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December 23, 2015

Cooperative Capital Markets Regulatory System (CCMR) Participating Jurisdictions

Re: Comments on Revised Consultation Draft CMA and Draft Initial Regulations

Dear Sirs:

We are pleased to respond to your request for comments with respect to the revised consultation draft *Capital Markets Act* ("**CMA**") and draft initial regulations and revised National Instruments thereunder ("**Regulations**").

Blake, Cassels & Graydon LLP is a national law firm with a significant Canadian capital markets practice. We represent a large number of market participants, consisting of public company issuers, of varying size, and industry sector, and registrants, and investors. We represent clients in both participating provinces and non-participating provinces.

Overall Comments

As we indicated in our previous comment letter, as a national law firm representing market participants who are based in, or who participate in the capital markets of, both participating and non-participating jurisdictions, our overriding concern is the harmonization nationally of clear requirements and the responsive administration of the requirements. Very substantial progress had been made by the Canadian securities administrators prior to the CCMR process in achieving harmonization of requirements and responsive administration over the past two decades. The CMA and Regulations should be designed to further, not detract from, that achievement.

Accordingly, as an overriding comment, we are of the view that it is preferable that the uniform CMA legislation reflect, so far as possible, what is currently common to the securities legislation provisions of major capital markets jurisdictions (participating and non-participating), without the introduction of new provisions and terminology, or provisions or drafting, which is not common to the major capital markets jurisdictions. Many of these changes have not been subject to the type of consultation process that has been typical of changes to Ontario securities legislation.

We note that, in the Commentary to the revised CMA and Regulations, it was indicated with reference to the Regulation process under the proposed CMA that:

> "More substantively, and consistent with current Ontario legislation, s. 205 of the CMA now requires that the notice of a proposed regulation must include a discussion of all alternatives that were considered by the Authority and the reasons for not proposing their adoption."

We refer to this type of consultation as an appropriate consultation process below.

We would suggest that the same type of process should be followed with respect to the changes proposed in the CMA itself for provisions which are not common to the current legislation of all of the major capital market jurisdictions.

Retaining what is common to the major capital markets jurisdictions, without changes which have not been subject to such a consultation process, would, in our view, continue the objective of harmonization of securities legislation and allow for the most seam-less establishment of, and administration of the CMA and Regulations by, the new Authority.

As well, while we recognize that this issue is not addressed in the draft CMA and Regulations, the issue of the interface between the CCMR Authority ("**Authority**") and non-participating jurisdictions is extremely important to the efficient functioning of Canadian capital markets and the harmonized regulation thereof. We encourage the CMR Jurisdictions to address and resolve this issue as a high priority, with appropriate consultation with all market participants.

We comment below on certain specific provisions of the CMA and Regulations.

CMA

CMA Interpretation

Misrepresentation Definition

We support the change in the CMA to restore the definition of misrepresentation to the current definition contained in Ontario securities legislation.

Capital Markets Participants

We reiterate our previous comment that, given the extensive powers provided to the Authority with respect to market participants, and proposed and potential requirements in respect of market participants, we are of the view that new classes of "market participants" should not be added to the CMA without an appropriate consultation process. Pending such a process, we recommend that this definition in the CMA be restricted to the market participants which are currently common to the definition of this term in the legislation of the major capital markets jurisdictions.

While we recognize the deletion in the Regulations of provisions elating to recordkeeping for certain market participants, this does not address the broader point that the addition of all of these new classes of market participants is a fundamental change to the securities legislation of the major capital market jurisdictions as a whole.

Proposing to include in this definition the term "control persons" is an important example of this change. This term is not commonly found in the definition of market participants in the major capital markets jurisdictions, even for those that employ the concept of market participant. "Control persons" come into the market in a different way than "reporting issuers", which choose to raise capital in the markets, and registrants, who choose to be in the business of trading, or advising on the trading of securities. "Control persons" are already regulated through existing legislation and rules in certain situations where it is appropriate to do so by virtue of their relationship with reporting issuers (e.g. prospectus

requirements) and it is not clear what the rationale is for adding them to the category of "market participants" without the appropriate consultation process at this stage, given the significant implications of that change.

