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October 25, 2010

British Columbia Securities Commission
Alberta Securities Commission
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

c/o John Stevenson
Secretary
Ontario Securities Commission
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c/o Me Anne-Marie Beaudoin
Corporate Secretary
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VIA E-MAIL: jstevenson@osc.gov.on.ca; consultation-en-cours@lautorite.qc.ca

RE: Canadian Securities Administrators' Request for Comment in Relation to Proposed National Instrument 25-101 *Designated Rating Organizations* and Related Policies and Consequential Amendments

Dear Sirs/Mesdames:

1. Introduction

1.1 This letter is submitted by Standard & Poor's Ratings Services ("S&P Ratings Services") in response to the Notice and Request for Comment issued by the Canadian Securities Administrators (the "CSA") on proposed National Instrument 25-101 *Designated Rating*

Organizations (the "Proposed Instrument"); Companion Policy 25-101CP to the Proposed Instrument; consequential amendments to National Instruments 41-101 *General Prospectus Requirements*, 44-101 *Short Form Prospectus Distributions*, and 51-102 *Continuous Disclosure Obligations* (the "Consequential Amendments"); and National Policy 11-205 *Process for Designation as a Designated Rating Organization in Multiple Jurisdictions*.

1.2 S&P Ratings Services believes that regulation can play an important part in restoring confidence in ratings and we welcome proposals that would, on a globally consistent basis, increase transparency and preserve the analytical independence of Credit Rating Organizations' ("CRO") opinions, methodologies and analytical processes.

1.3 In our view, it is essential that any system of oversight recognizes that our business supports the global nature of capital markets. S&P Ratings Services is a separately identifiable business unit of Standard & Poor's Financial Services LLC which is wholly owned by The McGraw-Hill Companies, Inc. ("McGraw-Hill"), a global business service provider in the fields of financial services, education and business information. In Canada, S&P Ratings Services operates through The McGraw-Hill Companies (Canada) Corp. We note that rating committees may be comprised of both locally-based staff and analysts based in different countries.

1.4 S&P Ratings Services welcomes the opportunity to work with the CSA towards implementing a CRO regulatory framework in Canada that is practicable, proportionate and meets the needs of the Canadian regulators, CROs, the users of ratings and the markets. We support working towards a framework that will safeguard the integrity of the ratings process while minimizing adverse effects on market and operating efficiency. As a general matter, S&P Ratings Services welcomes the CSA's proposed approach to regulating CROs. We set out below our comments on the Proposed Instrument and Consequential Amendments, organized first by some general comments we have on the Proposed Instrument and related materials followed by responses to your specific requests.

2. Comments on the Proposed Instrument and Related Materials

Support for Adopting the IOSCO Code

2.1 S&P Ratings Services reiterates comments made in its February 13, 2009 letter in response to CSA Consultation Paper 11-405 in support of adopting the International Organization of Securities Commissions' ("IOSCO") Code of Conduct Fundamentals for Credit Rating Agencies ("IOSCO Code"). The IOSCO Code is widely supported as an internationally recognized standard and provides a platform for national regulators to promote standards that will be consistent at an international level. This is particularly important for global CROs such as S&P Ratings Services because many of the securities we rate are traded on exchanges or markets in more than one country and held by investors globally.

2.2 We are particularly supportive of the "comply or explain" approach adopted by IOSCO. This approach ensures that market participants are aware of the extent to which any CRO adopts different policies from those in the IOSCO Code and why any deviations meet the spirit and goals of the Code, while allowing CROs the flexibility to develop their own procedures in areas where individual circumstances render the general approach

inappropriate or unworkable. We view this combination of transparency and flexibility as an example of a productive and effective regulatory approach and support the CSA's intention to retain a "comply or explain" approach.

