ask that this section be clarified so that the statutory duty does not import fiduciary duties or a duty to determine the suitability of a transaction for a counterparty. We also submit that this provision include an express statement that breach of the duty does not provide a basis for challenging the validity or enforceability of a contract between a dealer and its counterparty or client. The development of the common law duty of good faith in Canada can address any contractual effect of the breach of such duty. We believe that a provision similar to that included in section 59(2) of the CMA would be useful in precluding any statutory right of action for damages. We further believe that if would be useful to extend such provision so as to preclude the

remedies of rescission or declarations that the contract was void, voidable or otherwise unenforceable.

(g) Section 59 – *Misleading Statements*

Section 59 prohibits a "person" from making a statement it knows or reasonably ought to know is materially false or misleading and would reasonably be expected to have a significant effect on the market price or value of a "derivative" or "the underlying interest of a derivative". This prohibition is very broad and, with respect to derivatives, will require persons trading in derivatives to implement policies and procedures similar to what dealers would have in place with respect to securities. It should be noted, however, that this provision is much vaguer in its application to derivatives and specific policies may be difficult or effectively not possible to develop. Additionally, this provision does not require that the person making the statement be aware of the specific derivative. For example, this provision could be read to apply to a producer of a relatively rare or illiquid commodity who makes a statement in the press about the market for the commodity despite the fact that the producer does not participate in the derivatives markets and is unaware of any specific derivatives transactions but is aware that there is a derivatives market with the commodity as the underlying interest.

(h) Section 60(4) – *Listing on an exchange*

We wish to express concerns with the prohibition against listing representations included in this section. Based on past experience, this listing representation prohibition raises issues for inbound offerings by foreign issuers, particularly because, unlike the Toronto Stock Exchange, for example, many foreign exchanges do not provide listing approval, conditional or otherwise, until a final prospectus (or other offering document) is filed. As such, issuers applying to list on such exchanges effectively have to make prohibited listing representations in certain of their documentation and apply to the Authority for exemptive relief, or, in the potentially more costly and sometimes impossible alternative, prepare separate Canadian offering documents that do not include such representations. As a preferred approach, we suggest that a more tailored rule be included in the CMA that explicitly notes the circumstances in which issuers cannot make such representations or that specific exemptions be provided (for example, an exemption for foreign companies), rather than a catch-all provision that requires issuers to apply for relief. In this regard, we draw your attention to Multilateral Instrument 45-107 *Listing Representation and Statutory Rights of Action Disclosure Exemptions* which includes relief from the listing representation prohibition found in the securities acts of most Canadian provinces and territories provided that the distribution meets certain requirements, including that the representation be made in compliance with the by-laws and rules of the exchange or quotation and trade reporting system referred to in the representation.

(i) Section 62 – *Market Manipulation*

Section 62(1) of the CMA prohibits a person from (among other things) participating in any act or course of conduct relating to a security, derivative or underlying interest of a derivative that results in or contributes to "…an artificial price or value for a derivative". The term "underlying interest" is defined very broadly and we suggest should be revised to have a materiality qualifier. Many capital markets participants engage in a variety of activities that may generally impact the price or value of a security or derivative, for example, where they engage in transactions in the underlying interest of a derivative, particularly where the market for the underlying interest is relatively illiquid. As an example, read literally, section 62 may catch an option or warrant (a derivative) on shares in a private company (the underlying interest) where a person acts as a lender to an issuer and has received equity sweeteners as part of the lending relationship. The inclusion of an underlying interest of a derivative in this provision causes the prohibition to be broader than may have been intended without any qualifier (or, at the least, interpretative guidance).

(j) Section 66 – *Insider Trading*

The insider trading provision of the CMA is significantly broader than that included in the OSA because it captures a "purchase or trade" rather than a "purchase or sale" of a security. We respectfully submit that to the extent a fundamental capital markets concept is being expanded or revised, such expansion or revision be considered carefully and explained in detail given its possible implications and the disruptive effect such an amendment may have on capital markets.

In addition, we note that the prohibition on insider trading applies to securities and "related financial instruments", a defined term that includes not only derivatives but also "agreements, arrangements, commitments or understandings" that affect a person's "economic interest" in a security, namely the right to receive a benefit or exposure to risk. As currently drafted, these prohibitions may operate to unduly restrict entering into, rolling, amending or terminating certain types of derivatives contracts where a party may have undisclosed material information regarding an issuers whose securities form part of or are otherwise connected to the underlying interest, even in circumstances where the relationship between the issuer or security and the instrument is tenuous. We would suggest amending this section of the CMA to include a materiality qualifier and including more tailored defences under section 68 of the CMA (as discussed below).

