Cooperative Capital Markets Regulatory System – Revised Consultation Draft of the Provincial/Territorial *Capital Markets Act* and Draft Initial Regulations

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association.

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Cooperative Capital Markets Regulatory System – Revised Consultation Draft of the Provincial/Territorial *Capital Markets Act* and Draft Initial Regulations

EXECUTIVE SUMMARY

The Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association (the CBA Sections) are pleased to comment on the Cooperative Capital Markets Regulatory System (CCMR) revised consultation draft on the provincial and territorial Capital Markets Act (CMA) and its draft initial regulations (CMRA Regulations) published on August 25, 2015. The CBA is a national association representing over 36,000 jurists, including lawyers, Quebec notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice.

These comments are the collective work of the Securities Committee of the Business Law Section and the Canadian Corporate Counsel Association of the CBA. Together, these groups comprise lawyers from across Canada who are experts in all areas of securities law including securities filings, initial public offerings, corporate governance, continuous disclosure, registrants, and other financial instruments including both transactional and regulatory practice and litigation.

While much of the detail of the legislative framework is hashed out in the CMRA Regulations, matters dealing with the interface with non-CMR jurisdictions should be addressed before the CMA comes into force to avoid creating a potentially more fractured regulatory system.

Our substantive comments are organized in accordance with the draft initial regulations.

Certain Capital Market Participants

We believe the requirements of Section 2 of CMRA Regulation 21-501 would be better placed in NI 21-101 instead of a standalone instrument.

It is unclear why section 3 of CMRA Regulation 21-501 regarding the Bourse de Montreal Inc. exists, or whether it is correct to state that Bourse de Montreal Inc. is recognized for the

purposes of NI 21-101 and NI 23-101 in the Capital Markets Regulatory (CMR) jurisdictions, or why other exchanges are not included here.

The requirements of section 4 of CMRA 21-501, as they relate to recognized exchanges, might be better placed in NI 21-101 or in the recognition orders for recognized exchanges, rather than in a standalone instrument.

Registration Requirements, Exemptions and Related Matters

Section 3 of CMRA Regulation 31-501 imposes additional responsibilities on an exempt market dealer's auditor to bring these responsibilities in line with those of auditors of the Investment Industry Regulatory Organization of Canada (IIROC) and Mutual Fund Dealers Associations. This would be an additional burden for exempt market dealers but would bring review procedures in line with those of IIROC and mutual fund dealers.

Prospectus Requirements and Exemptions

Under section 2 of CMRA Regulation 41-501, we generally support the consolidation of subsection 120(2) of the Securities Rules (British Columbia), subsection 75(2) of the *Securities Act* (New Brunswick), subsection 61(2) of the *Securities Act* (Ontario), and subsection 70(2) of *The Securities Act*, 1988 (Saskatchewan) as presented. However, we urge caution with the discretion provided to the Chief Regulator. We also generally support subsection 3(1), 3(2) and 4(1) of CMRA Regulation 41-501.

We support carrying over into the CMRA Regulation 41-501 Parts 1, 3 and 4 of OSC Rule 56-501 Restricted Shares (56-501), which restrict the use of prospectus exemptions for restricted shares in the absence of minority shareholder approval. Because this will be a substantive change for unlisted reporting issuers in CMR jurisdictions other than Ontario, we suggest that the fact be stated explicitly in a future CCMR publication.

Assuming there is no intent to apply section 13 of CMRA Regulation 11-501 to subsections 60(3) or (4) of the CMA, we propose that the reference to subsection 60(5) of the CMA be removed from section 13 of CMRA Regulation 11-501.

Section 9.1.1 of NI 45-101 Rights Offerings provides that an exemption from the prohibition will be evidenced by the non-objection to a circular or the receipt for a prospectus for a rights offering. Since subsection 60(4) of the CMA does not include this provision for written permission, we question whether it is necessary to include section 9.1.1.

We suggest that the prohibition on listing representations should not apply to securities of a class of securities already listed on an exchange.

National Policy 47-201 reflects the disparity in approach between provincial securities commissions asserting jurisdiction over trading. The effect of adopting CCMR Rules that expand the application of extra-territorial jurisdiction to more provinces and territories is anachronistic in its approach. In our view, the CMR jurisdictions should be encouraged to adopt the jurisdictional approach of Ontario reflected in section 2.3 of National Policy 47-201 which is more efficient as it does not purport to extend its jurisdictional reach beyond its own borders, but may elect to do so in the public interest on a case by case basis.

We support replacing applicable corporate law provisions dealing with trust indentures with Part 3, section 7 of CMRA Regulation 41-501.

Disclosure and Proxies

We believe there needs to be a consistent approach under CMRA Regulation 71-501 on the extra-territorial application of a jurisdiction's securities laws.

