December 21, 2015

SENT BY EMAIL

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RE: Comments on the Capital Markets Act – Revised Consultation Draft ("Revised CMA") and Draft Initial Regulations ("Draft Regulations") for the Cooperative Capital Markets Regulatory System ("CCMRS")

The Investment Industry Association of Canada (the "IIAC" or the "Association") welcomes the opportunity to comment on the Revised CMA and the Draft Regulations of the CCMRS. The IIAC commends the Governments of Canada, British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan and Yukon (the "Participating Jurisdictions") for this important next step towards the establishment of the CCMRS.

The IIAC is the national association representing the investment industry's position on securities regulation, public policy and industry issues on behalf of our 144 IIROC-regulated investment dealer member firms in the Canadian securities industry. These dealer firms are the key intermediaries in Canadian capital markets, accounting for the vast majority of financial advisory services, securities trading and underwriting in public and private markets for governments and corporations. The IIAC provides leadership for the Canadian securities industry with a commitment to a vibrant, prosperous investment industry driven by strong and efficient capital markets.

As we urged in our December 2014 comment letter, the IIAC notes that in crafting the Draft Regulations, the Participating Jurisdictions adhered to the overriding principle that the development of new securities legislation should ensure such legislation is as consistent with existing requirements as possible to avoid disruptions in market activity, confusion and unnecessary costs to market participants. The Draft Regulations have been substantially harmonized and changes have only been made where necessary to accommodate the structure of the new CCMRS, including the removal of references to individual participating provinces or territories. However, where some notable exceptions to this harmonization principle exist in the Revised CMA and Draft Regulations, they have been highlighted in this submission.

The Association appreciates that our concern regarding sufficient consultation was noted and as a result, the request for a 120 day comment period was granted. We also wish to thank the Participating Jurisdictions for the useful accompanying background commentary on both the Revised CMA and Draft Regulations. It is apparent that many changes were made based on comments received on the initial consultation draft of the CMA. The IIAC also welcomes the blacklined versions of the National Instruments and Multilateral Instruments.

That being said, the IIAC has identified some issues with both the Revised CMA and the Draft Regulations that we hope are reviewed carefully and given due consideration in future revisions. The remainder of this comment letter focuses on the Capital Markets Act, while the Draft Regulations are discussed in the attached Appendices, segmented into individual appendices with respect to the relevant instruments, policies and/or forms.

(A) <u>The Form and Substance of the CMA</u>

i) **Organization and form**

The IIAC is pleased to see that the Participating Jurisdictions, where possible, adopted existing regulations in their entirety, using the same numbering and wording (including applicable definitions). We found the accompanying commentary extremely useful, giving attention to any significant changes, outlining jurisdictions upon which a provision was based, and explaining the intention and rationale of such changes.

We would suggest that for any future versions of the Revised CMA, blacklined versions are provided at publication, similar to those that were provided for the Draft Regulations. This provides the industry with assistance in properly considering and assessing any future amendments.

ii) **Transition and Implementation Periods**

The IIAC recommends the use of staggered implementation to allow market participants to address the business and systems issues that will result from the new Revised CMA and Draft Regulations. Furthermore, we note that there are numerous provisions in the CMA that have not been finalized (such as prospectus exemptions) and therefore, those portions of the CMA should have delayed coming into force dates.

In addition, there are some provisions in the Revised CMA that rely on details to be supplied in the related Draft Regulations but in many cases, the Draft Regulations have yet to be finalized. For example, section 77 deals with reprisals yet the accompanying Whistleblower Regulations have only just been released for comment.

The IIAC also questions how the Authority plans to address the challenge of the continually evolving local securities law and regulations. We note that the Draft Regulations reflect instruments, forms and policies that were effective on or before March 2, 2015. However, as the provincial securities commissions are constantly amending the regulatory requirements and issuing requests for comments, what mechanism or process will the Authority adopt to ensure that provincial requirements are harmonized and consistent? We query how developments in one particular Participating Jurisdiction (but not necessary all Participating Jurisdictions) will be taken into account after March 2, 2015.