2.3 We note that the CSA has proposed at sections 6(1) and (2) that a designated rating organization must post a copy of its code of conduct (together with any amendments), prominently on its website within three days of the amendments coming into affect. As a practical matter, S&P Ratings Services currently discloses its current code of conduct prominently on its website, however amendments from the previous version may not necessarily be individually identified, nor would changes to our code of conduct be filed with the United States Securities and Exchange Commission (the "SEC") as an exhibit to Form NRSRO unless such changes make the currently-filed Form NRSRO materially inaccurate. We believe that it is appropriate that our current code of conduct is available to the public, but are concerned that the sections in question require the designated rating organization to individually identify or otherwise highlight amendments as they are made from time to time. We would urge the CSA to allow NRSROs to post on their website the code of conduct that is currently filed with the SEC as an exhibit to Form NRSRO. This will assist with consistency and prevent NRSROs from being required to post two different versions of the code of conduct on the website. We request clarification that presenting an up-to-date (amended and restated) code of conduct without specifically identifying amendments will satisfy the website posting requirements of sections 6(1) and (2). We further note that three days to update the website is a short timeframe and suggest a more reasonable time frame would be five business days.

Support for Acceptance of NRSRO Filings

2.4 S&P Ratings Services strongly supports the CSA's decision to include exceptions in the Proposed Instrument for NRSROs to prevent duplicative disclosure and processes, such as those found in sections 3(2) and 13(2) of the Proposed Instrument. We believe these exceptions will reduce compliance costs without compromising the achievement of the objectives of the proposals.

2.5 S&P Ratings Services notes that the proposed timing in section 13(2)(a) is inconsistent with requirements for filing the annual update to Form NRSRO with the SEC. Section 13(2)(a) refers to a designated rating organization filing its most recent Form NRSRO no later than "90 days after the end of its most recently completed *financial year*" whereas the annual update to Form NRSRO must be submitted to the SEC no later than 90 days after the close of the *calendar year*[1]. There is potential for a mismatch between the version of the Form NRSRO filed to fulfil the annual filing requirements in Section 13 and the version of the Form that constitutes the annual update in the U.S. In addition to the annual filing requirement, NRSROs are required to file interim updates to Form NRSRO if information in the Form becomes "materially inaccurate." These interim updates may only include those exhibits being amended as part of that update. As a result, there is a possibility that an interim update may be the Form NRSRO most recently filed with the SEC prior to the time the Canadian filing is due.

[1] Section 15E(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. §78o-7(b)(2).

2.6 As well, section 3(2) of the Proposed Instrument refers to an NRSRO filing its "most recent Form NRSRO." We note that it would not be appropriate for S&P Ratings Services to file its Form NRSRO before the date the Form is filed with the SEC. We also note that, in practice, there may be circumstances which may delay the filing in Canada, for example, if the filing date in the U.S is a Canadian holiday or if other logistical matters arise. It would be preferable for NRSROs such as S&P Ratings Services to be provided with up to 10 Canadian business days from the day the form is filed with the SEC to file the form in Canada. We provide below our suggestion on how section 13(2) can be amended to address our feedback. Where we believe additional words should be added we have included the words in *italics and underlined*. Where we have suggested the deletion of words, these appear with a ~~strikethrough~~.

13. Annual filing requirement –

(2) Despite subsection (1), a designated rating organization may file its ~~most recently completed~~ *annual certification of its* Form NRSRO *or its amendments* ~~on or before the earlier~~ *within 10 business days* of

~~(a) 90 days after the end of its most recently completed financial year, and~~

~~(b)~~ the date the credit rating organization files its *annual certification of* its Form NRSRO *or its amendments* with the SEC.

We also suggest that reference to the annual certification of Form NRSRO be included in section 3(2) of the Proposed Instrument.