International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions

Arguably, CMRA Policy 71-601 presents a departure from the current Ontario practice for non-reporting issuers. The scope of the concept of an "indirect distribution" is broad. It could potentially include almost any initial issuance and subsequent resale of a security that may end up being traded in Ontario. In our view it would be useful to provide more guidance on the concept of "indirect distribution" through commentary and examples. Consider clarifying that, absent an intent to circumvent the prospectus requirement, the concept of an "indirect distribution" will not apply to the initial issuance and subsequent resale of a security which is not subject to a statutory hold period following the initial issuance.

As a general comment, the section 4(1) exemption of CMRA Regulation 71-501 provides more certainty for issuers selling "from a CMR jurisdiction" or making "indirect distributions" into a CMR jurisdiction. However, the section 4(1) exemption would not be available for issuers that are not listed or quoted. We do not support placing a restriction on private placements outside of a CMR jurisdiction by CMR issuers not listed or quoted on a qualified market without a detailed analysis of the impact this may have on the ability of such issuers to raise capital.

Derivatives

While at this stage we support the approach under the CMA to adopt the provincial securities derivatives regime, securities regulators should continue to work closely with foreign regulators to adopt harmonized rules to provide Canadian market participants with continued access to international markets. Under the proposed regulations, trades with affiliated entities are required to be reported. We believe that trades with affiliates should continue to be exempted. We also suggest that consideration be given to exempting trades between end-users and their affiliates regardless of jurisdiction given the increasingly international nature of domestic companies operating globally.

I. INTRODUCTION

The Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association (the CBA Sections) are pleased to comment on the Cooperative Capital Markets Regulatory System (CCMR) revised consultation draft on the provincial and territorial Capital Markets Act (CMA) and its draft initial regulations (CMRA Regulations) published on August 25, 2015. The CBA is a national association representing over 36,000 jurists, including lawyers, Quebec notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice.

These comments are the collective work of the Securities Committee of the Business Law Section and the Canadian Corporate Counsel Association of the CBA. Together, these groups comprise lawyers from across Canada who are experts in all areas of securities law including securities filings, initial public offerings, corporate governance, continuous disclosure, registrants, and other financial instruments including both transactional and regulatory practice and litigation.

Our comments are organized in accordance with the structure of the commentary on the draft initial regulations document provided in the consultation.

II. DEFINITIONS, PROCEDURE, CIVIL LIABILITY AND RELATED MATTERS

Our comments relate to CMRA Regulation 11-501.

A. Section 1(2) – (3), Section 6 – Capitalization of "Regulation"

The definition of "regulation" in section 2 of the CMA is singular and not capitalized. Capitalization of "Regulation" is used. Either the defined term should be capitalized in the CMA (consistent with terms such as "Authority" and "Chief Regulator") or "Regulation" should be capitalized only in reference to a specific regulation, e.g., "CMRA Regulation 11-501".

B. Section 5 – Person Prescribed to be a Reporting Issuer

The term "CMR launch date" is not defined.

C. Section 7(3) – Exemption ,Voluntary Surrender of Reporting Issuer Statues

It is not clear why this section is titled "Exemption". We suggest that "Effect of Notice" is more appropriate to suit the provision's purpose.

D. Section 14 – Prescribed Converting Security

This is an open ended definition rather than a prescription of the kinds of converting securities that will be covered by Part 12 of the CMA. In that sense it is analogous to the definition of "convertible security" in NI 45-102.

Section 118 of the CMA references a "prescribed converting security". The term "prescribed" implies that the regulations will specify the types of converting securities in the statutory right of action. However, section 14 seems to define "converting security" generally rather than prescribing specific kinds of converting securities. If the statutory right of action in section 118 is intended to be broad, it would be more appropriate to use the term converting security in the CMA and define the term in the regulations.

E. Section 22 – Liability in Margin Contracts

Section 22 confers a statutory right on investors and should be included in Part 12 of the CMA. This is consistent with the essential statutory rights in the CMA and the provisions governing liability in margin contracts in the CMR jurisdictions.

III. CERTAIN CAPITAL MARKET PARTICIPANTS

Our comments focus on CMRA Regulation 21-501.

A. Section 2 – Requirement to Provide Information to Clients

The phrase “client of a member or participant” should be replaced with “client of a marketplace participant”. “Marketplace participant” should have the meaning in NI 21-101.

The requirement in Section 2 currently exists in the securities acts of British Columbia, Saskatchewan and Ontario. However, NI 21-101, Part 11 contains detailed requirements for the collection and disclosure of trade information. We believe the requirements of Section 2 would be better placed in NI 21-101 instead of a standalone instrument. We acknowledge, however, that it may be more expedient for the securities commissions to avoid amending NI 21-101.

