Blakes

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

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VIA E-MAIL

Reference: 64521/2

Consultation Process

commentonlegislation@ccmr-ocrnc.ca

Re: Provincial Capital Markets Act
Audit firm comments on Part 2

Dear Sirs/Mesdames:

We are counsel to the Canadian audit firms Deloitte LLP, KPMG LLP, Ernst & Young LLP and PricewaterhouseCoopers LLP. On their behalf, we write with concerns about certain provisions in the consultation draft of the Provincial Capital Markets Act (the "PCMA"). The firms limit their comments here to Part 2 of the PMCA, and specifically certain provisions regarding auditor oversight organizations.

Since 2004, the national auditor oversight organization in Canada has been the Canadian Public Accountability Board ("CPAB"). Every audit firm which audits a Canadian reporting issuer is party to a participation agreement with CPAB, as required by National Instrument 52-108, and pursuant to which a body of rules has been established ("CPAB Rules"). CPAB was subsequently given statutory authority pursuant to various provincial legislation, which in Ontario is the *Canadian Public Accountability Board Act (Ontario), 2006*, S.O. 2006, c.33, Sch. D ("CPAB Act"). The CPAB oversight system works well and is a counterpart to the public audit firm oversight system in the United States operated by the Public Company Oversight Board ("PCAOB") established in 2002 pursuant to the *Sarbanes-Oxley Act*.

Unlike other self-regulatory organizations contemplated by the PCMA (but similar to the PCAOB), the CPAB oversight framework is premised on the free flow of confidential communications and reports between the CPAB and participating audit firms concerning the inspection of audits of reporting issuers (CPAB Rule 413), subject to public disclosure if the audit firm does not satisfactorily address weaknesses or deficiencies identified in systems of quality control or specific audit engagements (CPAB Rule 414) and subject to notice or disclosure in defined circumstances to regulatory authorities including the provincial Institutes, securities regulators, OSFI and foreign audit oversight authorities (CPAB Rule 417; CPAB Act, ss. 13, 14; and NI 52-108, ss. 5, 6). While auditors have wide powers to obtain documents and information from reporting issuer clients as necessary to carry out their role as auditor (e.g. OBCA, s. 153(5)), they are under a professional obligation to maintain confidence over client information obtained in the course of a professional engagement (e.g. Chartered Professional Accountants of Ontario Rule 208).

In light of these considerations, we comment as follows:

Client Privileged Information

The audit firms are required by the participation agreement and by provincial legislation (e.g. CPAB Act, ss. 11(1) and (4)) to provide CPAB with all documents and information that the firm obtains or prepares in order to perform the audit of a reporting issuer, including that issuer's documents and information that are subject to solicitor-client privilege. When privileged documents and information are disclosed to CPAB, the privilege is not waived but continues for all other purposes (CPAB Act, s. 11(5)). The CPAB Act is thereby consistent with the strong protections repeatedly recognized for solicitor-client privilege by Canadian courts, including the Supreme Court of Canada which has held that solicitor-client privilege should be "as close to absolute as possible": *R. v. McClure*, [2001] 1 S.C.R. 445, paras 31-34.

The audit firms submit that it is critical that the PMCA be consistent with this authority in both approach and terms. For example, PMCA section 15(3) should be made expressly subject to section 16(5). In all respects, the PMCA and subsequent regulations should ensure that privilege is protected and not subject to a general waiver by virtue of disclosure under the Act. At the same time, the audit firms believe that the proper functioning of the CPAB oversight system is facilitated and enhanced by the statutory requirement to deliver privileged documents and information to CPAB (as in CPAB Act, section 11(4)), which avoids the creation of unnecessary tensions between the client and audit firm, or between the client and regulatory authorities.

It is worth noting that the CPAB Act applies to all reporting issuers as determined by Ontario securities law, which includes not only issuers that have issued securities in Ontario under a prospectus, but also issuers that have their securities traded on a stock exchange in Ontario. Accordingly, the CPAB Act (while Ontario legislation) applies to the vast majority of reporting issuers in Canada, regardless of their location or the law under which they are constituted. The statutory requirement in section 11(4) of the CPAB Act functions well and, if followed in the PMCA as the firms recommend, the proposed section 16(3) of the PCMA is unnecessary.

Confidential Communications between CPAB and Audit Firms

Subsection 11(2) of the CPAB Act restricts the disclosure of documents and other information prepared for or received by CPAB in the course of its mandate without the written consent of all persons whose interests might be reasonably affected or without a court order. In the US context, subsection 105(b)(5) of the Sarbanes-Oxley Act similarly contains a provision exempting such documents or information from production except in defined circumstances. These provisions recognize that confidentiality of communications between reporting issuers and their auditors, and those auditors and the audit oversight organization, is essential to the operation of the oversight framework. The PCMA should contain a similar provision.

Subsection 15(3) of the PCMA requires the CPAB to provide the Authority with any information or record or thing, "other than information, records or things within a prescribed class". It is not possible

to assess the adequacy of the impact or operation of this provision in the absence of regulations defining the prescribed class. As general proposition, the audit firms believe that it is most appropriate for the Authority to obtain information from reporting issuers directly, rather than via CPAB via the auditor. Further, the audit firms ask that the "prescribed class" be defined so as to preserve the balance between confidentiality of communications between CPAB and participating audit firms, and disclosure to the public and to regulators (including provincial Institutes, securities regulators and OSFI) that is reflected in the current framework and in particular in CPAB Rules 413 and 417, CPAB Act section 13, and NI 52-108 sections 5 and 6.

If you have any questions or wish to discuss these issues with the audit firms, please contact Brad Berg (tel. 416-863-4316) at your convenience.

Yours very truly,

Blake, Cassels & Graydon LLP

c. Brad Berg, Blakes
Rob Collins, Blakes

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