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By Email: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Draft Prospectus and Related Registration Exemptions for the Cooperative Capital Markets Regulatory System (the "Proposed Regulations")

Thank you for the opportunity to comment on the Proposed Regulations.

Our comments are focused on certain aspects of new CMRA Regulation 45-501 *Prospectus and Registration Exemptions* ("**CMRA Regulation 45-501**") where the local prospectus exemptions of the participating jurisdictions (the "**CMR Jurisdictions**") would benefit from further harmonizing and modernizing. We have not commented on the balance of the Proposed Regulations as these pertain only to changes necessary for the adoption (without substantive amendment) of existing national and multilateral instruments, policies and forms.

In connection with this consultation in respect of the Proposed Regulations, we recommend that the CMR Jurisdictions also address their proposed regime for securities transactions outside the CMR Jurisdictions. This offshore offering regime will add a number of important prospectus exemptions that are best considered as a package together with the exemptions in the Proposed Regulations. Moreover, offshore offering regulation is an area in which there is a significant need for harmonization due to conflict in the existing local regulations and policies of the CMR Jurisdictions. For the reasons noted below, we recommend that the CMR Jurisdictions adopt a harmonized regime for securities transactions outside of the CMR Jurisdictions consistent with Ontario Securities Commission Rule 72-503 *Distributions Outside Canada* (the "**OSC Rule 72-503**") and its companion policy ("**OSC 72-503CP**").

CMRA Regulation 45-501 Part 3

<u>Section 98 – Definitions</u>

Offering Memorandum

To avoid introducing potential confusion and unintended consequences from the use of inconsistent terminology, we suggest that the new "making available to or sending to" language within the "offering memorandum" definition (in Section 98) be replaced with "delivery to" in order to remain consistent with

the “offering memorandum” definition in the *Securities Act* (Ontario). Delivery is a concept that is used throughout Canadian securities legislation governing offering documents. The concept of “availability” is not.

Prospective Purchaser

We recommend that CMRA Regulation 45-501 include clear provision (by way of a new definition in Section 98 or elsewhere) that references to “prospective purchaser” throughout CMRA Regulation 45-501 are limited to purchasers resident in a CMR Jurisdiction. The voluntary offering memoranda that are subject to CMRA Regulation 45-501 should not include any offering documents that are provided to prospective investors outside of the CMR Jurisdictions in respect of an offshore offering, whether that offering is made pursuant to an offshore offering exemption (under the CMRA equivalent to OSC Rule 72-503) or is determined to not be a “distribution” under the Capital Market Act (the “**CMA**”).

Specified Term Sheet

We support the inclusion of an exception for term sheets within the “offering memorandum” definition. While a typical term sheet should not in any event constitute an “offering memorandum”, clarity on this point is helpful. However, the proposed “specified term sheet” exception should not be limited only to circumstances in which prospective purchasers are provided an offering memorandum in addition to the specified term sheet. In the context of a private placement for which no offering document is prescribed, no policy purpose is served in deeming a basic term sheet to be an “offering memorandum” and subjecting that term sheet to the same disclosure and delivery requirements as an actual offering memorandum. This is distinguishable from the “standard term sheet” concept applicable in the context of a prospectus offering, where reference is appropriately made to the prospectus (and content is limited to that which may be derived from the prospectus), as the prospectus is the prescribed disclosure document by which a public offering must be made. Accordingly, we recommend amending the “specified term sheet” definition (in its introductory language, as well as clauses (b) and (c)) to accommodate private placements for which a term sheet is provided to prospective purchasers but there is no offering memorandum.

In addition, the permitted information for a “specified term sheet” under clause (e) of the definition should be expanded to include additional market and other offering specific information that is typically included in a term sheet. For example, a typical term sheet for a debt offering would include the issue spread (together with the benchmark government bond data), issue yield and the credit ratings and CUSIP/ISIN assigned to the offered debt security. It may also include a list of all of the dealers comprising the underwriting syndicate, which may include dealers that are not registrants (e.g., a concurrent cross-border offering). We suggest that you further consult with dealers and other market participants to identify what further terms should be permitted for a “specified term sheet”. Notably, some of these terms would not be included in the offering memorandum (*e.g.*, issue spread). This is market information not specific to the issuer that is appropriately included in a term sheet but is not necessary for the offering memorandum. Clause (c) of the “specified term sheet” definition should be amended to accommodate inclusion of this additional market information (despite not being derived from the actual offering memorandum). Further, it is unclear why it is necessary to impose a three line limit (per the “brief description” definition) in respect of certain permitted information. While we do not

object in principal to some limitation to ensure that a description of the business of the issuer is indeed brief, there may be circumstances where three lines is not sufficient (*e.g.*, an acquisition financing). Moreover, it will be impractical in many offerings to limit the description of the securities and the use of proceeds to no more than three lines of text. This may also pose an issue for the description of interest payable on certain debt securities (*e.g.*, those with a floating interest rate or the option for 'pay-in-kind' interest). We suggest that you remove this "brief description" limitation entirely or, alternatively, limit its application only to the description of the business of the issuer (clause (d)). Finally, a "specified term sheet" should be permitted to include any disclosure required by NI 33-105 to address underwriting conflicts as well as the legal disclaimers and other legends that are standard for private placement term sheets (*e.g.*, to address applicable securities laws (both Canadian and foreign) and transfer limitations and confidentiality and use restrictions with respect to the term sheet).