B. Section 3 – Bourse de Montreal Inc.

It is not clear why this section exists, or whether it is correct to state that Bourse de Montreal Inc. is recognized for the purposes of NI 21-101 and NI 23-101 in the Capital Markets Regulatory (CMR) jurisdictions, or why other exchanges are not included here.

Under the existing securities regulatory regime, each province has jurisdiction to recognize or exempt exchanges. The recognition or exemption order issued by each province typically contains many conditions.

The Bourse de Montreal Inc. is a recognized exchange in Quebec and is subject to conditions in a detailed recognition order. In Ontario, for example, it is exempt from recognition and the exemption is subject to conditions in the exemption order. Although British Columbia Instrument 21-501 recognizes or designates certain exchanges, it has not been customary in Ontario to list recognized exchanges in a regulatory instrument. Furthermore, other exchanges are listed in British Columbia Instrument 21-501 (e.g. the TSX and TSXV), which are absent from section 3 of CMRA Regulation 21-501.

C. Section 4 – Auditor of Member

NI 21-101 and the recognition orders issued by the commissions for a recognized exchange contain detailed requirements for the conduct of recognized exchanges. The requirements of section 4 (as they relate to recognized exchanges) might be better placed in NI 21-101 or in the recognition orders for recognized exchanges, rather than in a standalone instrument. Similarly,

the requirements of section 4 (as it relates to self-regulatory organizations) might be better placed in the recognition orders for self-regulatory organizations. We acknowledge that it may be more expedient for the commissions to avoid amending NI 21-101 or existing recognition orders.

D. Section 5 – Restriction on Shareholdings of a Recognized Exchange

It is common practice for recognition orders of a recognized exchange to require that no person may own more than 10% of the voting shares of a recognized exchange, as well as other requirements regarding ownership of securities and governance matters. We therefore question whether section 5 is required.

E. Section 6 – Trade Reporting for CUB Securities

Paragraph 6(1)(c) should be revised to ensure that section references remain relevant. For example, section 2.7 of NI 45-106 has been repealed.

IV. REGISTRATION REQUIREMENTS, EXEMPTIONS AND RELATED MATTERS

A. CMRA Regulation 31-501

Most of the proposed changes are non-contentious as they are directed at transitioning NI 31-103 into the CCMR regime or integrating the regulation of derivatives into the new regime.

B. Part 1 – Definitions and Interpretation

References to the non-CMR jurisdictions remain in the definitions, suggesting that the rule has application to certain activities in the non-CMR jurisdictions.

Matters dealing with the interface with non-CMR jurisdictions should be addressed before the CMA comes into force to avoid creating a potentially more fractured regulatory system. The commentary to the CMA states that “the CMRA will use its best efforts to negotiate and implement an interface mechanism with non-participating jurisdictions such that the CCMR is effectively of national application”. The current passport system could be a starting point.

C. Part 2 – Registration Requirements

Auditor of registrant

Section 3 of CMRA Regulation 31-501 imposes additional responsibilities on an exempt market dealer's auditor to bring these responsibilities in line with those of auditors of the Investment Industry Regulatory Organization of Canada (IIROC) and Mutual Fund Dealers Associations. These include examining the registrant's financial statements and other regulatory filings in accordance with the General Anti-Avoidance Principle and preparing a report on the financial affairs of the registrant in accordance with professional reporting standards.

This would be an additional burden for exempt market dealers but would bring review procedures in line with those of IIROC and mutual fund dealers.

V. PROSPECTUS REQUIREMENTS AND EXEMPTIONS

Our comments on the prospectus and distribution rules relate to CMRA Regulation 41-501 and proposed amendments to National Policy 47-201.

A. Section 2 of CMRA Regulation 41-501 (the Regulation) – Refusal to Issue Receipt for Prospectus

Generally, we support the consolidation of subsection 120(2) of the Securities Rules (British Columbia), subsection 75(2) of the *Securities Act* (New Brunswick), subsection 61(2) of the *Securities Act* (Ontario), and subsection 70(2) of *The Securities Act*, 1988 (Saskatchewan) as presented in the Regulation. However, the new section gives the Chief Regulator significant discretion when determining whether to refuse a receipt for a prospectus, from which the person or company who filed the prospectus would have no grounds to appeal. Subsections 61(3)–(8) of the *Securities Act* (Ontario) gives a framework that entitles the refused person or company who filed the prospectus an opportunity to be heard and allows the director to address matters in the interpretation of subsection 61(2). Although subsection 31(3) of the CMA gives the refused person or company who filed the prospectus an opportunity to be heard, subsections 61(3)–(8) of the *Securities Act* (Ontario) give a more in-depth framework for those procedures and interpretation related matters. These provisions are missing from the current draft Regulation and should be included in future versions.