Likewise, we continue to question the other broad additions of entities to the category of market participants, such as non-reporting issuers who rely on long standing exemptions, such as private companies, and foreign issuers, which will now be subject to regulation by the Authority for example, by offering employee stock plans to Canadian employees.

We also note that these additions reflect a retroactive application of this legislation, and the jurisdiction of the Authority, to these entities. Reporting issuers and securities registrants entered, by choice, the regime, aware they would be subject to regulation under securities laws. Control persons did not. We also expect it will be a surprise to Canadian private companies and foreign companies they are now subject to the broad-ranging regulation of the Authority. It might even be a surprise to provincial legislatures.

Although we believe it is more appropriate to simply delete the addition of these entities from the CMA, absent that, the Regulations should, at a minimum, be revised to "un-prescribe" control persons, private issuers and foreign issuers, and other similarly situated non-registrants and non-reporting issuers, so that any new regulations to add these would at least be subject to an appropriate consultation process.

Registration Requirements and Related Matters

The draft CMA proposes not to carry forward the registration exemptions which Ontario currently has from registration as either a dealer, underwriter, adviser or investment fund manager, for banks listed in Schedule I, II or III to the *Bank Act* (Canada), co-operative credit associations or certain co-operative credit societies, loan corporations, trust companies, insurance companies, credit unions, caisse populaires or the Business Development Bank of Canada. The Commentary indicates there are a number of other registration exemptions contained in the initial regulations and market participants may apply for exemptive relief. With respect, this is not responsive to the comments on the fundamental

issue raised by this change. These exemptions have been basic to market participants' understanding of the requirements to which they are subject. We anticipate confusion and disputes, with market participants caught in a confusing jurisdictional cross-fire between the Authority and OSFI.

Market participants in Ontario, where this is a significant issue due to the large number of financial institutions located there, have benefited from the certainty provided by those exemptions, which stemmed from the Hockin-Kwinter Accord of 1987. While it may only have been included as a formal statutory exemption in Ontario, it was the de facto no-action position in the other provinces as well. The adoption of the CMA by CMR jurisdictions does not mean that this federal-provincial intergovernmental agreement itself has been or should be eliminated. Eliminating the clarity will simply cause future greater confusion as to where the line is drawn between powers of federal financial institutions and provincially-regulated institutions as to their respective jurisdictions. Promoting that confusion is not in the public interest. Some bright line tests (such as re-instatement of these exemptions) or guidance are appropriate and would be highly beneficial for the Canadian capital markets and its participants.

Takeover Bids and Issuer Bids

We appreciate the rationale provided for the adoption of the "platform" approach. However, in certain cases, certain provisions and concepts contained in provincial securities legislation have been so well established, and are significant enough, that they should, in our view, continue to be embodied in the legislation. For example, the current proposed provisions relating to take-over bids should in our view, at a minimum, contain the definition of take-over bid which references the thresholds and types of securities sought, and as well, certain well established exemptions, such as those for normal course issuer bids, should be retained.

Prospectus Requirements

We note that this draft version of the CMA continues to include the broadly-worded section 32 authorizing the Chief Regulator to demand information beyond that required by the CMA and Regulations. Consistent with our comments regarding introduction of changes without the appropriate

consultation process, we propose this section and the related section 2(1)(i) of CMRA 41-501 be deleted until that process occurs.

We note the change from the legislation of a number of the jurisdictions in section 37 with respect to the primary obligation to provide a prospectus. We are concerned that the change may create an unintended consequence to impose a new obligation on issuers. In light of this uncertainty, and again without the benefit of an appropriate consultation process, we suggest a reversion to the existing language in the Ontario Securities Act to maintain the status quo.