2.7 Neither section 3(2) nor section 13(2) specifies whether the filing of Form NRSRO with Canadian securities regulators is to include the exhibits to Form NRSRO. On the presumption that it does, we wish to call attention to the fact that certain exhibits to an initial application on Form NRSRO can be filed with the SEC on a confidential basis due to the commercially sensitive nature of the information being supplied. NRSROs typically use this option due to the sensitive nature of this information. Following registration as an NRSRO, updates of this confidential information are supplied to the SEC annually not as part of Form NRSRO, but as reports pursuant to Rule 17g-3 under the Securities Exchange Act of 1934. To the extent it is the intention of the CSA to require this confidential information to be supplied to Canadian securities regulators pursuant to section 3(2) and 13(2), we urge that the Proposed Instrument make clear that such information shall be provided to any Canadian securities regulators on a confidential basis only.

Non-Interference with Content and Methodology of Ratings

2.8 In the Request for Comments, Part 4 "Proposed Legislative Amendments", the CSA indicates that "in addition to rule making authority, changes to the local securities legislation may include: ... confirmation that the securities regulatory authorities may not direct or regulate the content of credit ratings or the methodologies used to determine ratings". The use of the word "may" in this commentary causes S&P Ratings Services

concern as it indicates that not all Canadian jurisdictions will be in a position to adopt this important provision protecting CRO analytical independence. S&P Ratings Services strongly encourages the CSA to expressly prohibit interference with CRO's analytical independence as part of implementation in all Canadian jurisdictions. As noted above, we believe analytical independence is the hallmark of ratings quality and an essential factor in market confidence in credit ratings.

2.9 We wish to highlight that the approach of expressly protecting CRO's analytical independence, as contemplated by the CSA in its commentary discussed above, is consistent with regulatory regimes for CROs in the U.S. and Europe. United States law (section 15E(c)(2) of the Securities Exchange Act of 1934, in particular) expressly prohibits the SEC from regulating the substance of credit ratings or the methodology by which ratings are determined. Similarly, Article 23(1) of the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies states that the competent authorities and other public authorities of a Member state shall not interfere with the content of credit ratings or methodologies. S&P Ratings Services urges the CSA to pursue similar implementing legislation in each of the Canadian jurisdictions.

2.10 We are also concerned with certain comments made by the CSA in the Notice and Request for Comment that indicate the potential for interference with rating content and methodology. Specifically, in the summary of comments and responses on CSA Consultation Paper 11-405 the CSA indicates in two responses that "securities regulatory authorities will, *in most cases*, be prohibited from directing or regulating the content of credit ratings or the methodologies." These statements suggest that there are situations where regulatory authorities may dictate the content of credit ratings or the methodologies used to determine ratings. However, the Proposed Instrument itself provides in section 2 that "nothing in this Instrument is to be interpreted as regulating the content of a credit rating or the methodology a credit rating organization uses to determine a credit rating." S&P Ratings Services requests clarification on this potential inconsistency from the CSA and requests that the Proposed Instrument explicitly prevent interference by securities regulators and other public authorities with the content of credit ratings and methodologies.

Conflict of Interest Provisions

2.11 Section 8 of the Proposed Instrument states that a CRO may not issue or maintain a credit rating in the event that any of the enumerated conflict situations has occurred. S&P Ratings Services is concerned that in the event of a technical, minor or inadvertent breach of section 8, we would be required to withdraw our credit rating, which seems to be a disproportionate result. We suggest there should be some sort of curative provision or materiality threshold that would allow us to maintain a rating in circumstances where the breach is immaterial or its effect has been mitigated.

2.12 The proposed language in section 8(a) to (f) is consistent with the language in SEC Rule 17g-5(c), which concerns prohibited conflicts of interest. However, rather than prohibiting a CRO from issuing or maintaining a credit rating where one of the enumerated situations exists, Rule 17g-5(c) states that an NRSRO "is prohibited from having the following conflicts of interest relating to the issuance or maintenance of a credit rating." S&P Ratings

Services believes the better approach would be to mirror the SEC language in this particular case. The SEC language allows for a cure through removal of the conflict, whereas the proposed section 8 wording makes it appear as though the only cure is withdrawal of the rating, which could be disruptive to issuers and the markets and unnecessary when the conflict situation is technical, minor or inadvertent in nature.