The discretion granted could have significant repercussions for issuers attempting to access the capital markets. If the Chief Regulator refuses to issue a receipt for a prospectus pursuant

to section 2, the impacted issuer should have a level of procedural fairness that better balances the public interest with the needs of issuers to be able to effectively access the capital markets.

B. Section 3 of the Regulation – Permitted Activities Under Preliminary Prospectus

Generally, we support current form of subsection 3(1) of the Regulation. However, subsection 3(1)(b) follows the current language in the *Securities Act* (British Columbia), referring to "give out a preliminary prospectus". We believe that this term is not sufficiently precise and should follow the language in the *Securities Act* (Ontario), "to distribute a preliminary prospectus".

We support the carry forward of subsection 3(2) of the Regulation from the similar provisions in the *Securities Act* (British Columbia) and the *Securities Act* (Ontario), that require any dealer distributing a security during the waiting period to send a copy of the preliminary prospectus to each prospective purchaser who, without solicitation, indicates an interest in purchasing the security and requests a copy of the preliminary prospectus.

C. Section 4 of the Regulation – Material Given on Distribution

Generally, we support the current form of subsection 4(1) of the Regulation. However, we suggest using "send" rather than "give out" to be consistent with the terminology in Part 5 of the CMA and Part 16 of NI 41-101. The commentary to the Regulation suggests that only the materials listed in subsection 4(1) of the Regulation may be distributed. However, given the permissive language of subsection 4(1), it is not clear where there is a general prohibition on distributing other materials. We suggest expressly addressing the interaction of this subsection with Part 13 of NI 41-101, particularly to the extent that any materials listed in subsection 4(1) may be considered to be marketing materials under NI 41-101.

D. Section 5 of the Regulation – Obligation to Send Prospectus

The language of subsection 5(2) of the Regulation follows the current language in the *Securities Act* (British Columbia). However, removal of the obligation to deliver prospectus amendments if the agreement of purchase and sale has been entered into before the obligation to file the amendment arises would represent a change in some jurisdictions. We question whether the relief from the requirement to deliver prospectus amendments should run from the expiration of the rescission period under proposed CMRA Regulation 11-501 rather than the time of entry into the agreement of purchase and sale.

E. Section 6 of the Regulation – Publication of Research Reports During Distributions

We generally support carrying forward Part 4 of Ontario Rule 48-501. However, the term "restricted period" is used without definition, as in the existing Ontario Rule.

F. Section 8 of the Regulation – Restricted Shares

We support carrying over into the Regulation Parts 1, 3 and 4 of OSC Rule 56-501 Restricted Shares (56-501), which restrict the use of prospectus exemptions for restricted shares in the absence of minority shareholder approval. Although not stated in the Draft Initial Regulations, this will be a new provision for CMR jurisdictions other than Ontario. However, because there are rules in the TSX Venture Exchange Corporate Finance Manual and in the TSX Company Manual limiting the issuance of restricted shares, there is no apparent substantive change for issuers listed on those exchanges.

Because this will be a substantive change for unlisted reporting issuers in CMR jurisdictions other than Ontario, we suggest that the fact be stated explicitly in a future CCMR publication.

The term "preference shares" is defined in subsection 8(1) but not used in the Regulation. We suggest that it be removed or, if it is defined here because it is anticipated to be used in a form to be appended to the Regulation, that the definition be moved either to section 1 or to the applicable form.

Pursuant to paragraph 8(7)(a), the restrictions in subsection 8(5) do not apply to reorganizations that took place before December 21, 1984. We acknowledge that this is a carry-over from 56-501, but we question whether it remains necessary. This rule does not currently apply in any CMR jurisdiction other than Ontario, and there may be reporting issuers in other CMR jurisdictions that have conducted reorganizations since 1984 that would have been caught by this restriction had it existed. We propose that either paragraph 8(7)(a) be removed or the date referenced be updated to the date of implementation of the Regulation. We do not believe that either proposal would create any lapse in effectiveness in Ontario, assuming that 56-501 remains in effect until the date of implementation of the Regulation.

G. Listing Representations

The rule in BC Notice 47-701 Blanket Permission Under Section 50(1)(c) of the *Securities Act* (British Columbia), which allows representations as to the future listing of securities on an

exchange if such representations do not constitute a misrepresentation, is not proposed to be carried over into the CCMR. Some clarity on this would be helpful.

We have three comments about the prohibition on listing representations in section 60(4) of the CMA.

The first relates to the wording of the exception in section 13 of 11-501:

> 13. Prohibited representations – exceptions
>
> For the purposes of subsections 60(1) and 60(5) of the CMA, the prescribed circumstances are if the representation is contained in a written agreement and the security involved has an aggregate acquisition cost of more than $50,000.

