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CANADIAN BANKERS ASSOCIATION

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Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

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Re: Proposed National Instrument 25-101 *Designated Rating Organizations*, Related Policies and Consequential Amendments

Dear Sirs and Mesdames:

The Canadian Bankers Association ("**CBA**") works on behalf of 51 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 263,400 employees to advocate for efficient and effective public policies governing banks and to promote an understanding of the banking industry and its importance to Canadians and the Canadian economy.

The CBA appreciates the opportunity to provide the Canadian Securities Administrators ("**CSA**") with our comments on the CSA's proposed National Instrument 25-101 *Designated Rating Organizations* ("**NI 25-101**"), Companion Policy 25-101CP to NI 25-101, National Policy 11-205 *Process for Designation as a Designated Rating Organization in Multiple Jurisdictions* and consequential amendments to National Instrument 41-101 *General Prospectus Requirements*, National Instrument 44-101 *Short Form Prospectus Distributions* and National Instrument 51-102 *Continuous Disclosure Obligations* (the "**Proposed Amendments**").

In addition to general comments set out below, our members have provided comments on some concerns they have with respect to the Proposed Amendments, as well as their views on certain of the specific requests for comments outlined by the CSA.

General Comments

Our members recognize the importance to financial markets of both quality of credit ratings and investor confidence in such ratings and generally support the CSA's efforts to implement an appropriate Canadian regulatory regime for credit rating organizations ("**CROs**"). However, our members are concerned about certain aspects of the proposed regulatory regime, some of which are discussed below, and urge for caution to ensure that its implementation does not result in unintended consequences that may serve to counteract other reform efforts. In particular, our members are concerned about any possible "expertizing" of CROs under the Canadian securities laws, given the likelihood of a profound impact of any such move on investors and the capital markets.

Members' Concerns

CROs should not be "expertized" under Canadian securities laws

We believe that there is a common desire to hold CROs more accountable for their ratings, but the expert liability may not be the best way to achieve that goal. Our members are of the view that focus should instead be on accountability under a disclosure regime (i.e., on whether CROs have properly disclosed inputs, assumptions and other relevant data to put their ratings in proper context). Making CROs statutorily liable for ratings referred to in a prospectus or other disclosure document could restrict capital raising options for issuers and further investor scepticism about the integrity of CROs and the accuracy of ratings. More is required to explore the alternatives and the effects of any liability regime on the financial marketplace as a whole.

CROs' expressed unwillingness to provide expert's consent in the wake of the rescission of Rule 436(g) under the *Securities Act of 1933*, as amended, (the "**Rule 436(g)**") in the United States, resulting in the loss of their exempt status under the U.S. law, indicates that any imposition of statutory liability on CROs in Canada may cause CROs to make significant changes to their business that could have a significant impact on the market. Some or all CROs may decide to withdraw from the credit ratings business or be less likely to rate certain securities. As in the United States, CROs in Canada may also refuse to provide consent to include rating statements, which would effectively prohibit issuers from using rating in marketing of securities. As a result, capital raising efforts may be hindered and this could be detrimental to the economy and the public.

We note that in their comment letters on the Proposed Amendments, certain of the CROs have already indicated that they are at this time unwilling to take on statutory liability for their credit opinions without a complete understanding of the ramifications of the liability to their business practices and the means by which they may be able to effectively mitigate the associated risks. As a result, should CROs become required to file an expert's consent to the CSA, they will not provide their expert's consents.

A refusal by CROs to provide consent in Canada would also be extremely problematic to issuers because of the requirement to disclose credit ratings in a number of forms, including the long form prospectus form, the short form prospectus form and the annual information form (the "**AIF**"). The United States Securities and Exchange Commission ("**SEC**") has had to suspend the requirement that asset-backed issuers disclose ratings in registration statements because CROs have refused to provide the necessary consent. The situation for Canadian issuers could be even more difficult because credit rating disclosure requirements apply to the AIF, a continuous disclosure document, and because the AIF disclosure requirement extends to unsolicited credit ratings which may be issued by agencies with whom the issuer has no relationship. Any statutory amendments to impose a consent requirement on rating disclosure would need to be accompanied by changes that remove obligation to disclose credit ratings.

Assuming that certain CROs may decide to provide consent to the CSA (if that were to become a requirement under the Canadian securities laws), such ratings may be unduly conservative, especially in respect of new product structures and industries, because of liability concerns thus impeding innovation of new financial products. This could lead to an increase in the cost of obtaining credit ratings and it could limit capital raising options for issuers.

"Expertizing" CROs may also have a negative impact on competition among CROs, as some CROs may decide that the potential imposition of liability for credit ratings is not acceptable in the context of their business models and may choose to withdraw from the ratings business. Other agencies may decide not to register as "designated rating organizations" under the proposed NI 25-101. Our members are concerned that any decrease in the number of CROs will have a negative impact as it would reduce options in issuers' capital raising efforts.

Our members are also concerned that any imposition of statutory liability on CROs for its credit opinions would have a negative impact on investor protection. As discussed above, enhanced disclosure of the scope and limitations of credit ratings would hopefully enable investors to determine whether ratings are credible and independent, and also provide investors with greater confidence in the integrity of the markets. "Expertizing" CROs would not necessarily further investor interests. While the possibility to hold CROs liable for their ratings might give investors more confidence in the ratings, it may also cause investors to place greater reliance on ratings.

Ratings disclosure should not require CROs' consent under U.S. law

A number of our members file reports with the SEC under the Canada-United States multi-jurisdictional disclosure system ("**MJDS**"). The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the "**Dodd-Frank Act**") contains new disclosure requirements that apply to all SEC reporting issuers, including MJDS issuers, that will change how MJDS issuers prepare their SEC disclosure documents. The extent of these changes will in part depend on the interpretation of the provisions of the Dodd-Frank Act and the substance of the rules to be issued by the SEC implementing the Dodd-Frank Act.

One of the requirements of the Dodd-Frank Act of particular interest to MJDS issuers is the above-mentioned rescission of Rule 436(g), resulting in the loss of exempt status of CROs. While our members are in favour of implementing the accountability of CROs through a disclosure regime, the concern is that ratings disclosure under Canadian rules included in MJDS filings may require consent from the rating agencies under the U.S. law, which rating agencies have indicated they are currently unwilling to provide. Our members urge for caution to ensure that the implementation of a Canadian regulatory regime for CROs does not have such unintended consequence.

We appreciate the opportunity to express our views regarding the Proposed Amendments. We would be pleased to answer any questions that you may have about our comments.

Sincerely,