Compliance Officer and NRSROs

2.13 Section 11(2) of the Proposed Instrument requires a compliance officer to report to "the board of directors of the designated rating organization (or the board's equivalent)" in the event of a breach of the CRO's code of conduct. S&P Ratings Services is concerned that in the event of a technical, minor or inadvertent breach, the compliance officer would be required to report this to the board of directors (or the board's equivalent). This could result in an undue focus of board resources on essentially day-to-day management concerns that are ordinarily outside their province and result in diverting the attention of the directors and the most senior managers of the CRO from more strategic policy and business management issues.

2.14 S&P Ratings Services recognizes that effective internal governance is at the foundation of a CRO's internal controls. S&P Ratings Services has a strong internal governance and control framework and has taken steps over the last three years to strengthen and enhance internal governance. S&P Ratings Services has adopted an internal control structure governing the implementation of, and adherence to, policies, procedures and methodologies for determining credit ratings. There are three groups that play key roles in S&P Ratings Services current internal control structure: (1) the businesses, which are accountable for risk, quality and adherence to compliance requirements; (2) four control functions, which include independent quality, criteria, compliance, and risk functions; and (3) an internal audit function, which checks that the businesses and control functions are performing their respective responsibilities. S&P Ratings Services has also established an independent Policy Governance Group (PGG) and given it a mandate to develop and approve all new ratings policies and procedures. This group is also responsible for maintaining policies that are clear, measurable, and uphold our quality standards. PGG membership includes representatives from the legal, compliance, regulatory affairs, criteria and quality functions.

2.15 We consider that the fundamental objectives of corporate governance can be met through a number of different arrangements. Rather than specifying that each and every breach of the CRO's code of conduct that is outlined in section 11(2)(a) to (c) be brought to the attention of the board or its equivalent, our view is that reliance should be placed instead on governance arrangements established within the CRO, including the requirement for a compliance officer to monitor and assess compliance with the organization's code of conduct and securities legislation as specified in proposed section 11(1). We suggest that section 11(2) be deleted as a breach reporting requirement already exists in clause 1.16 of the IOSCO Code. If the CSA does not agree with our feedback we suggest that, at a minimum, a materiality threshold be included to ensure that only those instances of non-compliance, that are in the opinion of the CRO significant, are brought to the attention of the board or its equivalent.

Clarification on Prospectus Disclosure Triggers

2.16 Under the proposed consequential amendments adding sections 10.9(1) of Form 41-101F1, 21.8(1) of Form 41-101F2, 7.9(1) of Form 44-101F1 and 7.3(1) of Form 51-102F2, issuers are required to disclose in their prospectuses and AIFs not only credit ratings but also any other kind of rating, including a stability rating or a provisional rating. Subject to our comments below at paragraph 2.17 about the mandatory credit rating disclosure for issuers, S&P Ratings Services suggests that the words struck in the text below should be deleted from section 10.9(1) of Form 41-101F1, 21.8(1) of Form 41-101F2, 7.9(1) of Form 44-101F1 and 7.3(1) of Form 51-102F2:

> "If you have asked for and received a credit rating, ~~or if you are aware that you have received any other kind of rating~~, including a stability rating or a provisional rating, from one or more credit rating organizations for securities of your company that are outstanding and the rating or ratings continue in effect, disclose…"

The phrase "any other kind of rating" is exceedingly broad and may contribute to a great deal of uncertainty as to what must be disclosed. Given that the focus of the Proposed Instrument is on the issuance and maintenance of credit ratings, the requirement to disclose any other kind of rating may produce superfluous disclosure. Rather than assisting investors in understanding the significance of credit ratings, this disclosure may instead serve to confuse or obfuscate the information that is most central to the concerns the Proposed Instrument seeks to address. We consider that our proposed change maintains the focus on those central concerns and provides greater certainty to issuers on what must be disclosed in an issuer's prospectus and AIF.