In light of subsection 60(5) of the CMA, set out below, this appears either to provide an exception from the prohibition on listing representations or to be confusingly repetitive. We assume it is the latter, given that applying this exception to listing representations would be a substantive change in the law that has not been acknowledged. Subsection 60(5) of the CMA states:

> Subsection (1) [representations as to a future repurchase], (3) [representation as to future value] or (4) [representation as to listing] does not apply in the prescribed circumstances.

Assuming there is no intent to apply section 13 of CMRA Regulation 11-501 to the subsections 60(3) or (4) of the CMA, we propose that the reference to subsection 60(5) of the CMA be removed from section 13 of CMRA Regulation 11-501.

Second, section 9.1.1 of NI 45-101 Rights Offerings provides that an exemption from the prohibition will be evidenced by the non-objection to a circular or the receipt for a prospectus for a rights offering. The *Securities Act* (British Columbia) (paragraph 50(1)(c)) and the *Securities Act* (Ontario) (subsection 38(3)) currently provide for exceptions to the prohibition if "written permission" is provided by the regulator. In the context of a rights offering, this written permission is evidenced in the non-objection or the receipt of the regulator. Since subsection 60(4) of the CMA does not include this provision for written permission, we question whether it is necessary to include section 9.1.1.

Third, we suggest that the prohibition on listing representations should not apply to securities of a class of securities already listed on an exchange. Many private placement subscription agreements contain a statement that shares being issued (of a class already listed) will be listed, or at least that the issuer will apply to have them listed. As it stands, subsection 60(4) of the CMA (as well as the existing statutory provisions to this effect) technically prohibits such a statement, even if unintentionally.

H. Comment on National Policy 47-201

The proposed CCMR Rules represent an opportunity for regulation to be harmonized and updated. National Policy 47-201, adopted on December 17, 1999, reflects the disparity in approach between provincial securities commissions asserting jurisdiction over trading. In general, Ontario has adopted the view that a distribution of securities entirely outside of Ontario is not subject to Ontario securities laws. This presumes that securities distributed outside of Ontario will not come to rest in Ontario within a prescribed hold period.

The effect of adopting CCMR Rules that expand the application of extra-territorial jurisdiction to more provinces and territories is anachronistic in its approach. It will unnecessarily burden issuers with an increase in filings and related costs without materially benefiting market participants within the jurisdiction where it is applied.

In principle, we believe that Ontario's approach is more efficient as it does not purport to extend its jurisdictional reach beyond its own borders, but may elect to do so in the public interest on a case by case basis. This would only arise for activities originating in its own jurisdiction subject to legal tests ordinarily applied in the circumstances. This would most likely apply in matters involving financial crimes, which would fall under the purview of provincial and federal law enforcement agencies and not provincial securities commissions.

In our view, the CMR jurisdictions should be encouraged to adopt the jurisdictional approach of Ontario reflected in section 2.3 of National Policy 47-201.

I. Part 3 of the Regulation – Trust Indentures

We support replacing applicable corporate law provisions dealing with trust indentures with Part 3, section 7 of the Regulation.

Section 7(6)(b) as currently drafted refers to "***the*** security interest constituted by or under the trust indenture" (emphasis added). This infers that a security interest exists. We suggest that

"the" be changed to "any" or "a" to provide for situations in which a security interest may not exist (consistent with the applicable provision of the *Canada Business Corporations Act*).

Section 7(8)(a) requires the trustee to provide a list of information including the name and address of each person holding outstanding debentures. To clarify that this only requires the trustee to provide information from the register of debenture holders, we suggest changing the reference from holders to registered holders (consistent with the applicable provision of the *Canada Business Corporations Act*).

Section 7(14) refers to "compliance with every term of the trust indenture" for specified acts. The *Canada Business Corporations Act* refers to compliance with the conditions in the trust indenture. Section 7(15), in addressing the types of evidence of compliance for the purposes of subsection (14), refers to compliance with conditions, and section 7(16) refers to an issuer or a guarantor providing the trustee with evidence as to "compliance with any condition in the trust indenture". For consistency, we suggest that section 7(14) be revised to replace the reference to compliance with every term of the trust indenture with compliance with the conditions in the trust indenture relating to the specified acts.

VI. DISCLOSURE AND PROXIES

We believe there needs to be a consistent approach under Regulation 71-501 on the extra-territorial application of a jurisdiction's securities laws. If an issuer must comply with local securities laws for offerings entirely outside of Canada, then the proposed rules for disclosure and proxies for companies listed on foreign markets make sense. If this is not the case, these rules should not be necessary. 71-501, as drafted, is not limited to issuers that have any connection to Canada, and lacks the commentary in the companion policy that is present for the corresponding current New Brunswick rule (72-501) that lays out the situations of concern for which the local regulator may seek to apply its securities rules.