The IIAC notes from the commentary that while the monitoring of proposals for new instruments is occurring in order to include any new instruments as part of the initial regulations, such monitoring only occurs *if* all the Participating Jurisdictions adopt it prior to the date the Capital Markets Regulatory Authority ("CMRA") commences. We are unsure what will occur if one Participating Jurisdictions moves ahead on its own, or prior to approval from

the other provinces, before the launch of the CMRA. It is unclear how these potential differences in regulatory requirements in the future will be addressed. The Association is concerned that market participants will have to address these differences in regulatory requirements at a later date when they should be focusing resources on complying with the new Act and Regulations that are in force at the commencement date of the CMRA.

iii) **Transition Provisions and Exemptive Relief**

Many IIAC members have received discretionary exemptive relief in respect of their business operations. As noted in our previous submission, the IIAC was very concerned about the availability of existing exemptions and the corresponding exemptive relief currently provided for under provincial securities laws and National Instruments after the transition to the CCMRS.

Until such time as the transition provisions are finalized and published, the IIAC is unable to comment in detail about transition plans. However, both the commentary and the Summary of Proposed Transition Approach chart recently released by the CCMRS make it clear that the goal of the transition provisions is to minimize the impact on market participants, and their businesses, including, for example, "by ensuring that ongoing transactions or applications made to current (i.e. predecessor) securities regulators are not adversely affected." We are pleased to see that this goal is intended to be achieved in proposed provisions to the CMA in the future. The deeming of decisions of a predecessor regulator to be decisions of the CMRA is a positive approach. The commentary and chart indicate that this approach will provide that registrations, recognition orders, designation orders and discretionary exemptive relief orders which have been granted by a predecessor regulator will be deemed to be decisions of the CMRA and will apply in all the CMR jurisdictions.

iv) **Interaction with Non-Participating Jurisdictions**

A critical aspect in determining whether the CCMRS can function effectively and efficiently is whether and how the participating jurisdictions will interact with the non-participating jurisdictions. It is vital that this interaction not increase the costs to market participants or result in disruption of their activities in the non-participating jurisdictions. In particular, we query how the passport regime will operate upon the launch of the CCMRS and the manner in which the newly formed Authority will interact with the non-participating jurisdictions. In addition, as our members' primary regulator is IIROC, we are concerned about how the existing oversight of Self-Regulatory Organizations will be maintained and what the interplay will be with the oversight and recognition provided by the non-participating jurisdictions.

(B) Material Changes in the Revised CMA

i) **Definition of "Misrepresentation"** – The IIAC is pleased to see the definition of "misrepresentation" has been amended to align with the definition in the Securities Act (Ontario) (the "OSA"). However, we note that subsection 72(2) of the CMA still contains a reference to "false or misleading" statements as opposed to the use of "untrue" as contained in subsection 44(2) of the OSA. For consistency, subsection 72(2) should be revised.

ii) **Dealer Exemption for Banks** – The Association notes that our request to carry forward the exemption for banks under section 35.1 of the OSA has not been included in the Revised CMA. This exemption provides that banks are exempted from the requirements to be registered as a dealer, underwriter, adviser or investment fund manager. The commentary explains that this was a policy decision consistent with the approach taken in existing securities legislation in other CMR jurisdictions and that financial institutions will be able to avail themselves of a number of other registration exemptions contained the CMA and/or apply for exemptive relief under section 94 of the CMA**.**

The IIAC does not find this proposed solution acceptable. It provides little clarity or certainty for our bank-owned member dealers in terms of the ability to use other registration exemptions. The rationale for the unusual decision to not include this fundamental exemption in the revised CMA is not explained.

In addition, the commentary makes it clear that the Participating Jurisdictions aimed to maintain continuity and minimize disruption for market participants during the transition to the CCMRS by ensuring that regulatory requirements were adopted on a substantially harmonized basis. This would assist in providing a seamless transition for market participants without an undue regulatory burden or additional costs for market participants. However, in the context of this principle, the removal of the dealer exemption for banks would result in a wholesale repositioning of how these institutions achieve an exemption from registration, which was automatic in the past, and would require costly, inefficient dismantling and redesign of their operational structures to the extent the banks are unable to avail themselves of exemptions available under the CMA for certain products. Such a change we believe would be detrimental to the Canadian capital markets given the extent of securities trading activities conducted by Canadian banks that rely on the exemption. One of the primary activities impacted would include the liquidity of the corporate debt market in Canada.