We continue to question the removal of the “2 day” cooling-off period from the prospectus requirements. This length of time has been a well-established matter of securities laws and we are not aware of a rationale as to why it would need to be removed from the legislation at this stage.

Disclosure and Proxies

The CMA continues to contain in section 45 a broad power for the Chief Regulator to require a number of persons to provide any information, records or things in the person’s possession or under the person’s control that relate to the administration or enforcement of capital markets. We have noted above concerns regarding the addition of “control persons”, private issuers and foreign issuers to the definition of market participant without a clear rationale being provided for these changes. We reiterate those comments as they relate to the proposed section 45.

Market Conduct

With respect to section 54, we reiterate our comments with respect to the addition of broad new categories of new market participants caught by this provision.

In subsection 66(1), we note the CMA carries forward the amendment to Ontario securities legislation to include trading in securities of publicly-traded entities for the purposes of insider trading liability. This provision significantly expands the application of Canadian securities laws to transactions in non-Canadian jurisdictions and is a noteworthy change from the prior regime. We do not think this change should be made in the context of the CMA without appropriate consultation on this point.

We remain concerned as to the change in wording in subsection 66(2). The wording "in the necessary course of business" has been a long established, common provision in the securities law of the major capital markets jurisdictions. It is a fundamental concept in analysing the application of the "tipping" provisions and allowing for appropriate exchanges of information without triggering the serious consequences of insider trading liability. It has not been explained whether any change in meaning is intended. If no change is intended, why change the wording? And if a change is intended, what is the intended change and what is the rationale? We recommend reversion to the long standing provisions of the Ontario Securities Act with respect to this term absent an appropriate consultation process.

Derivatives

We have reviewed the comment letter submitted by the International Swaps and Derivatives Association, Inc. ("**ISDA**") and generally agree with its comments and recommendations.

Maintain Status Quo for Prospectus and Registration Requirements

As noted in the Commentary on the Regulations, the proposed derivatives regulations will be updated to reflect the work now being done by the OTC Derivatives Committee of the Canadian Securities Administrators (the "**CSA Derivatives Committee**"). Given that the work of the CSA Derivatives Committee is ongoing, with only rules relating to trade reporting in force, we agree with the stated approach to preserve the status quo (with respect to derivatives regulations) and have proposed substantive changes only where necessary to harmonize requirements. The implementation of transitional rules or rules that may change once the CSA Derivatives Committee (and any successor after the implementation of the CCMR) completes it work should be avoided, so as to not create market inefficiencies prior to the adoption of a complete and fully-considered derivatives regime.

In order to best facilitate maintaining the status quo with respect to OTC derivatives, it is inappropriate to adopt transitional requirements with respect to OTC derivatives which may result in requirements that are not currently applicable under Ontario law given the high proportion of Canadian OTC derivatives trading activity involving Ontario market participants. Unfortunately, the derivatives requirements in the CMA and Regulations generally result in significant additional requirements for

Ontario OTC derivative participants (whereas the current Ontario derivative requirements would not impose additional obligations in those other CMR Jurisdictions).

In order to better maintain the status quo, we recommend in particular that the CMA and Regulations be revised to more closely reflect the current Ontario requirements with respect to the prospectus requirement and the registration requirement for derivatives dealers and advisers.

As a result, the prospectus requirement should not apply to derivatives and instead consideration should be given to whether a "prescribed disclosure document" (as referred to in CMA section 38) should be used for derivatives "sold as retail investment products". We note as well that the prospectus requirements in the Regulations that would apply to OTC derivatives are clearly tailored to the nature of more traditional securities and the marketing of such securities. For example, there is no clear "issuer" in respect of an OTC derivative, which is akin to a bi-laterally negotiated contract, and the application of certain of the prospectus requirements to OTC derivatives is unclear.