VII. INTERNATIONAL ISSUERS AND SECURITIES TRANSACTIONS WITH PERSONS OUTSIDE THE CMR JURISDICTIONS

A. CMRA Policy 71-601

CMRA Policy 71-601 sets out at least two instances where an issuer selling to persons outside of the CMR jurisdictions must comply with the prospectus requirement:

(i) where an issuer in a CMR jurisdiction makes a distribution "from a CMR jurisdiction". This includes a distribution by an issuer where the following factors are in place: (a) mind and management in a CMR jurisdiction; (b) business of an issuer is administered from a CMR jurisdiction; (c) the operations of the issuer are in the CMR jurisdiction; or (d) if there are any advertising, underwriting or investor relations activities in a CMR jurisdiction; and

(ii) where there is an "indirect distribution into a CMR jurisdiction". The definition of distributions includes "a transaction or series of transactions involving a purchase and sale or repurchase and resale in the course of or incidental to a distribution." An indirect distribution can occur in two circumstances: (a) where an issuer located outside of a CMR jurisdictions distributes securities to a person outside a CMR jurisdictions but the securities are resold into a CMR jurisdiction, or through a market in a CMR jurisdiction, in a manner that indicates the securities did not come to rest outside the CMR jurisdictions and this issuer could reasonably foresee that the securities will be resold in the CMR jurisdiction; and (b) where an issuer located outside of a CMR jurisdiction distributes securities to a person outside a CMR jurisdiction but the issuer has a "significant connection" to the CMR jurisdiction. Factors to be considered in determining whether an issuer has a "significant connection" to a CMR jurisdiction include: majority of trading in a CMR jurisdiction; issuer is a reporting issuer in a CMR jurisdiction, significant portion of the assets in a CMR jurisdiction; significant portion of the revenues are derived from operations in a CMR jurisdiction; significant portion of the issuers security holders are in a CMR jurisdiction; issuer is incorporated or organized in a CMR jurisdiction.

Arguably, CMRA Policy 71-601 presents a departure from the current Ontario practice for non-reporting issuers. Currently in Ontario where a distribution of securities is effected outside of Ontario by an Ontario issuer or a non-Ontario issuer and reasonable steps are taken to ensure that the securities come to rest outside of Ontario (at least for the length of 45-102 hold periods), based on OSC Interpretation Note 1 there would likely be no distribution in Ontario requiring a prospectus or an exemption from the prospectus requirements.

The scope of the concept of an "indirect distribution" is broad. It could potentially include almost any initial issuance and subsequent resale of a security that may end up being traded in Ontario.

In our view it would be useful to provide more guidance on the concept of "indirect distribution" through commentary and examples.

As a starting point, the definition of "distribution" is broad and does not simply include public offerings and private placements but also issuances of securities pursuant to "transaction-based" exemptions such as the "business reorganization exemption" in section 2.11 of NI 45-

106. Consider clarifying that, absent an intent to circumvent the prospectus requirement, the concept of an "indirect distribution" will not apply to the initial issuance and subsequent resale of a security which is not subject to a statutory hold period following the initial issuance. An example of this scenario would be a distribution of a security by a reporting issuer pursuant to an amalgamation in reliance on the "business combination" exemption in section 2.11 of NI 45-106. Here, there is no hold period on the securities distributed and a security holder may promptly resell the securities (even if on a stock exchange in a CMR jurisdiction).

The policy preserves the concept of securities "coming to rest" outside of a CMR jurisdiction for the purposes of analyzing whether an issuance of securities and subsequent resale constitute an "indirect distribution". In preserving that concept, the CMRA acknowledges that it will not have jurisdiction over distributions by non-CMR issuers outside of a CMR jurisdiction, provided that the securities "come to rest" outside of the CMR jurisdiction.

It is not clear why an issuer's "significant connection" to the CMR jurisdiction would impact the analysis of whether a series of transactions are considered to be "incidental to a distribution". Even if an issuer has no connection to a CMR jurisdiction, in the context of a private placement, if the securities do not "come to rest" outside the CMR jurisdiction, the initial private placement and subsequent resale may be considered to be an indirect distribution in the CMR jurisdiction.

The policy references the concept of "reasonable foreseeability". This is a helpful and familiar concept. However, we suggest it could be clarified:

(i) Similar to the clarification set forth above, if a non-CMR issuer whose securities are listed on a stock exchange in the CMR jurisdictions issues securities to security holders outside of the jurisdiction in reliance on a "transaction based" prospectus exemption (such as the business reorganization exemption in section 2.11 of NI 45-106), the fact that the resale of those securities may occur (potentially immediately) on the stock exchange in the CMR jurisdiction should not result in the initial issuance and resale being an "indirect distribution"; and

(ii) By setting forth an example of a transaction where the CMRA would not apply to a private placement by a non-CMRA issuer which ends up ultimately being sold in a CMR jurisdiction. An example may be based upon the conditions set forth in the prospectus exemption set forth in section 4 of CMRA Regulation 71-501 (discussed below). Our comments on the exemption in that section also apply to this point.