Proposed Requirements for Disclosure of CRO Fees will Undermine Conflict Rules and Competition

2.17 S&P Ratings Services supports the goal of enhanced investor understanding of credit ratings and the rating process. S&P, however, takes issue with the proposed provisions mandating disclosure of fees paid to CROs in sections 10.9(2) of Form 41-101F1, 21.8(2) of Form 41-101F2, 7.9(2) of Form 44-101F1 and 7.3(2) of Form 51-102F2. S&P Ratings Services objects to the proposed fee disclosure requirements for the three reasons outlined below.

Fee disclosure will undermine efforts to eliminate conflicts of interest

2.18 First, the proposed provisions mandating disclosure of fees paid to CROs will undermine the IOSCO Code's conflict of interest goals, particularly section 2.12 of the IOSCO Code, which prohibits employees who are involved in the rating process from participating in any discussion regarding fees with the entities they rate. The proposed provisions mandating disclosure of fees are also inconsistent with the objects of section 8(e) of the Proposed Instrument. Proposed section 8(e) prohibits a CRO from issuing or maintaining a credit rating where anyone who participates in determining credit ratings or who develops or approves procedures or methodologies used for determining credit ratings was involved in negotiating, discussing or arranging the fees paid for ratings. This provision is intended to

maintain analytical independence and ensure that rating quality is not affected by commercial interests. S&P Ratings Services fully supports this aim and separates commercial and analytical activities, with separate personnel dedicated to each of these activities.

2.19 If the fee disclosure requirements mentioned above are adopted, information about the revenues received from each client that pays a CRO to issue or maintain a rating, as well as the relative importance of each such client as a contributor to the CRO's revenues, would become publicly available. Publicly disclosing this information would undermine the objects of section 8(e) of the Proposed Instrument as well as the efforts of regulators globally to shield credit analysts from such fee information in order to promote independence in the credit rating process. It is incongruous that the Proposed Instrument would on the one hand facilitate access to information on the fees paid for credit ratings while on the other hand endorse measures aimed at insulating persons responsible for determining credit ratings from this information so that analytical decisions cannot be seen as having been influenced by commercial considerations.

Fee disclosure will undermine competition

2.20 The second reason S&P Ratings Services objects to the fee disclosure rules is that disclosing the actual amounts paid by individual issuers will hinder competition in the industry. Fees paid for ratings services are commercially sensitive information. We are not aware of any other jurisdiction that requires such detailed ratings fee disclosure.

Fee disclosure requirements are unnecessarily broad

2.21 Thirdly, if the CSA determines that disclosure of specific fee amounts for ratings is warranted, S&P Ratings Services objects to the requirement that issuers separately disclose the amounts paid to CROs and their affiliates for other services provided during the previous two years since it would be unduly burdensome for issuers and yield little in the way of meaningful information for investors. The obligation would require issuers to have systems in place to track payments to affiliates of CROs for any other services even if these are not related to credit ratings. Further, in S&P Ratings Services' case, some of these other services may be provided by Standard & Poor's or McGraw-Hill entities that are legally and/or operationally separated from S&P Ratings Services and whose services are ancillary to or wholly unconnected to credit rating activities and could not conceivably pose a potential conflict of interest. Indeed, rather than making it easier for users of credit ratings to understand potential conflicts of interest, this disclosure could provide rather convoluted revenue information from which no clear conclusions could be drawn. This might lead market participants to draw erroneous conclusions about the existence and scope of potential conflicts of interest. In such circumstances, where the disclosure to market participants is not meaningful and potentially misleading, market participants may consequently discount all disclosures regarding potential conflicts of interest, including relevant and meaningful disclosures. Such a result would be counterproductive to the CSA's goals. Subject to our comments above regarding fee disclosure generally, S&P Ratings Services requests clarification from the CSA that fees paid for non-credit rating services by CROs or their affiliates need not be disclosed under the proposed amendments mentioned in paragraph 2.17 of this letter.