Finally, as noted above, given the lack of a materiality threshold in the definition of "related financial instrument", a person in a special relationship with an issuer may be prohibited from trading in a security because such person knows of a material fact or material change relating to such issuer and the issuer's securities are a seemingly immaterial component of another security (for example, an indexed fund). The result is an overly broad prohibition on trading that may be very difficult for certain actors to comply with.

(k) Section 68 – *Defence to trading, tipping or recommending*

It is our view that the manner in which this section is drafted does not adequately account for the complex ways in which people purchase, sell or otherwise invest in or trade securities and derivatives. While we understand that this section was adopted from existing securities legislation, we note that such legislation has not been updated to reflect this changing marketplace. We recommend that the defences to trading, tipping and recommending be broadened and/or further tailored to take into account current common practices that do not offend the underlying prohibition against insider trading. These include defences that apply in the circumstances of trading by investment or other firms or organizations where the trading is not tainted by knowledge of material undisclosed information as well as defences relating to trades under automatic plans.

For example, we note that neither the *Securities Act* (Alberta) (the "**ASA**") or the OSA explicitly require that these obligations or plans be written as is currently contemplated in the CMA (see ASA ss. 147(7) (c) through (e) and OSA General Regulation ss. 175(2)). While we recognize that OSC Staff Notice 55-701 – *Automatic Securities Disposition Plans and Automatic Securities Purchase Plans* ("**OSC Staff Notice 55-701**") published in response to questions received from insiders wishing to establish "automatic securities disposition plans" does refer to trading parameters and other instructions being set out in a written plan document, OSC Staff Notice 55-701 was intended to be a temporary notice pending the development by the CSA of a CSA Staff Notice; such a notice has not been forthcoming, resulting in disharmony among CSA jurisdictions and outstanding questions regarding certain defences to insider trading. OSC Staff Notice 55-701 also does not address the full range of "automatic" circumstances pursuant to which trading may be structured as the focus is primarily on officers or directors of reporting issuers who enter into their own automatic plan arrangements. Other circumstances include compensation arrangements structured and/or administered by the issuers themselves that may have automatic distributions or similar elements.

As noted above, we would also recommend including more tailored defences under section 68 of the CMA, for example, an expanded "legal obligation" defence that permits a party to trade, amend, roll, etc., a derivatives contract in accordance with the terms of a contract, or even a non-documented arrangement or practice, entered into or agreed to prior to acquiring knowledge of the undisclosed material fact or material change. It may also be advisable to provide for further defences or exceptions to be prescribed in order to provide flexibility to address market and trading developments.

(l) Section 76 – *Obstruction*

We believe that the standard of "likely to be considered" that is included in this section is one that makes it difficult for individuals to comply with the CMA and does not provide a bright line rule for when a person must maintain information for the purpose at hand.

(m) Section 103 – *Review of Market Participants*

Section 103 of the CMA gives the Chief Regulator certain authority over "market participants" including the authority to review business conduct, require a market participant to provide information and records, and to make enquiries of any person under review, including its employees, agents, officers, directors and control persons. The term "market participant" includes persons exempted from the registration requirement as well as those distributing securities in reliance on a prospectus exemption. As a consequence, capital markets participants who rely on such exemptions, for example international dealers and international advisers, will be subject to this authority. We recommend express exemptions from the definition of "market participant", or from this section, for participants who are exempt from registration or the prospectus requirement.

(n) Section 105 - *Duty to assist*

As currently drafted, this section appears to bring individuals who may have no connection whatsoever to Canadian capital markets under the jurisdiction of the Authority, for example a landlord, a tenant or other employees of a place who do not have any connection to an issuer or the capital markets. While we understand the intention behind this section, we suggest that it is overbroad.

(o) Section 117 - *Actions relating to prospectus or prescribed offering document*

Currently, there are no "prescribed offering documents" relating to this section of the CMA. Given that section 122 of the CMA provides actions relating to offering memoranda and section 120 of the CMA provides for actions relating to take-over or issuer bid circulars, we query what other types of offering documents will get captured under this section, if any at all.

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.

The revisions clarify how the statutory right of action will operate with regard to the available remedies, but note the concerns above.

(p) Section 118 *Right of rescission*

As currently drafted, we believe that this section suggests that a prospectus that qualifies the underlying securities of a "prescribed converting security" will remain live (i.e., potentially needing to be amended) until all of the underlying securities have been distributed (i.e., until the conversion of all of the convertible securities). Typically, the prospectus qualifies the convertible or exchangeable security and the conversion or exchange right with the underlying security

distributed in reliance upon a prospectus exemption to allow for the distribution to terminate in the normal course of prospectus distributions. We believe that a preferred approach to ensuring that purchasers are provided with adequate rights when purchasing convertible securities is the approach taken in Companion Policy 41-101CP, which approach requires the issuer to provide a contractual right of rescission in respect of the conversion, exchange or exercise transaction in appropriate circumstances.