B. CMRA Regulation 71-501

Part 1 Definitions and Interpretations

The definition of "Canadian underwriter" seems inconsistent with the changes to NI 31-103 which eliminate the underwriter registration category and subsume that registration under the investment dealer registration category.

Part 3 Distributions Outside the CMR Jurisdictions

Issuers who distribute out of a CMR jurisdiction or who make an indirect distribution in the CMR jurisdictions are required to file a prospectus or find a prospectus exemption.

As a general comment, the section 4(1) exemption provides more certainty for issuers selling "from a CMR jurisdiction" or making "indirect distributions" into a CMR jurisdiction. However, the section 4(1) exemption would not be available for issuers that are not listed or quoted.

We recommend that the public policy reason for each condition of the exemption be examined carefully, particularly the criteria that the issuer be quoted or listed. We do not support placing a restriction on private placements outside of a CMR jurisdiction by CMR issuers not listed or quoted on a qualified market without a detailed analysis of the impact this may have on the ability of such issuers to raise capital. The two goals of securities legislation are protecting the investing public and fostering fair and efficient capital markets. While a "distribution" may occur in more than one jurisdiction and therefore the CMRA may apply to a distribution outside of the CMR jurisdictions, as long as the laws of the jurisdiction where the purchaser is resident are being complied with and the conditions of section 4.1(a) and (b) (and perhaps (e)) are complied with, we believe that the goals of securities regulation may be satisfied.

Section 4(b)(iii) of CMRA Regulation 71-501 includes the concept of "continuing the distribution by reselling the security to a person in a CMR jurisdiction". We urge you to consider incorporating a similar concept in the indicia to determine whether an "indirect distribution" has been made in a CMR jurisdiction. . For example, if a non-CMR issuer obtains a similar representation from a purchaser in connection with a distribution in a non-CMR jurisdiction, in the event the securities are subsequently sold to a purchaser in a CMR jurisdiction, the non-CMR issuer has not made an "indirect distribution" into the CMR jurisdiction.

C. Local Rules Not Carried Forward

OSC Interpretation Note 1 - Distributions of Securities Outside of Ontario

While the new approach does provide greater certainty over the existing Ontario Interpretation Note, it also imposes additional local compliance obligations for non-listed companies especially for issuers without securities listed or quoted on a qualified market.

Section 2.14 of 45-102 will remain in place, meaning that the first trade of securities of a non-reporting issuer on a foreign exchange or to a person outside of Canada, if less than 10% of the shareholders are resident in Canada, will be exempt from the prospectus requirement. We question how this meshes with the "significant connections" criteria in Part 2 section 2 of CMRA Policy 71-601.

D. Questions for Comment on CMRA Policy 71-601

Our comments respond to the questions posed in the consultation, and copied below.

Question 1(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 believe the Canadian issuer should be specifically exempted from having to deliver a copy of the Canadian prospectus to U.S. purchasers. The Canadian prospectus does not serve any practical purpose for a distribution in the U.S.

Question 1(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?*

Yes. In our view, Canadian prospectus marketing rules do not serve any practical purpose for a distribution in the U.S.

Question 1(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.?*

Yes. U.S. purchasers will be sufficiently protected when purchasing under a U.S. prospectus which contains similar statutory rights. We do not believe a review of the relative ease or difficulty of pursuing a claim against a Canadian issuer in either jurisdiction will yield a satisfactory result or is relevant to the question posed (especially in light of the established jurisprudence for the recognition and enforcement of claims).

Question 1(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?*

Our answer to question 1(c) above applies equally to this question.

Question 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 tradable in CMR Jurisdictions under the CMA (subject to paragraphs (c) and (f) of the definition of "distribution" in section 2 of the CMA)?*

While we do not believe it is necessary to clarify in CMRA Policy 71-601 or the new CMRA regulations that securities distributed to U.S. purchasers under a Canadian prospectus filed with the Authority are freely tradeable in CMR Jurisdictions (subject to paragraphs (c) and (f) of the definition of "distribution" in section 2 of the CMA), it may be helpful to do so to eliminate uncertainty.

Question 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?*

We believe the U.S. underwriter should be specifically exempt from the dealer registration requirement in CMR Jurisdictions in this scenario. Requiring a U.S. underwriter to register in a CMR Jurisdiction in the scenario would serve no practical purpose and would create an unreasonable administrative and regulatory burden. Access to the U.S. market for Canadian issuers would be adversely impacted if U.S. underwriters were required to register.