Likewise, the requirements in the CMA to register as a derivatives dealer and adviser should not be proclaimed into force until the CSA Derivatives Committee develops a comprehensive approach to such registration (maintaining the status quo existing in Ontario). To the extent an exemption is not available, the CMA and Regulations would require registration in one of the existing securities dealer or adviser registration categories (until a separate derivatives registration regime is developed). The existing categories of registration and related rules applicable to dealers and advisers were not developed to address the context of trading or advising in OTC derivatives, which may raise concerns in respect of interpretation and compliance, resulting in a need to negotiate exemptions from inapplicable registration requirements. It would be more appropriate to impose registration, if required in the Canadian context, only once specific registration requirements relating to OTC derivatives are developed.

The CMA should also be revised to maintain the general exemption from Ontario registration requirements applicable to Canadian financial institutions in order to reflect the status quo and the fact that such entities are already prudentially regulated, as discussed in greater detail above.

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Registrant Duties

The requirement of a registrant to deal fairly, honestly and in good faith with its clients does not appear to have been fully considered in the context of OTC derivatives. OTC derivatives are bilateral contracts. It is not clear which party may be the “client” of the other, especially in circumstances where both parties to a contract are registrants or other large institutions.

In order that this duty may be fully considered in the context of OTC derivatives, we suggest that any duty of registrants towards “clients” be specified in regulations that can be more closely considered at a later date rather than creating a statutory requirement. This would maintain the status quo in Ontario where the requirement of a duty of good faith for securities dealers and advisers is imposed in regulatory instruments (and rules of self-regulatory organizations). It would also make sense to consider the duty in the context of the final registration rules and requirements for derivatives dealers and advisors under development. Regulators should focus on identifying the categories of participants in the derivatives market who may need additional protections and impose additional duties as appropriate on people dealing with them. Under Dodd-Frank, this was done by designating “special entities” (e.g., states, municipalities, State and Federal agencies, pension plans, governmental plans, and endowments) who dealers need to ensure are represented by qualified independent representatives before trading swaps with them.

Section 91 – Freeze Orders

The Tribunal’s powers under section 91 of the CMA to make orders prohibiting a person from taking certain actions with respect to derivatives may be interpreted so broadly as to permit the Tribunal to prevent a party from terminating a derivative transaction or dealing with collateral after an event of default by a counterparty. As a result, the inclusion of this provision in the CMA would undermine certainty in respect of the availability of termination safe-harbours, which are recognized as being critical to the efficient functioning of domestic and international financial markets, and could limit the ability of financial institutions to obtain enforceability opinions on the close-out netting provisions under derivative agreements. These opinions are necessary under prudential capital rules to allow banks’

capital requirements to be determined based on the net exposure between the counterparties to the transaction.

We agree with ISDA's recommendation that the CMA be revised to impose limits on the authority of the Tribunal or the Authority to interfere with termination, close-out netting and collateral enforcement powers such that no order or regulation made under the CMA can prevent a party to an eligible financial contract (as defined in the regulations to the *Payment Clearing and Settlement Act* (Canada)) from exercising its close-out rights, including its right to deal with collateral on a termination event or event of default. We note that the Canadian bankruptcy and insolvency regime also provides for the protected treatment of eligible financial contracts.

Civil Liability

We suggest for clarity that the wording in subsection 117(1) be changed to "contains a misrepresentation that has not been corrected before the time of the purchase".

In a significant change from the provisions of the legislation of major capital markets jurisdictions, subsection 122(1) creates a new statutory right of action against directors of the issuer. The existing private placement regime, consisting of tailored exemptions for investors, requirements relating to disclosure, and liability, have been crafted over time to provide an appropriate mechanism for non-prospectus financings. Introducing into this regime a new concept of personal liability for directors may well have a significant impact on issuers, and investors, with respect to the exempt market. The current regime, as a package of provisions, represents an appropriate balancing of investor protection and faster access to capital. Consistent with our other comments, we believe that such a change should only be introduced after an appropriate consultation process.