The IIAC has previously alerted the Canadian Securities Administrators of the significant stress corporate debt markets are currently under[1] and believes that by not carrying forward the exemption for banks, the CCMRS risks further dislocation in this important market. We are particularly concerned as to what impact the CCMRS proposed approach could have on investor access to corporate debt products dealt by the banks such as Deposit Notes and Money Market instruments. As highlighted by the Canadian Bankers Association (“CBA”), the repo activity conducted by some banks may also be impaired – interfering with the Bank of Canada’s existing framework for financial market operations and bringing increased risk to the broader financial system. The IIAC does not believe that this outcome is desirable for the stability of the market or the avoidance of market disruption and, as such, we support the CBA’s submission requesting the re-introduction of the dealer exemption for banks within the CMA.

iii) **Unfair Practices** – Section 70 includes several requirements to protect vulnerable persons. While the IIAC has no objection to such a provision being included, its scope has been vastly expanded from the provisions in the B.C. Securities Act (“BCSA”), upon which it is based.

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[1] See, for example, IIAC response to CSA Staff Notice and Request for Comment 21-315 *Next Steps in Regulation and Transparency of the Fixed Income Market*

Subsection 50(4) of the BCSA does mirror the language of section 70 of the CMA. However, subsection 50(4) is applied only for the purposes of subsections 50(1) and 50(3) – specifically, investor relations activities and effecting a trade in a security or an exchange contract. More specifically, it relates to misrepresentations. The CMA broadens the scope and application of this section to simply engaging in trading generally.

To expand subsection 50(4) and apply it broadly does not align with the goal of harmonizing securities legislation across the Participating Jurisdictions and would be inconsistent with current law. If section 70 of the CMA is to remain, it should be confined to the limited scope in the BCSA.

iv) **Designations** – The IIAC notes that section 95.1 is new and allows the Authority to recognize or designate an exchange or a market place for the purposes of a regulation or any provision of a regulation. While we do not necessarily object to these provisions, we question if this is the complete list or if further designations are contemplated in future revisions to the CMA.

The IIAC also raises the issue of the potential challenges for firms when additional market places are designated in the future and how that may impact the burden with respect to best execution requirements.

v) **Compelled Evidence and Protection of Confidentiality** – The IIAC recommends greater precision in the drafting of subsections 104(1) and 104(4). For example, subsection 104(4) should include a reference to subsection (1) to ensure the Chief Regulator has by order, authorized the investigator to conduct the investigation.

vi) **Statutory Duty to Assist** – The IIAC is pleased to see that the duty to assist with an on-site review, an inspection or a search has been narrowed as we suggested.

vii) **Burden of Proof for Reasonable Investigation Defence** – The IIAC has serious concerns with the provision that shifts the burden of proof to defendants to prove that a reasonable investigation has been conducted or that the defendant believes that there had been no misrepresentation has remained in Part 12 of the Revised CMA.

As the IIAC previously outlined in our 2014 submission, under Part XXIII of the OSA and securities legislation in other jurisdictions, the plaintiff bears the burden of proving that a defendant failed to conduct a reasonable investigation or believed there had been a misrepresentation. In contrast, under sections 119, 121 and 123 of the Revised CMA, the defendant has the burden to prove that, after conducting a reasonable investigation, the defendant had no reasonable grounds to believe and did not believe that there was a misrepresentation. The commentary states that the rationale for this shift is that the defendant is much better placed to establish that they had no reasonable grounds to believe that there was a misrepresentation and they did not believe one existed.

The Association finds this explanation to be unsatisfactory and believes that it fails to justify the shift of legal precedent. The burden of proof on the plaintiff acts as a discipline in bringing forward complaints of misrepresentation. This will no longer be the case, unleashing frivolous claims and litigation, and may have a chilling effect on, for example, the willingness of experts to give fairness opinions. The decision to take such an unprecedented step in shifting the

burden of proof is contrary to the underlying principle of the drafting exercise in connection with the harmonized legislation. This matter and its broad economic implications merits full consultation and review by the Authority, market participants and the general public before implementation as formal regulation.

We are not aware of any Canadian jurisdiction that currently employs this reverse burden of proof and it is a dramatic shift from the common law.