(q) Section 122(1) – ***Actions relating to prescribed disclosure document***

This section represents a broadening of the persons against which an action for damages may be brought where a person purchases securities under an offering memorandum. For example, in Ontario a purchaser under an offering memorandum would only have a right of action against the issuer and the selling security holder. A similar approach is also currently adopted in New Brunswick (see section 150 of the *Securities Act* (New Brunswick)). Under section 122(1) of the CMA, the person would also have a right of action against the directors of the issuer. The result is the broadening of the civil liability provisions beyond that which we consider to be reasonable and beyond the approach historically taken under the OSA. As the OSA was never broadened to include directors, the policy reasons for not doing so should be considered in this instance.

(r) Section 201(4) – ***Immunity for Compliance***

We respectfully submit that there appears to be a word missing in this subsection after "…no action may be commenced…"

3. Draft Initial Regulations

(a) General

(i) Prospectus Exemptions

We look forward to seeing the proposed regulations relating to prospectus exemptions and trust that they will be substantially in the form of National Instrument 45-106 *Prospectus Exemptions* that is currently in force along with scheduled amendments (i.e., the Crowdfunding Exemption and the Offering Memorandum Exemption amendments expected to come into force in January 2016).

(b) CMRA Regulation 11-501 *Definitions, Procedure, Civil Liability and Related Matters*

(i) Section 9. Execution and certification of documents

We do not believe this section should stipulate that where a record is required to be signed or certified, it must be "manually signed" by the individual given the increasing prevalence of electronic commerce. We note that pursuant to the *Electronic Commerce Act, 2000* (Ontario), subject to certain exceptions, a legal

requirement that a document be signed is satisfied by an electronic signature (s. 11(1)) and that electronic signature has become common practice among capital markets participants. As such, we would suggest that this section be amended to allow for methods of signing and certification beyond manual signature.

(ii) Section 13. Prohibited representations – exceptions

As a preliminary comment, it appears that the reference to subsection 60(1) of the CMA in this section of Regulation 11-501 is erroneous. More substantively, we query whether the exception in this section is still relevant given that it is not clear why a $50,000 threshold applies. While we recognize this threshold comes from existing legislation, we respectfully suggest that it be reconsidered.

(iii) Section 15. Disclosure document prescribed for subsection 122(1) of the Act

We understand that this section is derived from the definition of "offering memorandum" found in the OSA; however we note certain inconsistencies with such definition that cause concern. Firstly, section 15 refers to a document that "provides information". While the section continues by referencing "information about the business or affairs of the issuer", similar to what is currently in the OSA, the first reference to generally providing information is too broad and should, in our view, be limited to information about the business and affairs of the issuer. Secondly, the definition of "offering memorandum" in the OSA includes an exception for "documents setting out current information about an issuer for the benefit of a prospective purchaser familiar with the issuer through prior investment or business contacts." We believe that this is an important exception that takes into account a level of familiarity a purchaser may have with an issuer and is relevant, for example, to distributions to employees under stock options or similar share-based arrangements. Finally, the definition in section 15 does not take into account amendments to the document. As a general comment, we suggest that the entire OSA definition of "offering memorandum" be imported into this CMRA Regulation without amendment to avoid ambiguities in its application and maintain consistency of practice in this respect.

(c) CMRA Regulation 31-501 *Registration Requirements, Exemptions and Related Matters*

(i) Section 6. Over-the-counter trading and reporting

Pursuant to this section, investment dealers are required to comply with certain recordkeeping requirements and establish beneficial ownership of securities before accepting an order to sell securities of an issuer who is not listed on a recognized exchange and whose securities have been assigned a ticker symbol by FINRA for use on the OTC markets in the United States. Importantly, we believe that this section may have significant implications as, in practice, a U.S. broker-dealer may apply to have a FINRA ticker symbol assigned to an issuer's securities without the knowledge or involvement of the issuer, which will make compliance with this

section difficult. In addition, we believe that difficulty may arise in establishing the beneficial ownership of securities, particularly in the case of clients who borrow securities for the purpose of short selling.

(d) CMRA Regulation 41-501 *Prospectus Requirements and Exemptions*

(i) Section 3. Permitted activities under preliminary prospectus and Section 4. Material given on distribution

These provisions of CMRA Regulation 41-501 should be harmonized and considered in light of the ability to distribute "marketing materials" including standard term sheets as is permissible under National Instrument 41-101 *Prospectus Distributions*, and the ways in which these requirements are tailored to "bought deals" and shelf offerings, etc., including the fact that, depending on the type of distribution, the permissible "marketing materials" may not be filed with or referred to in the prospectus until a later time or date.