Regulations, Rules and Policies

In sections 205 and 211, the term "forms" appears to have been inadvertently excluded from these provisions. As "forms" have substantive legal effect, this oversight should be rectified.

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For section 212, we are of the view that the minimum comment period be required for proposed changes to the policy statements, as well as regulations and forms. Policy statements may have a significant effect on the function of the capital markets and, to reiterate our previous comment, a comment period would offer a process for explanation, clarification and refinement which would lead to more effective regulation of capital markets.

REGULATIONS

CMRA Regulation 11-501

Section 15 - Disclosure Documents

We believe that the existing definition of "offering memorandum" should be retained.

The definition of an offering memorandum as a document describing the business and affairs of the issuer has long been established. The proposed change which describes a document which contains other information is a broadened definition which may have unintended consequences.

To take one example, there is currently no requirement for a disclosure document to be delivered in connection with the operation of a plan providing for the issuance of securities to employees, under the exemption provided for such purposes. Often issuers provide documents describing the operation of the plan. Such documents are not typically regarded as offering memorandum as they do not purport to describe the business and affairs of an issuer. Broadening the definition of "offering memorandum" to include any information may have the unintended consequence of imposing liabilities for documents where none previously existed, undermining the policy rationale and approach of the employee-related exemption.

CMRA Regulation 44-501 – Prospectus Requirements and Exemptions and Related Policies

Section 2 creates an additional power for the Chief Regulator to refuse to issue a receipt for a prospectus if the directors and officers of the issuer lack the knowledge and expertise necessary to conduct the business of the issuer in the best interests of the securityholders of the issuer.

This appears to go beyond the range of considerations generally employed relating to the decision to receipt a prospectus, and requires a business/investment judgment by the regulator.

The issue of the knowledge and expertise of the directors and officers is presumably a matter best addressed by disclosure to investors, as are the other aspects of the issuer's business disclosed in the prospectus.

As well, the concept of the "best interests of the securityholders in the issuer" is importing concepts (not entirely accurately) from corporate law which are best addressed in the context of corporate law rights and remedies.

We would expect that, in fact, the Regulator may find he or she prefers not to have this power, in cases where receipts were issued and investors assign accountability to the Authority for failing to exercise this authority where they believe the authority should have been exercised.

CMRA Regulation 51-501 - Disclosure and Proxies

The wording in subsections 4(2) and (4) of CMRA Regulation 51-501 appears to only deal with the distribution of materials from the issuer or its agent. As you are aware, in the current capital markets system, materials are chiefly distributed through a network of intermediaries for the benefit of beneficial holders. A number of the participants and intermediaries in this process would not be regarded as "agents" of the issuer, so this language should revert back to the existing provisions used by the major capital market jurisdictions.

National Instrument 52-110 Audit Committees – Definition of Independence

The introduction of the CCMR provides the opportunity to address a long standing issue with respect to the definition of "independence" under National Instrument 52-110 – Audit Committees, and, in particular, the "deeming rule" which deems "all affiliated entities of reporting issuers, including the directors and officers of controlling shareholders", as being not independent for the purposes of corporate governance. Although the definition is specific to the National Instrument for Audit Committee, by virtue of the disclosure requirements under National Instrument 58-101 Disclosure of

Corporate Governance Practices, the definition significantly impacts the composition of the Board and all of its committees and hence corporate governance of reporting issuers. The definition currently deems directors and officers of controlling shareholders of reporting issuers as not independent of those reporting issuers.