In addition, such a shift creates an uneven playing field by imposing a greater liability on market participants that have head offices in one of the Participating Jurisdictions as opposed to those participants operating in non-participating jurisdictions. Such lack of harmonization in this area is extremely problematic.

viii) **Directors' or Officers' Circulars and Statutory Rights of Action –** The IIAC notes that subsection 120(2) of the CMA includes an expanded right of action for misrepresentations in a director's or officers' circular which permits the plaintiff to sue an expert whose consent was filed in respect of the circular. Both subsection 131(2) of the OSA and 132(3) of the BCSA only permit a right of action against any director or officer who signed the circular and not with respect to those whose consent has been filed. This would be a significant change, impacting our members that provide fairness opinions, or other expert analysis, in circulars and thus this expansion should be removed in order to remain consistent with current securities legislation.

ix) **Liability Caps** – In the IIAC's previous submission, we had raised concerns surrounding Part 13 which had the potential to penalize issuers and other defendants who faced parallel proceedings in a Participating Jurisdiction and a non-participating jurisdiction because the liability limit in section 165 did not incorporate damages and amounts paid in settlements in the non-participating jurisdiction. We are pleased to see that amendments have been made to take into account damages under comparable legislation in other provinces and territories.

x) **Best Interest Standard** – We note that section 55 of the CMA has expanded the standard requirement for registrants to deal fairly, honestly and in good faith with their clients. The section now requires that registrants also "meet other such standards as may be prescribed." The IIAC is concerned that the addition of such a broad, sweeping and vague provision creates uncertainty in respect of this long standing, and well understood basic principle of securities legislation. From the commentary, it appears that this change is meant to permit the Authority to make regulations such as imposing a best interest standard.

The IIAC does not believe that a provision to contemplate a best interest standard should be included in the CMA. The best interest standard is a matter of complex debate among provincial regulators, market participants and the general public. While the best interest standard is currently being studied by the relevant securities commissions, the industry has raised a number of significant issues related to the implementation of such a standard.

We are concerned that a new provision with such significant implications has been included in the legislation simply as a placeholder for future rule-making. If that is the intention of the Authority then, at the very least, we recommend moving the power to the regulation-making process set out in Part 15 of the CMA. This section also ensures that any proposed new

regulation is subject to a detailed public consultation, approval process and includes certain items in the notice of a proposed regulation such as any alternatives that were considered by the Authority.

The IIAC appreciates the opportunity to comment on the Revised CMA and Draft Regulations. We look forward to reviewing future proposed regulations relating to prospectus exemptions, fees and the interface mechanism with non-participating jurisdictions. However, given the absence of these key provisions, in addition to the delay in the release of the revised Capital Markets Stability Act, and lack of review of the implementation legislation of the Participating Jurisdictions, the Association would suggest an additional comment period to review the relevant material in its entirety.

Yours sincerely,

Ian Russell
President and CEO
Investment Industry Association of Canada

Appendix I

CMRA Regulation 11-501: Definitions, Procedure, Civil Liability and Related Matters (“Draft Regulation 11-501”)

Section 9: Certification and Execution of Documents

Section 9 of Draft Regulation 11-501 requires “a duly completed attorney or record of authority authorizing the signing of the record” to be filed with any record that has been executed or signed by an attorney or agent, but does not include the exception allowed under the current Ontario regulations, which states that the Director may permit the filing of the document without the power of attorney or document of authority.[1] From the Commentary accompanying the draft CMRA Regulations[2], we understand that a decision was made to base section 9 on section 189 of the *BC Securities Rules*, and that the CMRA could provide an exemption under section 94 of the CMA. However, we note that in order to obtain an exemption order under section 94, an application must be made to the Authority, and we question whether this approach is appropriate from an administrative efficiency standpoint. We would prefer to see the approach in the existing Ontario regulations be adopted in Draft Regulation 11-501 section 9, and if this approach is not adopted in the next version of the regulations, we would appreciate further explanation on the policy decision and benefits achieved that are perceived to outweigh the potential inefficiencies that are likely to be created.

Section 15: Disclosure document prescribed for subsection 122(1) of the CMA

As noted in the Commentary, “the effect of section 15 is to extend liability to all disclosure documents provided to a purchaser in the course of a prospectus exempt distribution, whether provided voluntarily or not”, and indicates that this is change in all CMR Jurisdictions. The stated policy rationale behind this change is “investor protection”; however, we have concerns around the inclusion of this change in the initial harmonized CMRA Regulations primarily from a procedural standpoint. Our understanding is that the intended goal of the CMRA regulation drafting process is to implement the CMA, and to harmonize existing rules and requirements across CMR Jurisdictions wherever possible, and not to impose new policies and requirements that do not currently exist in any of the CMR Jurisdictions. This also represents a change from the status quo in non-CMR jurisdictions, which is an important part of the analysis and would have an impact on firms operating in CMR and non-CMR jurisdictions, potentially created an unlevel playing field.