(ii) Part 3 Trust Indentures

We submit that this part of CMRA Regulation 41-501 be reconsidered as it is our view that these provisions are outdated and of limited use, as has been our experience with Part VIII of the *Canada Business Corporations Act* (the "**CBCA**"), for example. Firstly, it is unclear why it is necessary for the CMRA to mandate requirements relating to trust indentures, given that these are all protections or rights that are arguably best addressed through contractual negotiations between the relevant parties. Additionally, as this part of the CMRA Regulation applies only to a trust indenture where a prospectus, securities exchange issuer circular or take-over bid circular has been filed, investors would generally be protected through alternative means, such as prospectus disclosure, and through involvement by sophisticated parties such as agents or underwriters. In our experience, the involvement of trustees is largely a function of whether it is useful to have certain rights (e.g., security interests) vest in a single bondholder representative. The parties are best suited to choose whether this is necessary or useful in their circumstances.

Moreover, in our experience, the representative function of trustees is rarely a factor in determining the outcome of any specific issue that may arise, not least because individual bondholders in Canada have oppression remedies available to them. Aside from such representative function (the utility of which is questionable), trustees perform few other practical functions. In addition, this types of regulation create difficulties for issuers involved in cross-border offerings where, among other things, the requirement to have a Canadian trustee can be impractical and unnecessary. It also raises ambiguity where a document such as a prospectus is filed in the United States with the distribution made under an offering memorandum in Canada.

Finally, while we do not agree that trust indentures need to be regulated, we note that trust indentures are currently regulated pursuant to the business corporations acts of most Canadian jurisdictions, including under the CBCA, and

more specifically, in all CMR Jurisdictions other than New Brunswick and Prince Edward Island, making further regulation under CMRA Regulation redundant.[1] While we understand that the 2010 Uniform Law Conference suggested the repeal of the corporate law provisions dealing with trust indentures, we do not believe that a capital markets regulator should regulate in this area simply because it is no longer regulated elsewhere. Given the reasons cited above, we question the need for this section of CMRA Regulation 41-501.

(iii) Part 4 Restricted Shares

While we agree that issuers of restricted shares should be required to provide shareholders with adequate disclosure regarding the rights of such shares, based on our past experience we do not believe that it makes sense to limit access to the exempt market for "stock distributions" for all issuers and we respectfully submit that a more tailored approach to the regulation of restricted shares may be more appropriate. For example, we do not believe that non-reporting issuers should be required to obtain minority approval for private placements in Canada. Similarly, to the extent that a reporting issuer's dual class structure already exists, has been previously approved by shareholders and such issuer has provided adequate disclosure to its shareholders outlining the voting rights attaching to the securities they hold, we do not believe that minority approval of a prospectus exempt distribution should be required, particularly as the cost and timing for obtaining minority approval often negates the benefits of relying on a prospectus exemption. In such circumstances, to the extent that investors choose to purchase dual-class or restricted shares, disclosure should provide sufficient investor protections. We do, however, support requiring minority approval where existing reporting issuers wish to create restricted shares. We believe that the convoluted nature of existing OSC Rule 56-501 related to the rule-making authority to require minority approval and suggest that a more direct approach may be preferable.

(e) CMRA Regulation 51-501 *Disclosure and Proxies*

(i) Section 3(2) and (3). Reporting Requirements

This section requires non-reporting issuers to provide certain disclosure to the Authority and imposes record keeping requirements on non-reporting issuers. This section carries forward a New Brunswick Local Rule 51-504 *New Brunswick Corporations Listed or Quoted on Certain Marketplaces* ("**NB Rule 51-504**") which we understand was implemented in New Brunswick to address the issue that companies with no real connection to New Brunswick were incorporating in New

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[1] See the *Canada Business Corporations Act* (sections 82 through 93), the *Business Corporations Act* (BC) (sections 90 through 101), the *Business Corporations Act* (Ontario) (sections 46 through 52), the *Business Corporations Act* (Saskatchewan) (sections 77 through 88) and the *Business Corporations Act* (Yukon) (sections 82 through 93). See also the *Business Corporations Act* (Alberta) (see sections 81 through 92), the *Business Corporations Act* (Manitoba) (sections 77 through 88), the *Business Corporations Act* (Newfoundland) (sections 145 through 158), the *Business Corporations Act* (Nunavut) (section 82 through 93), and the *Business Corporations Act* (Northwest Territories) (sections 82 through 93).