2.22 While we agree that an investor may want to know if a CRO is potentially influenced by the revenue stream that it and its affiliates receive from an issuer and its affiliates, if the revenue stream is relatively insignificant to the CRO and its affiliates, then it is very difficult to understand why an investor would need (or want) to know the actual dollar amounts involved. We are also not aware of such broad disclosure requirements as they would apply to a CRO being applied to participants in the transaction. Therefore, subject to our comments above regarding fee disclosure generally, we believe that if such disclosure is truly necessary, then subject to paragraph 3.8 below, a more sensible approach would be to limit disclosure by the issuer in offering documents to the names of the CROs that were paid for ratings.

3. Responses to Specific Requests for Comment

Prohibiting Waivers of Codes of Conduct

3.1 Section 7 of the Proposed Instrument stipulates that a code of conduct must specify that waivers of the code are prohibited. As discussed below, while S&P Ratings Services supports the aim of ensuring code of conduct compliance, it is our position that section 7 is problematic as it would reduce our flexibility to deal with unusual circumstances. As well, this requirement would pose added difficulties for global CROs. We believe the problems with the provision outweigh the benefits, which will likely be achieved independently through other provisions of the Proposed Instrument.

CROs need flexibility to deal with unusual circumstances

3.2 The prohibition against code of conduct waivers is problematic because it reduces the flexibility that CROs have to deal with unusual circumstances. Large CROs such as S&P Ratings Services issue or maintain ratings for thousands of issuers and debt issues at any given time. During the course of these operations, unusual circumstances will inevitably arise that could require a departure from our code of conduct. In most cases, the waiver of the code provision would not be material nor would it undermine the objectives of the IOSCO Code. A prohibition against waivers could prevent us from issuing a rating in such circumstances.

Issues pertaining to global CROs

3.3 The IOSCO Code has been widely supported as an internationally recognized standard for a number of years without a provision prohibiting code waivers. S&P Ratings Services is not aware of any other jurisdiction that has adopted the IOSCO Code having imposed a restriction on code of conduct waivers. In fact, we believe that prohibiting waivers of the code of conduct is inconsistent with the "comply or explain" approach adopted by IOSCO. If many countries were to implement unique CRO regulatory regimes, global CROs such as S&P Ratings Services would face the burden of having to comply with different (and possibly contradictory) regulatory standards and requirements across their businesses in different jurisdictions. This would not only be onerous and expensive, but also potentially disruptive. If the CSA requires that a prohibition on waivers be placed in our actual code of conduct, we are concerned that this may require S&P Ratings Services to create and

implement a wholly new code of conduct for its operations in Canada. This approach would not be consistent with the global nature of our business.

Other regulatory initiatives will ensure code of conduct compliance

3.4 Finally, we believe a prohibition against waivers is unnecessary to ensure code of conduct compliance because waivers would only be used to deal with unusual circumstances and there are other mechanisms in the Proposed Instrument that will ensure code compliance, such as monitoring by the compliance officer.

Suggested alternative

3.5 For the above reasons, S&P Ratings Services objects to the proposed requirement to include a prohibition against waivers in a CRO's code of conduct. If, however, the CSA still believes that a restriction on code waivers is truly necessary in achieving the objectives of Canadian CRO regulation, S&P Ratings Services suggests the following alternative that will help address S&P Ratings Services' concerns outlined above while maintaining the spirit and intent of the IOSCO Code and still serving the goal of code compliance in Canada.

> **Waivers** – A designated rating organization must not waive provisions of its code of conduct unless it can explain where and why the waiver is granted, and how the waiver nonetheless achieves the objectives contained in the IOSCO Code.

Support for the NRSRO Exception from Providing Personal Information Forms

3.6 S&P Ratings Services intends to rely on the provisions in the Proposed Instrument which permit an NRSRO to file its Form NRSRO in lieu of Form 25-101F1. In this case, S&P Ratings Services understands that it will not be required to file director and officer personal information forms. We strongly support the CSA's decision to accept Form NRSRO in lieu of the Canadian form as this will help to reduce the regulatory burden and associated costs of operating a global CRO by avoiding duplicative processes while still providing meaningful information.