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[1] *Ontario Securities Regulations*, R.R.O. 1990, Reg. 1015: General, at paragraph 161(d).
[2] *Draft Initial Regulations For the Cooperative Capital Markets Regulatory System*, Section V.A: Summary of CMRA Regulations: Definitions, Procedure, Civil Liability and Related Matters.

If the Authority wishes to introduce substantive changes or new provisions, these should be subjected to a full and separate consultation process (after the initial regulations have been finalized) that will allow the industry adequate time to consider the impact of the changes and provide comment. There may be additional industry concerns around such a broad expansion of liability, for example, whether this would potentially cause a "chilling" effect on providing investors with information, but these concerns may not be fully considered and addressed without the adequate consultation time they require. Our recommendation is to reserve making any new substantive policy changes until the first set of CMRA Regulations have been finalized, and then to publish the proposed changes with a full consultation period.

Section 19: Rescission of purchase – mutual fund security; Section 20: Rescission of purchase – scholarship plan, etc.

We note in the Commentary, it is stated that the Authority is not carrying forward rights to rescind a purchase of mutual fund securities under a contractual plan which is currently provided by B.C., New Brunswick, Ontario and Saskatchewan, but is carrying forward rescission rights for scholarship plans. We would appreciate additional commentary on this policy decision to better understand the scope of the rescission rights for mutual fund securities (whether under a contractual plan or not) and scholarship plans under the CMA, so that members can make any operational changes that may be required for implementation, and explain the changes to clients.

Appendix II

CMRA Policy 71-601 *Distribution of Securities to Persons Outside CMR Jurisdictions* ("Draft Policy 71-601"and CMRA Regulation 71-501 – *International Issuers and Securities Transactions with Persons Outside the CMR Jurisdictions* ("Draft Regulation 71-501"), (the "Draft Regulations")

The IIAC has a number of concerns with the requirements in the Draft Regulations. We believe the approach taken under OSC Interpretation Note 1 – *Distribution of Securities Outside of Ontario* provides a more practical and efficient approach to such distributions without sacrificing investor protection. By characterizing distributions out of the jurisdiction as a distribution within a CMR jurisdiction, and then providing various carve out and exemptions, the Draft Regulations add significant complexity and expense, without demonstrable improvements to investor protection.

It is unclear who will benefit from this approach, given that foreign investors will continue to receive disclosure mandated by their jurisdiction and be protected by investor protection regulation in their jurisdiction. The requirement for issuers to undertake the significant time and expense to draft a Canadian prospectus that then is subject to certain exemptions from certificate requirements investor remedies adds to the regulatory burden without providing investors with benefits.

We understand the Draft Regulations will not change practices when issuers use the Canadian MJDS system to raise fund on both sides of the border. The current system and Draft Regulations are appropriate for such offerings, where Canadian investors are involved.

However, for equity or debt transactions where no Canadian investors are involved, requiring issuers to comply with additional Canadian disclosure requirements combined with various exemptions located in different instruments, creates unnecessary complexity and expense.

The commentary relating to the Draft Regulations do not indicate that the current Ontario approach has resulted in negative outcomes that could be addressed by the approach in the Draft Regulations. If this is the case, we recommend retaining the efficient and effective approach currently in effect under OSC Interpretation Note 1.

Our responses to the questions posed by the regulators are as follows:

QUESTIONS FOR COMMENT ON DRAFT POLICY 71-601

1. In a cross-border prospectus offering, a Canadian issuer in a CMR Jurisdiction will file a Canadian prospectus with the Authority in compliance with the initial regulations and a U.S. registration statement with the SEC (to which a U.S. prospectus is attached) in compliance with U.S. securities legislation. Typically, the Canadian and U.S. prospectuses will contain substantially the same information.