Brunswick, in part because this province has no director residency requirements, and listing their shares on lower tier exchanges using fraudulent documentation. It was perceived that these issuers were legitimate because of their Canadian incorporation and exchange listing. As noted in the New Brunswick Financial and Consumer Services Commission's request for comments, the goal of the rule was to allow the Commission to better monitor the extent of capital raising activities by issuers with a connection to New Brunswick. While there may still exist a justified reason for maintaining this *status quo* in New Brunswick, importing these disclosure and record keeping requirements to non-reporting issuers organized in other jurisdictions in Canada who, other than being formed in such jurisdiction, have no connection to Canada or Canada's capital markets may deter entities from organizing under Canadian corporate statutes as this may be seen as an onerous requirement. Additionally, pursuant to subsection 3(3), "listed or quoted issuers"[2] are considered to be market participants under the CMA, which results in such issuers being subject to capital market laws with respect to record keeping and compliance reviews. Please see our comments above regarding "market participants" and the Review of Market Participants under section 103 of the CMA.

(f) CMRA Regulation 71-501 *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions*

(i) Section 1. Definitions

We respectfully submit that in the definition of "genuine market", the reference in subsection (a) should be to the International <u>Capital</u> Markets Association and not to the International Securities Markets Association. We further note that the ICMA does not regulate the Eurobond market, but rather is an industry association.

We also submit that in the definition of "qualified market", the reference in subsection (i) should be to the London Stock Exchange <u>plc</u> and not Limited.

(ii) Section 4. Distribution of securities to purchasers outside the CMR Jurisdictions

Currently, issuers in Ontario expect to be able to distribute securities to purchasers outside the province without being subject to the prospectus requirement, regardless of whether the issuer's securities are listed on a "qualified market". While we applaud the inclusion of a prospectus and registration exemption for issuances to purchasers outside of the jurisdiction, we believe that this exemption is too narrow, particularly taking into consideration proposed CMRA Policy 71-601. Additionally, we do not believe that a report of the distribution should be required where the purchasers are not resident in a CMRA Jurisdiction. Please see our comments below with respect to CMRA Policy 71-601.

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[2] Defined as issuers with a class of securities listed or quoted on a marketplace <u>outside</u> of Canada and who is formed or continued under the laws of a CMR Jurisdiction or under the CBCA.

Question for Comment on CMRA Regulation 71-501

Subsection 4(1) of CMRA Regulation 71-501 provides an exemption from the registration requirement 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

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

With respect to the definition of "qualified market" we question whether this list is broad enough. We suggest additional exemptions be included for other issuers, including, for example, funds, as currently many issuers would be precluded from partaking in private placements outside of Canada, which may result in such participants being unable to raise sufficient funds to operate their businesses, making it a difficult decision to operate their businesses from a CMR jurisdiction.

In addition, we believe that there may be undue hardship and significant negative market impact resulting from requiring an issuer to list non-Canadian purchasers in the report of exempt distribution required by paragraph 4(1)(e). Such a report would require disclosure of the identity of non-Canadian purchasers which may be difficult to comply with where the issuer is selling securities in a public offering in another country to many purchasers. Furthermore, such a requirement could result in foreign purchasers declining to purchase securities from Canadian issuers reducing access to capital by Canadian issuers and hurting such issuers competitively.

Additionally, the report of exempt distribution required to be filed is currently expected to be Form 45-106F6, the report currently applicable to exempt distributions in British Columbia.[3] This form represents a significant expansion of disclosure obligations over the existing regime (outside of British Columbia). A cost-benefit analysis should be conducted and a clear rationale should be articulated for the collection of each additional piece of information that would have to be collected and disclosed under the proposed report. In other words, additional information beyond the existing requirements should not have to be provided unless the benefits to the Authority in having access to such information are shown to outweigh the costs (financial and otherwise) to issuers and others in respect of whom disclosure would be required. Obtaining and verifying some of the additional particulars would be burdensome and time-consuming for issuers in a number of respects. The time required and the costs associated with collecting prescribed information and

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[3] While National Instrument 45-106 and its related forms have not yet been released for comment, we assume that the reference to the F6 will continue to refer to the BC form.

completing a filing must be considered against the value of the information contained in such filings; the practical reality of requiring time-consuming disclosures in a routine, transaction-related filing must be considered carefully. Second, some of the information that would be required to be disclosed is commercially sensitive and may be confidential and/or private. We encourage a review of the equivalent reporting requirements in other jurisdictions as a means of assessing the reasonableness of various aspects of the report of exempt trade.