This provision results in black being deemed white. It is difficult to contemplate that any individuals could be more independent of the management of a reporting issuer than directors and officers of the controlling shareholder of such issuer. It has the result that directors and officers of controlling shareholders are precluded from serving on the audit committees of companies in which they have a huge financial investment and are likewise, by virtue of the effect of disclosure rules, effectively precluded from playing a significant role on other board committees such as compensation committees. This result contradicts the entire rationale behind the independence rules, namely, that corporate governance is best effected by the greatest number of members of the Board and its committees being independent, and truly independent, of management. In all of these regards, the interests of controlling shareholders are completely aligned with the interests of all shareholders.

At the time of the initial introduction of this definition, the CSA recognized that this was a problematic issue and undertook to address it. In fact, it was recognized in proposed amendments to the Audit Committee National Instrument in 2008 to amend this deemed definition of independence to reflect reality. However, the CSA abandoned that effort in light of the financial crisis.

It is now appropriate to address this definition and eliminate this deeming rule, so that directors and officers of controlling shareholders, who are otherwise independent of management of reporting issuers, can appropriately and accurately be disclosed as being independent of management, and to remove an impediment to them serving as members of the audit and other committees of such reporting issuers, which will strengthen, as opposed to weaken, oversight of management, and hence the corporate governance of such companies.

To the extent there are concerns with respect to related party transactions between reporting issuers and controlling shareholders, this one aspect of the corporate governance of reporting issuers (which in many cases arises only occasionally) is not a basis for deeming such Board members as non-

independent for all purposes, and indeed this designation does nothing to address these issues in any event. Such conflicts are appropriately addressed by existing corporate legislation, and in the case of major related party transactions, by Multi-Lateral Instrument 61-101. As well, the solution provided by the TSX, in its precedent corporate governance disclosure rules, was more responsive to the issue. Instead of deeming such directors to be non-independent, the TSX rules required disclosure of them as being related to a significant shareholder. That achieved the objective of both providing more useful disclosure, and as well as strengthening, as opposed to weakening, strong, independent Board supervision of management.

While we appreciate this is a “change” to an existing National Instrument, in light of the history, and extensive prior consideration and consultation, and given the lack of a rationale basis for the provision, it is now appropriate to address in the context of the new CMA and Regulations.

National Instrument 55-104 – Insider Reporting Requirements

The definition of “economic interest” should be reconciled with (presumably replaced by) the definition of “related financial interest” in the CMA, so that there is no confusion between these terms.

CMR Regulation 71-501 and CMRA Policies 71-601- Distribution of Securities to Persons Outside CMR Jurisdictions

In our view, the CCMR should not follow the approach proposed by CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions* (Policy 71-601) and CMRA Regulation 71-501 *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions* (Regulation 71-501). These proposals are based on an approach followed in British Columbia that has prevented B.C. investors from having access to distributions available to investors in all other North American jurisdictions, which would have an expanded anti-competitive impact if extended to the other CMR Jurisdictions. Among other things, Policy 71-601 would require dealers in other countries to make an assessment whether a distribution made to investors in other countries are accredited investors, as defined in Canadian securities legislation, or another exemption is available if a prospectus is not filed in the CMR Jurisdictions even though those other countries have their own equivalent requirements to protect investors. Regulation 71-501 provides exemptions that fail to

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correspond with the impact of Policy 71-601 and also are outdated in failing to recognize current market practices (e.g., changes in the use of definitive certificates, the increased importance of the European and Asian capital markets, the greatly reduced significance of the Eurobond market, and increased U.S. trading volumes of interlisted securities) and the sophistication of securities regulatory regimes outside the United States and the United Kingdom.

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We thank the CCMR jurisdictions for this opportunity to provide our comments on the proposed draft CMA and Regulations.

Our working group for these comments consisted of John Tuzyk, Ross McKee, Andrea Laing, Ryan Morris, Matthew Merkley, Aaron Palmer, Gordon McKenna, Steven McKoen, Markus Viirland, Ralph Lindzon and Pamela Hughes.

You may direct any further follow-on communications to John Tuzyk (john.tuzyk@blakes.com).

Yours very truly,

Blake, Cassels & Graydon LLP