Given the approach to "distributions out" under CMRA Policy 71-601:

(a) **Should the Canadian issuer be specifically exempted from having to deliver a copy of the Canadian prospectus to U.S. purchasers, provided that the U.S. prospectus is delivered to those purchasers and the U.S. prospectus contains substantially the same information as the Canadian prospectus? In this scenario, if the issuer is not concurrently distributing in Canada, the distribution-out Canadian prospectus will be prepared for filing and review by the Chief Regulator only.**

In these circumstances, a Canadian prospectus is not necessary and should not be required. Given that the investors are not Canadian, there is no reason for them to be protected by local rules, as they are protected through the U.SS document. By defining the disclosure document as a Canadian prospectus, it means all of the investor protection provisions applicable to Canadian investors would to foreign investors (who are protected under their own legislation) unless specifically exempted. As noted above, producing a prospectus and navigating the various exemptions creates complexity, adds confusion and increases the costs without any measurable benefit to investors or the market in general.

(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?**

The Canadian marketing rules should not be applied in respect of prospective marketing activities to U.S. purchasers. In the current Ontario system, which we support, the underwriters are not required to undertake liability in this regard.

(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.?**

Only Canadians should be able to sue under a Canadian prospectus. There is no need to provide U.S. purchasers with additional rights, as they have similar rights under U.S. securities legislation. The U.S. laws provide robust investor protection. It is not appropriate to provide U.S. investors with more protection than Canadian investors who would only get one set of

rights under Canadian law. The provision of additional rights for a certain class of investor also adds unnecessary complexity.

(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?

In respect of rights for recession and damages for misrepresentation, U.S. investors currently have these rights in the U.S., and it is not appropriate to provide them with additional Canadian investor protection benefits.

2. Should CMRA Policy 71-601 or the new CMRA Regulations clarify any matters with regard to how securities distributed to U.S. purchasers under a Canadian prospectus filed with the Authority are freely tradeable in CMR Jurisdictions under the CMA (subject to paragraphs (c) and (f) of the definition of “distribution” in section 2 of the CMA)?

The proposed requirements should be made very clear when they are determined, in order to avoid confusion, and avoid the development of conflicting practices in the marketplace.

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?

Currently no Canadian registration is required in the above noted circumstances. If the financing involves a wrap prospectus, Canadian registration is required. Some members are of the view that even where no Canadian investors are involved, U.S. underwriters should be required to be registered under Canadian regulation, as it is unfair to allow such underwriters to be able to access the Canadian system, which may be advantageous, without being subjected to the Canadian registration requirements. This level playing field argument is particularly relevant to smaller Canadian dealers, as most larger dealers would have dual registration in Canada and the U.S.

4. CMRA Policy 71-601 notes that where a distribution is made under a prospectus exemption to an initial investor, either within or outside of a CMR Jurisdiction, any subsequent trade of those securities in a CMR Jurisdiction will be deemed a distribution subject to the prospectus requirement. In these circumstances, the resale requirements in NI 45-102 Resale of Securities, including hold periods, must be complied with, unless a prospectus exemption is available (subject to the guidance in the Policy, under the section on “Indirect Distribution into a CMR Jurisdiction”). In the case of distributions to persons outside of Canada, will any undue hardship or negative market impact result

from the application of resale requirements in NI 45-102, such as the four-month hold period or the legend requirements in section 2.5? As noted in question 1(a) above, if a Canadian issuer is permitted to file a distribution-out prospectus (with no delivery requirement to U.S. investors), how will issuers view the distribution-out prospectus in the sense that the securities will not have a four-month hold period or be subject to a legend requirement? In this context, do market participants consider it necessary to revise the guidance contained in section 1.6 of Companion Policy 45-102 for the CMR Jurisdictions?

If a prospectus is filed for a distribution out, it should serve to clear the resale requirements in the U.S. For U.S. investors, the requirement to have a hold period or has a significant negative effect. Given that for equities, the distributions are overwhelmingly multijurisdictional, and a prospectus must be filed, this does not pose a problem.

It is uncertain to us if the distribution of Deposit Notes, within or outside a CMR jurisdiction, is captured by the CMRA requirements. It is our members' strong desire to maintain the existing regulatory framework for the issuance of Deposit Notes.

QUESTIONS FOR COMMENT ON DRAFT REGULATION 71-501

The objective of this section, whether it applies to Canadian issuers, and how it applies to MJDS is unclear. If the provisions apply to Canadian issuers, it appears to conflict with the provisions in Draft Policy 71-601. If it only applies to foreign issuers, the provisions appear to be appropriate.