(iii) Section 4(4) and (5) Exemption for Eurobond offerings

It is our opinion that the exemption found in section 4(4) of CMRA Regulation 71-501 requires modernization and amendment and that such exemption appears to describe the Eurobond market as it existed a number of years ago. Firstly, we note that Eurobond issues are, at times, sold in part to institutional accredited investors in Canada. For example, some Canadian issuers issue notes under Euro Medium Term Note ("**EMTN**") programmes and sell them into Canada on a prospectus exempt basis (i.e., to accredited investors). These note issuances are almost always fully underwritten and the dealers are registered dealers or are international dealers in the relevant provinces. As currently drafted, it does not appear that the exemption found in subsection 4(4) would be available in such circumstances due to the requirement in subsection 4(4)(a) that the distribution be made to a person outside of Canada. We believe that this represents a change from the *status quo* and should be reconsidered so as to allow issuances of non-convertible debt securities to institutional accredited investors in Canada on both a prospectus exempt and registration exempt basis. In addition, the language currently included in subsection 4(4)(d) with respect to sales in Canada pursuant to a prospectus exemption seemingly contradicts subsection (a).

Secondly, as has been our experience, Eurobond notes are not always represented by a temporary global note and are almost never exchangeable for definitive notes. These forms of note are also specific to notes in bearer form. In today's market, some notes are in registered form only and as such there is no temporary global note. We suggest revising subsection 4(4)(f) of CMRA Regulation 71-501 to permit either bearer or registered forms where bearer notes are represented on issue by either (i) a temporary global note exchangeable for a permanent global note or a definitive note; or (2) a permanent global note exchangeable for definitive notes and registered notes are represented by a global certificate.

In addition, it is not clear to us how senior bank debt convertible into equity on a non-viability trigger will be treated under the Proposed Legislation. As currently drafted, senior debt issued by the big Canadian banks under their EMTN programmes would fall outside the four corners of the exemption in subsection 4(4), whereas subordinated debt with a contractual non-viability trigger would be captured. We do not believe that this is the appropriate outcome.

Finally, with respect to subsection 4(5), we note that not all issuers of Eurobonds are reporting issuers; some are private companies that are funding vehicles only.

Question for Comment on CMRA Regulation 71-501

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

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

We do not believe that the exemption in subsection 4(4) should be limited to debt listed on a "genuine market". Not all Eurobond issues are listed on a genuine market or even listed at all like commercial paper which, for example, is never listed. As such, this requirement could possibly prevent the issuance of certain Eurobond securities and have a negative market impact. It is our opinion that there should not be a listing requirement in the exemption. Furthermore, CMRA Regulation 71-501 defines a "genuine market" to include the "Eurobond market". We note that the "Eurobond market" is an amorphous concept referred to by the industry but which is not actually an exchange or trading platform. Notes issued under Eurobond programmes are most commonly listed on exchanges in London, Luxembourg or Ireland, but are also listed on any number of other European exchanges. Once again, we would suggest removing the listing requirement from this exemption and reconsidering the definition of "genuine market".

In respect of non-Canadian purchasers being included in a report of exempt distribution, we believe that undue hardship and negative market impact may result, particularly given that such a requirement would represent a significant change from current regulatory requirements and market practice. Currently, post trade reports are not filed for issuances by Canadian issuers of "Eurobond" or EMTN programmes. All of the big Canadian banks have such EMTN programmes and sell billions of dollars' worth of bonds thereunder. Requiring these types of issuers to prepare post trade reports would be an onerous requirement and, often, almost impossible as many times the issuer is not aware of whom the end investors are as these transactions are fully underwritten. Where such securities are sold into Canada, post trade reports are filed for Canadian investors as they would be for a private placement in Canada. We do not see a need to file post-trade reports for foreign purchasers and respectfully query why such information would be required by the CMA. In addition, we refer you to our comments above with respect to reports of exempt trade and the need for a proper cost-benefit analysis before imposing post trade reporting requirements on foreign offerings.

(g) CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions*

(i) General

We believe that CMRA Policy 71-601 represents a significant change in policy in a number of Canadian provinces, including in Ontario, where currently the OSC considers a distribution to take place primarily in the jurisdiction of residence of the purchaser.[4]

Questions 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 legislation. 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.

We do not believe that a Canadian issuer should be required to deliver a copy of a Canadian prospectus to a U.S. purchaser regardless of whether a U.S. prospectus is being prepared or filed. In particular, where an issuer is not concurrently distributing in Canada, we do not see the need for the issuer incur the substantial costs of preparing a distribution-out Canadian prospectus for review by the Chief Regulator. In this circumstance, investors are purchasing under the U.S. prospectus and there is no distribution to investors in Canada. As such, it is our view that an exemption would be appropriate. To the extent a distribution-out prospectus requirement is retained, further exemptions will need to be considered from the prospectus form and delivery requirements, including the requirement for certain certificates. See for example paragraph 4.2(2)(b) of the Companion Policy to NI 71-101 *Multi-Jurisdictional Disclosure System* which provides an exemption from the requirement for an underwriters' certificate. With respect to issues such as flow back we believe that a more principled approach such as that provided under Ontario Interpretation Note 1.5 is more appropriate, rather than an approach that broadly blankets all distributions and then requires the appropriate release through

[4] See Ontario Interpretation Note 1.5.

exemptions, which can never be perfectly tailored to address all circumstances that should be exempt or properly evolved as markets and practice develop and change.