The Test for Determining the Principal Regulator for a CRO's Designation

3.7 S&P Ratings Services has no comment on the factors suitable for determining "significant connection" under section 8 of Proposed NP 11-205. This test is not applicable to S&P Ratings Services, which has an office located in Canada.

The "Expert's Consent" Exemption for CROs is Appropriate

3.8 S&P Ratings Services believes the CRO exemption from filing "expert's consents" when a rating is used in a prospectus or other disclosure document is appropriate because eliminating it could have unintended market consequences that negatively impact the transparency and efficiency of capital markets in Canada. The reasons for this negative impact on capital markets' transparency and efficiency include a potential reduction in the amount of publicly-available information, more costly and time consuming public

securities offerings, and the potential for reduced access to capital for new or smaller issuers. Further, S&P Ratings Services believes that, particularly given the forward-looking nature of ratings, increased liability standards will potentially result in unwarranted litigation. S&P Ratings Services believes the professed goal of eliminating the "expert's consent" exemption, namely greater investor protection and quality of ratings, will effectively be achieved through other regulation found in the Proposed Instrument such as the code of conduct requirements, conflict of interest rules and annual disclosure requirements. Finally, it is not disputed that CROs should act responsibly and can incur potential liability for certain kinds of misconduct, just like other market participants. But any liability regime for CROs should take into account the unique nature of forward-looking rating opinions and their role in the markets and minimize inadvertent consequences and potential harm to the markets. For these and other important policy considerations explained further below, S&P Ratings Services believes that the exemption should be retained.

The nature of credit ratings is irreconcilable with certain liability standards and schemes

3.9 There is a core difference between ratings opinions and the statements provided by those parties traditionally treated as "experts" under current law such as accountants, appraisers and lawyers. Specifically, unlike these other statements, which speak entirely to an entity's historical and current financial or legal position, credit ratings are opinions about the likelihood of future events. An accountant may be able to say that it stands by, and will continue to stand by, its retrospective audit of an historical period. But because credit ratings are inherently forward looking, there is no conceivable scenario under which a CRO will be able to say that at any future point in time its current assessment of the prospective creditworthiness of an issuer will not change. As such, the question of whether a rating could contain an untrue statement of material fact – i.e., the basic concept underlying liability for an expert opinion and consent – is inconsistent with the inherent forward-looking and non-factual nature of ratings.

3.10 Moreover, because of their forward-looking nature, credit ratings present many more opportunities for after-the-fact second guessing by litigants. CROs offer opinions about the relative credit quality of a universe of securities, some of which (it is understood from the beginning) will inevitably be downgraded and, in some cases, default as issuers encounter financial difficulties, the markets in which they operate shrink or economies go into recession. Thus, simply as a function of the nature of ratings, CROs are inherently more vulnerable to the threat of liability and the perception of claims by investors – even when they did nothing wrong – than those persons traditionally treated as "experts" under current law.

Clarity of role

3.11 Retaining the exemption from consent would continue to promote clarity and transparency regarding the role of CROs. For example, CROs have no role in the promotion of securities offerings. Rather, CROs are independent providers of publicly-available opinions on creditworthiness. By removing the exemption and requiring a CRO's consent, investors may incorrectly conclude that the CRO is involved in promoting the offering and/or has had a greater involvement in the offering process than it in fact has had. S&P

Ratings Services'credit ratings have an important, but limited role, *i.e.,* they are opinions about creditworthiness, primarily expressed as the relative likelihood of a security defaulting. They do not speak to market value, volatility or liquidity, or suitability as an investment. They are but one tool among many that investors can consider in their decision-making process. They are not a substitute for independent investment analysis. We believe that removing the exemption may lead to an incorrect perception among investors regarding the limited role of CROs and their credit ratings.