Question 4: *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), 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?

There appears to be a lot of work for an issuer that has a connection to, but is not a reporting issuer in Canada and has a U.S. listing. If there is no flow back issue, why impose this requirement?

In this context, we believe it is necessary for market participants to revise the guidance in section 1.6 of Companion Policy 45-102 for the CMR Jurisdictions.

E. Questions for Comment on CMRA Regulation 71-501

Question 1: *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).

Being listed or quoted on a qualified market should not be included in the criteria for the exemption. Otherwise non-listed or non-quoted companies who meet the tests for selling from a CMR jurisdiction or indirect distributions into a CMR jurisdiction will have no exemption from the prospectus requirement. Ontario Interpretation Note 1 does not make this distinction and arguably does not raise concerns over flow back that arise with respect to larger enterprises and companies listed or quoted in a CMR jurisdiction.

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

This is an inconvenience to issuers but arguably does not interfere with their ability to raise capital. There may be some reluctance to listing foreign investors even where the information on the foreign investors is private. The CMR jurisdictions might consider eliminating that requirement from the report of trade form. The commissions would still get valuable information and could follow up with the parties should that be necessary.

Question 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).

The definition of "genuine market" is defined to include the Eurobond market, as regulated by the International Securities Market Association (ISMA). Should this reference be to International Capital Market Association, into which ISMA was merged in 2005? We are not

aware of any undue hardship or negative market impact, or any investor protection benefit that will result from limiting the exemption.

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

Requiring the issuer to list non-Canadian purchasers in the report of exempt distribution will have a limited practical purpose, which is outweighed by the undue administrative burden and the negative market impact, in that some non-Canadian purchasers would likely elect not to make an investment that would require them to be named in the report.

VIII. DERIVATIVES

While at this stage we support the approach under the CMA to adopt the provincial securities derivatives regime, securities regulators should continue to work closely with foreign regulators to adopt harmonized rules to provide Canadian market participants with continued access to international markets.

Current NI 91-507 sets out a hierarchy to determine which party is required to report a derivatives transaction. The hierarchy relies on the International Swaps and Derivatives Association (ISDA) methodology. The ISDA has created a Canadian Representation letter that parties can adhere to through an online portal to allocate reporting responsibilities to one of the parties. The corresponding draft CMRA Regulation 91-502 does not refer to the ISDA methodology. Rather, it requires the parties to enter into "a written agreement" to be "kept in a safe location and in a durable form and provided to the regulator within a reasonable time following request". A separate written agreement with each counterparty would be a cumbersome and costly process. The ISDA methodology permits parties to make a one-time election with all of its counterparties to follow a particular reporting protocol. We suggest that the CMR jurisdictions incorporate the ISDA methodology language or confirm that adhering to the Canadian Representation letter online would meet the requirement to enter into a written agreement.

Under the proposed regulations, trades with affiliated entities are required to be reported. On November 5, 2015, the Ontario Securities Commission issued proposed amendments to the Trade Repositories Rules that would alleviate certain reporting requirements for trades between end-user counterparties and their Canadian affiliates. We believe that trades with affiliates should continue to be exempted. We also suggest that consideration be given to

exempting trades between end-users and their affiliates regardless of jurisdiction given the increasingly international nature of domestic companies operating globally.

Section 22 of the CMA requires that a person must not act as a large derivatives participant unless the person is registered. Read together with the broad definition of "trade" in section 2, this could potentially result in pension funds, insurers and other non-dealer participants in the derivatives market being captured under the CMA. In our view, regulation in the area of derivatives should distinguish between institutions that are market makers in derivatives (typically banks that act as dealers) and end-users that generally use derivatives to hedge their exposed risks. To require a participant in the derivatives market to register based solely on the size of their derivatives book creates an additional regulatory burden associated with a sound risk management practice and is inconsistent with this approach.

IX. INVESTMENT FUNDS

The draft regulations largely maintain the status quo of the current National and Multilateral Instruments (and related documents) as they relate to investment funds and do not raise any substantive concerns. However, prospectus exemptions, the interface between CMR and non-CMR jurisdictions and the fees schedule remain unpublished. These are significant aspects of the CCMR and may warrant comment in the future.

X. CONCLUSION

We appreciate the opportunity to comment on the draft provincial and territorial *CMA* and the draft initial regulations. We encourage continued consultation with stakeholders as the CCMR moves toward implementation. We hope our comments will assist Finance Canada and all participating jurisdictions, as well as non-participating jurisdictions that may join the CCMR in the future in creating a streamlined and efficient securities regulatory system. The CBA Sections would welcome the opportunity to be of further assistance through future consultations, reviews or development of proposed legislation and regulations, or through any future dialogue.