(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?

We believe that a Canadian issuer should 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 given that the Canadian issuer and its U.S. underwriters would have to comply with U.S. securities legislation when dealing with U.S. purchasers. Once again, under this example, we do not believe there to be a distribution to investors in Canada and U.S. purchasers would be protected by the investor protections provided by capital markets laws in the U.S. In addition, we do not believe that Canadian issuers should be exempt from the prospectus marketing rules on the condition that they comply with U.S. securities legislation, but rather that the exemption should apply because there is no distribution to Canadian purchasers. To the extent that the issuer fails to comply with U.S. securities legislation when dealing with U.S. purchasers, such purchasers would be entitled to remedies, and/or the issuer would be subject to penalties, under U.S. law. Conditional relief of this nature leads to unfair "gotcha" situations for immaterial technical breaches of the foreign law.

(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.?

We believe that a Canadian issuer should be specifically exempted from providing statutory rights of withdrawal and rescission to U.S. purchasers, given that U.S. purchasers should be protected by similar rights under U.S. securities legislation and as U.S. purchasers would be purchasing under the U.S. prospectus. While we understand it would be prudent for the Authority to have some jurisdiction over the issuer and the distribution, we do not agree that this should be in the form of the extended protections that should apply only to purchasers in Canada under the distribution.

(d) Where a U.S. registration statement is filed with the SEC, in what circumstances should the Canadian issuer 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?

Once again, we do not believe that section 117 and 118 of the CMA should apply to U.S. purchasers in a cross-border prospectus offering because U.S. purchasers are protected by the disclosure in the U.S. registration statement filed with the SEC. We believe that an exemption would be appropriate with respect to issuance to U.S. purchasers.

2. Should CMRA Policy 71-601 or the new CMRA Regulations clarify any matters with regard to how securities 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)?

It is our view that CMRA Policy 71-601 and the CMRA Regulations should clarify how securities distributed to U.S. purchasers under a Canadian prospectus filed with the Authority are freely tradeable in CMR Jurisdictions under the CMA. We believe that they should be freely tradeable as they are qualified under a Canadian prospectus and a U.S. registration statement. Once issued to the initial purchasers in the U.S., the securities should be freely tradeable. In addition, we respectfully query how the Chief Regulator would be able to regulate secondary trades in the U.S.

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?

In our view, U.S. underwriters acting solely as underwriter under a U.S. prospectus of a Canadian issuer should be specifically exempt from the dealer registration requirement in CMR Jurisdictions. Given that the dealer registration requirement is triggered where a person "acts as an underwriter" and in this example the underwriter would only be acting as an underwriter in the United States, and further that the U.S. underwriter would be acting in accordance with U.S. securities legislation providing U.S. purchasers with sufficient investor protections, we do not believe it appropriate to require such actors to be registered in Canada. We also do not believe there is an appropriate category for registration given the very limited nexus these underwriters would have to Canada. As noted above, to the extent a Canadian distribution-out prospectus is required to be filed with the Authority, there should be a specific exemption from the requirement to have an underwriters' certificate given there is no underwriter in Canada.

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 complied 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 noted in question 1(a) above, if a Canadian issuer is permitted to file a distribution-out prospectus (with no delivery requirement 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?

We do not believe that a four-month hold period or legend requirement should apply to securities sold outside of Canada where Canada is not the principal market. We believe that where securities are sold to persons outside of Canada, in such cases CMRA Policy 71-601 should contemplate an exemption similar to the one included in section 2.14 of National Instrument 45-102 *Resale of Securities.*

4. Proposed National Instruments

(a) National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means*

Question for Comment on National Policy 47-201

Although we have tried to anticipate the impact of this policy change for Ontario market participants, we seek comments on how NP 47-201 and related initial regulations may be drafted to minimize any disruption or unintended consequences to capital-raising or investing activities by those participants.

