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SECURITIES REGULATORS ASSERT THEIR POLICY-MAKING AUTONOMY PENDING IMPLEMENTATION OF COOPERATIVE SYSTEM

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On April 16, 2015, the Council Of Ministers overseeing the establishment of the Cooperative Capital Markets Regulatory System for Canada announced that the participating jurisdictions would release updated consultation drafts of the enabling legislation, accompanied by draft regulations, in the summer of 2015. An amended Memorandum of Agreement among the participating jurisdictions (currently British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan, Yukon and Canada) included a "best efforts" agreement that the legislation will be enacted by June 30, 2016, and on that basis the stated expectation was that the new regulator would become operational in the fall of 2016.

In a published commentary dated October 31, 2014, the participating jurisdictions had confirmed that the cooperative system would be "based on a single set of regulations that are consistently applied." An update on December 5 included the following paragraph:

> In order to maintain continuity and minimize disruption for market participants, the participating provinces plan to propose initial regulations that substantially maintain the harmonization achieved under the current structure. This would simplify transition to the Cooperative System and provide a strong basis for cooperation with provinces that choose not to participate.

These comments reflect the generally held view of both the organizers of the new regulator and industry observers that the focus of the drafters of the new legislation should be on a smooth transition rather than on policy changes that could properly be the subject of public commentary and debate that would inevitably impede the timely implementation of the cooperative system.

Against this backdrop, it might be expected that the participating jurisdictions, in the course of developing any new policies during the time that preparations for the cooperative system are underway, would make special efforts not only to continue their harmonization efforts of the past several years but to intensify them. However, there are a number of fairly recent examples of differences among the regulators in proposals or enactments in major policy areas, most notably as between Ontario and British Columbia. These differences include those described briefly below.

Disclosure of Policies on Representation of Women on Boards and in Executive Management, and Director Term Limits

On October 15, 2014, the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan announced that they were amending National Instrument 58-201 – *Disclosure of Corporate Governance Practices* and Form 58-101F1 – *Corporate Governance Disclosure* to require annual disclosure by non-venture issuers regarding their policies on the representation of women on their boards and in executive management positions, and regarding director term limits and other methods of board renewal. (Yukon subsequently adopted the amendments.) The amendments came into force on December 31, 2014. Missing from the list of adopting jurisdictions were Alberta and cooperative regulator participants British Columbia and Prince Edward Island.

Proposed Whistleblower Program

On February 3, 2015, the Ontario Securities Commission published Staff Consultation Paper 15-401 – *Proposed Framework for an OSC Whistleblower Program*. Comments were requested until May 4, 2015. Among other things, the proposal contemplates amendments to the Ontario *Securities Act* that would provide retaliation protection for whistleblowers. The protections would include a prohibition against retaliation that could be enforced through a proceeding brought by Commission staff or through a civil action brought by the whistleblower. The other jurisdictions have not joined in the proposal. The initial consultation drafts of the enabling legislation for the cooperative regulator contained anti-retaliatory provisions to protect whistle-blowing employees but not a right of civil action.

Offering Memorandum Prospectus Exemption

The Canadian jurisdictions, with the exception of Ontario, have an offering memorandum prospectus exemption in section 2.9 of National Instrument 45-106 – *Prospectus Exemptions*. Within that section, the conditions for the exemption vary among the jurisdictions. On March 20, 2014, the Ontario Securities Commission published for comment a proposal under which it would introduce an offering memorandum exemption with conditions that would be similar to revised conditions proposed by only some of the other Canadian jurisdictions (Alberta, New Brunswick, Quebec and Saskatchewan). On February 19, 2015, the Commission announced that its goal was to publish a final version of the exemption or a second request for comments in the summer of 2015.

Proposed Prospectus Exemption Where Investment Dealer Gives Suitability Advice

On April 16, 2015, the securities regulatory authorities of only three jurisdictions – British Columbia, New Brunswick and Saskatchewan, all of whom are cooperative regulator participants – published for comment a proposed prospectus exemption for distributions to persons who have obtained advice about the suitability of the investment from a registered

investment dealer, subject to certain conditions. The comment period was to run to June 15, 2015.

Crowdfunding

On May 14, 2015, the securities regulatory authorities of British Columbia, Manitoba, New Brunswick, Nova Scotia, Quebec and Saskatchewan, three of which are cooperative regulator participants, announced that they were adopting "substantially harmonized" registration and prospectus exemptions, effective for a period of five years, relating to crowdfunding for start-up and early stage companies. The exemptions apply only to non-reporting issuers and are intended to co-exist with another crowdfunding regulatory regime of broader application currently under development in the form of proposed Multilateral Instrument 45-108 – *Crowdfunding*. Ontario is participating in the latter but has indicated an intention not to adopt the former.

Conclusion

While harmonization is generally considered desirable, the regulatory differences described above are of not the type that would be expected to be seriously disruptive to the efficient operation of the capital markets, in contrast to other areas such as take-over bids. In the context of the cooperative regulator, however, those charged with the responsibility of establishing "a single set of regulations that are consistently applied", and doing so in a reasonably timely manner, may be facing an interesting challenge.