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), or

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

If these requirements apply only to foreign issues, these limitations are appropriate. If they apply to Canadian issuers, the limitations appear to be inconsistent with those in Draft Policy 71-601.

2. Subsection 4(4) of CMRA Regulation 71-501 provides an exemption from the registration requirement and the prospectus requirement for certain Eurobond offerings. In this regard, will any undue hardship or negative market impact, or any investor protection benefit, result from:

(a) limiting the exemption to debt listed on a "genuine market" (defined in section 1 of the Regulation), or

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

A differentiating feature of Eurobonds is their reliance on international syndicates which necessitates a certain degree of coordination and harmonization in the distribution of the bonds. It is imperative therefore, that Canada's regulatory approach for Eurobond offerings maintains the flexibility required to operate within an international framework. While the definition of "genuine market" as defined in Draft Regulation 71-501 is fairly broad and provides flexibility to the Authority in designation marketplaces that will be subject to the exemption, it is important that the process followed by the Authority for such designations be transparent and accommodate the time-sensitivity of issuers and their underwriters in bringing an offering to market.

Appendix III

CMRA Regulation 91-501 *Derivatives and Strip Bonds (*"Draft Regulation 91-501)

Exchange Contracts

Draft Regulation 91-501 introduces a new registration exemption for international dealers: an unregistered firm can deal with permitted clients in respect of trading in non-Canadian exchange contracts. The international dealer must provide the permitted client with certain disclaimers, including that it is not registered in the local jurisdiction. The international dealer must deliver the risk disclosure that would otherwise be required to be provided to similar clients in the foreign jurisdiction in which it is located. Members believe Draft Regulation 91-501 should require an unregistered firm relying on the international dealer exemption to provide enhanced disclosure indicating that Canadian permitted clients do not qualify for CIPF coverage nor have equivalent coverage.

In respect of proficiency requirements, members noted that the proposed regulation refers to courses prepared and administered by CSI Global Education Inc. and suggested that the wording be changed to mention "CSI Global Education Inc. or other approved education organizations" given the potential for other education providers to be used by SROs.

OTC Derivatives

Under Draft Regulation 91-501, the prospectus and registration requirements apply to OTC derivatives unless there is an exemption. The registration and prospectus exemptions currently available in British Columbia (and granted on a discretionary basis in Ontario) are carried forward into Draft Regulation 91-501, which provides for an exemption from the registration and prospectus requirements where each party to the trade is a qualified party or a permitted client, each acting as principal. The members believe that the exemption should be extended to trades that involve an agent where the beneficial parties to the trade are qualified parties or permitted clients.

Draft Regulation 91-501 exempts certain types of contracts and instruments that may be caught within the broad definition of derivatives from most requirements other than prohibitions contained in the market conduct provisions in the CMA, such as prohibitions on fraud and manipulation. Exempt derivatives include gaming and insurance contracts and contracts for the purchase and sale of currency (spot contracts) or the physical delivery of other commodities (subject to certain conditions). Members do not see an issue with the proposal. The regulator sought comment on whether the Authority should regulate market conduct in all types of Exempt Derivatives or whether some or all Exempt Derivatives be entirely excluded from capital markets regulation, as in some jurisdictions securities regulation does not apply at all to these types of products. Some members commented that the Authority should have the ability to regulate and monitor all products, others suggested that the Canadian OTC Derivatives

Working Group should be the lead on developing the regulatory model for OTC derivatives in Canada, in conjunction with the Participating Jurisdictions and the non-Participating Jurisdictions. The IIAC believes that further discussions are needed regarding OTC Derivatives.

Furthermore, bank-owned members have additional comments on the OTC Derivatives sections of the proposed regulation. These comments will be included in the Canadian Bankers Association submission letter.

Appendix IV

CMRA Regulation 91-502 *Trade Repositories and Derivatives Data Reporting*

The Participating Jurisdictions are seeking comments as to the appropriate threshold for the exemption from reporting regarding trades in a derivative that is a contract for a commodity (other than cash or currency) if the local counterparty is not a derivatives dealer. The current exemption in Ontario is $500,000, whereas the proposed multilateral instrument for certain provinces, including British Columbia, Saskatchewan and New Brunswick, suggests a threshold of $250 million. The IIAC members indicated support for the $250 million threshold in order to decrease reporting.