It is our view that section 2.3 of National Policy 47-201 is worded in a manner that may cause some confusion.[5] The prospectus requirement is only triggered for

[5] This section states: "A person or company located in a CMR Jurisdiction, Alberta or Quebec that is distributing securities entirely outside of those jurisdictions through the Internet is considered to be trading within those jurisdictions and is therefore subject to applicable registration and prospectus requirements in those jurisdictions. The securities regulatory authorities in those jurisdictions may provide relief from those provisions in appropriate circumstances. The securities regulatory authorities in the remaining jurisdictions will assert jurisdiction over market participants on a case by case basis, with due regard to the legal tests ordinarily applied in such circumstances."

distributions and as such, being deemed to be trading in a CMR Jurisdiction does not trigger any prospectus requirement. While a trade forms part of a distribution, and all distributions are trades, not all trades are distributions. As such, simply being deemed to be trading in a jurisdiction may not require that a prospectus be filed or a prospectus exemption be relied upon. The registration requirement, however, is based upon a business trigger and as such, trading in a jurisdiction by a person in the business of trading will, in most cases, require registration. We suggest that this section distinguish between distributions and trades. We underscore this comment generally as well, that the difference between the trigger for registration when engaged in the business of trading as compared to the prospectus requirement for distributions not be confused, as we respectfully submit has been the case in, for example, *OSC Staff Notice 45-709 Tips for Filing Reports of Exempt Distribution* and its reference to *Crowe et. al v. Ontario Securities Commission*, for additional guidance as to when a distribution has occurred in Ontario.[6]

(b) Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*

We note that while this instrument has been adopted in the other Canadian jurisdictions, it will represent a significant change to the current regulatory regime for issuers located in Ontario. While we understand the policy concerns underlying Multilateral Instrument 51-105 ("**MI 51-105**") and support efforts by the Authority to protect public investors from potentially abusive shell companies that trade in over-the-counter ("**OTC**") markets, the broad application of MI 51-105 to any issuer that may have its securities quoted on an OTC market in the United States will result in the application of this instrument to an expansive array of international issuers, both public and private, engaged in legitimate capital markets activities who are not, as we understand, the intended targets of MI 51-105.

More particularly, the adoption of MI 51-105 has potentially significant implications as, in practice, a U.S. broker-dealer may apply to have a FINRA ticker symbol assigned to an issuer's securities without the knowledge or involvement of the issuer. Accordingly, the applicability of MI 51-105 will need to be determined on a transaction-by-transaction basis. Additionally, the cost and compliance implications of being an "OTC reporting issuer" are significant, and include being

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[6] In our view, owing to the unique nature of the facts in Crowe, neither the OSC reasons nor the Divisional Court decision are applicable to determining when a distribution to purchasers outside of Ontario is a distribution in Ontario, in the context of a private placement that is carried out as part of legitimate and bona fide capital raising activities. The Ontario Superior Court of Justice clearly limits the application of its finding, that the OSC had jurisdiction over distributions that occurred outside of the province, based on the facts at hand, citing the need to protect investors from unfair or fraudulent activities. Moreover, Crowe involved the contravention of, among other things, the registration requirement of the OSA. The majority of the decision and analysis is devoted to the issue of when the registration requirement in the province is triggered, including the relevant connecting factors for determining when there is an "act in furtherance of a trade" to trigger such requirement. In our view, neither the OSC's reasons nor the Divisional Court's decision clarify whether the OSC has jurisdiction over the distributions to investors outside of Ontario in circumstances of bona fide capital raising activities.

subject to, among other things, Canadian securities law requirements relating to continuous and timely disclosure that generally apply to Canadian public companies. MI 51-105 also imposes specific restrictions on the use of prospectus exemptions and the ability to resell securities, and requires securities issued by OTC reporting issuers to carry specific legend notations in certain circumstances. As a consequence of the adoption of MI 51-105, many issuers will be prohibited from partaking in private placements to retail investors.

Importantly, we note that, based upon our past experience with MI 51-105, issuers have decided not to issue securities in jurisdictions that have previously adopted MI 51-105 because of the risk of becoming a reporting issuer and the complex analysis involved in determining whether this will occur. We also refer to the disruptive effect this instrument had upon its adoption in other Canadian jurisdictions and how numerous blanket orders were required to address the issuers that resulted. Finally, we believe that the adoption of MI 51-105 is hurtful to Canadian investors who want to participate in private placements by foreign businesses into Canada. As such, and for the foregoing reasons, we respectfully suggest that this instrument be reconsidered before being adopted as part of the CCMRS, and we submit that if the Authority is concerned with a specific issue (for example, misrepresentations made by "OTC issuers"), that specific enforcement powers be created, as needed, rather than deeming a broad class of actors reporting issuers.

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Thank you for the opportunity to comment on the Proposed Legislation. Please do not hesitate to contact any of the undersigned if you have any questions in this regard.

Yours truly,

"Laura Levine"

Laura Levine, on my own behalf and on behalf of

Ramandeep K. Grewal
Philip J. Henderson
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