While the above concerns are also relevant in the context of a public offering (due to the overly restrictive content limitations for a "standard term sheet"), the incremental burden of a term sheet failing to qualify as a "standard term sheet" is relatively minor, as the issuer is already filing a prospectus. In contrast, requiring that typical term sheets for private placements satisfy the disclosure and delivery requirements applicable to an actual offering memorandum is a real burden, involving time and legal expense without a corresponding investor protection or other policy driven benefit. As a result, as we have proposed above, the "specified term sheet" concept should be more accommodating than the "standard term sheet" concept used for public offerings.

<u>Section 99 – Delivery of offering memorandum</u>

We recommend deleting section 99. In general, it seems an unnecessary burden to require delivery of a voluntary offering memorandum to the Chief Regulator. Moreover, it subjects a private issuer to the risk of potential public disclosure of confidential information in its offering memorandum under freedom of information legislation or other regulatory processes. That risk can have a significant chilling effect on private issuers' participation in Canada's exempt market. Notably, this requirement is now out of step with most other jurisdictions. While a few CMR Jurisdictions have a local requirement for the delivery of a voluntary offering memorandum to their local securities regulator, most Canadian jurisdictions do not require this delivery. Nor is it required under U.S. federal securities laws. Accordingly, to meet the objective of making our capital markets more efficient (by harmonizing securities regulation and reducing regulator burden that is not supported by a compelling rationale), modern and competitive, we suggest deleting this voluntary offering memorandum delivery requirement in its entirety.

If a voluntary offering memorandum delivery requirement is included in CMRA Regulation 45-501, non-reporting issuers should be excepted from the requirement in order to address the aforementioned confidentiality concern. In addition, we suggest that you consider further improvements to clarify the extent of the delivery obligation and minimize the administrative burden of this requirement. For example, section 99 could include an additional clause to clarify that the seller is not required to deliver to the Chief Regulator a preliminary version of an offering memorandum provided that the only difference between it and the final version (which is delivered to the Chief Regulator) is the inclusion of pricing information.

Distributions Outside of the CMR Jurisdictions

The associated backgrounder notes that the Proposed Regulations are intended to be a 'single set' of prospectus and related registration exemptions that would apply in the CMR Jurisdictions. We trust, however, that the CMR Jurisdictions' regime for securities transactions outside the CMR Jurisdictions will involve a number of additional prospectus exemptions that will be addressed through a separate CMRA regulation and policy (to replace the previously proposed CMRA Regulation 71-501 and CMRA Policy 71-601). Despite being the subject of separate regulation, we think it is important to address the CMR Jurisdictions' proposed offshore offering regime concurrently with the Proposed Regulations as they are best considered as a single package. Moreover, offshore offering regulation is an area in which there is a significant need for harmonization due to conflict in the existing local regulations and policies of the CMR Jurisdictions.

We recommend that CMRA adopt an offshore offering regime consistent with the regime established by OSC Rule 72-503 and OSC 72-503CP. While there are a number of ways in which it could be improved[1], Ontario's offshore offering regime is a significant improvement over regimes employed in other Canadian jurisdictions. Offshore offering exemptions adopted for British Columbia in BC Instrument 72-503 are more limiting than their Ontario counterparts because they fail to accommodate the improvements and corrections that the OSC made to OSC Rule 72-503 in 2017. Moreover, in many cases, the B.C. exemptions require more detailed post-trade reporting, which adds unnecessary cost and, where individual purchaser information is required, may conflict with the privacy expectations of certain foreign purchasers and dealers. Notably, exemptions proposed by the Alberta Securities Commission in April 2018 (ASC Rule 72-501) line up with the corresponding exemptions in OSC Rule 72-503 (not BC Instrument 72-503) except with respect to the form of post-trade report.

In addition to harmonizing the offshore exemptions, it is critical that the CMR Jurisdictions resolve the conflicting interpretation among Canadian jurisdictions as to what constitutes a "distribution" for purposes of applying their respective prospectus requirements. This conflict stems from the contrast between the modern 'distribution-in' approach applied in Ontario and the extra-territorial approach applied in Alberta and British Columbia, which further captures any 'distribution from' the jurisdiction. For all of the reasons detailed in Davies' commentary with respect to proposed CMRA Policy 72-601[2], and the initial proposal in respect of OSC Rule 72-503[3], the term "distribution" should only capture offers of those securities that are made, directly or indirectly, in a CMR Jurisdiction – it should not capture offers made outside of the CMR Jurisdictions (provided they are not indirect offers within a CMR Jurisdiction) because affording protection to non-resident investors is outside of the scope and purpose of Canadian prospectus requirements. Consistent with the purposes of the CMA, the prospectus requirement of the CMA should be focused on providing protection to investors resident in

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1 For suggested improvements, see Davies' comment letters (each dated September 27, 2017) with respect to OSC Rule 72-503 (addressed to the Ontario Securities Commission) and with respect to proposed amendments to National Instrument 45-102 Resale of Securities (addressed to the Canadian Securities Administrators).

2 See Davies' comment letter dated December 21, 2015.

3 See Davies' comment letter to the Ontario Securities Commission dated September 28, 2016.

CMR Jurisdictions from unfair, improper or fraudulent practices. The separate objective of protecting the integrity of the capital markets of the CMR Jurisdictions is properly, and adequately, achieved through the broad public interest powers afforded under the CMA – not the prospectus requirement. Given these existing policy differences, it is critical to clearly express the CMRA Jurisdictions' policy on this point. The policy adopted will also impact the extent to which additional exemptions are necessary for offshore offerings[4].

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If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Yours very truly,

(signed) David Wilson

[4] Each of Alberta and British Columbia have local rules that provide offshore offering related exemptions additional to those in OSC Rule 72-503. These additional exemptions attempt to address the unintended consequences of their extra-territorial approach to regulating offshore offerings. However, they are not sufficient.