Removal of the exemption may lead to unintended market consequences

3.12 Removing the exemption from consent may lead to unintended market consequences. For example, certain CROs may choose not to provide consent in some or all instances. For the market, this may lead to less information being readily available to investors in disclosure documents. This, we submit, runs counter to the fundamental goals underlying the securities laws. In addition, CROs that do provide their consent may adopt a more homogeneous approach to credit ratings, resulting in less diversity of opinion and strong disincentives for analytical innovation and increased competition in the industry. It may also create incentives for consenting CROs to narrow the scope of their rating analysis (such as by restricting it to those rating processes that courts have deemed "reasonable") in order, again, to minimize the areas for potential second-guessing and litigation. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), among other things, repealed the expert's consent exemption for NRSROs in the U.S. and exposed NRSROs to potential civil liability for consenting to disclosure of their credit ratings in U.S. public securities offerings. On July 22, 2010 the SEC noted that the NRSROs have indicated that they are not willing to provide their consent at this time[2]. The SEC's comments were made in the context of granting issuers of asset-backed securities temporary relief from a regulatory requirement that the prospectuses for such securities include disclosure of their credit ratings.

3.13 The above concerns are compounded by the proposed amendments mandating certain ratings disclosure in prospectuses and continuous disclosure filings. If adopted, such mandatory disclosure provisions would require an issuer to disclose in its AIF and any prospectus, each rating it has received and the name of the CRO that provided it. The combination of implementing this mandatory disclosure and repealing the CRO exemption would mean that any credit rating issued by a CRO to a Canadian reporting issuer would have to be disclosed by the issuer in its public filings, thereby triggering the mandatory requirement to file an expert's consent. If a CRO declined to issue its consent, presumably the issuer would be unable to comply with the mandatory disclosure provision and might decide not to pursue a credit rating at all. Accordingly, S&P Ratings Services submits that the combination of these two proposed amendments is practically unworkable and could lead to unintended market consequences including less transparency in the markets and a potential freeze of public security offerings.

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[2] http://www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm

The exemption promotes administrative efficiency in the offering process

3.14 As a practical matter, requiring issuers to obtain consents from CROs will likely significantly interfere with the timing of public securities offerings and raise the cost of executing them – costs that, in many instances, will be passed onto investors. CROs, cognizant of the duty to establish an affirmative due diligence defence, may insist on independently participating in the due diligence process, and reviewing and signing off on the disclosures in the prospectus. Unlike other parties whose consent is typically required—auditors, counsel, and providers of fairness opinions—all of whom today are directly involved in the offering process, CRO personnel are not part of the working group for the offering, and so the CRO cannot reasonably be expected to be in a position to provide its consent on as timely a basis as the other parties to the transaction.

3.15 The current exemption promotes administrative efficiency. Retention of the exemption would avoid placing any undue burden on issuers. S&P Ratings Services generally makes available to the public its ratings and related research reports. Therefore, before an S&P Ratings Services credit rating is cited in a prospectus it generally will have been published and constitute a matter of public record. This distinguishes a credit rating from most other statements that may be made in a prospectus which are not otherwise available to the public and which may require obtaining verification from the author before they may be included. With credit ratings, the issuer now has the ability to disclose the publicly-available credit rating in its prospectus without the need for CRO consent. In addition, we believe that placing the onus of verification of ratings disclosure on the issuer as the existing law does, will continue to provide the issuer with greater control over the administrative process, without placing an unrealistic time frame or administrative burden on CROs or putting the issuer to additional expense in managing the process.

Effects on newer and smaller issuers

3.16 Removing the exemption may have greater detrimental effects on newer and smaller issuers, including those in emerging sectors critical to the future growth of our markets and economy. Faced with a new liability standard, CROs may have strong incentives to provide consent only in connection with public securities offerings of those entities and securities that are least likely to default or be downgraded or which have a long history of providing the highest quality data. As a result, issuers that do not meet these criteria, including those relatively new to the debt markets, may have a difficult time getting consents for credit ratings and, therefore, greater difficulty accessing capital in public securities offerings.

Investor protection will be better achieved through other regulatory initiatives

3.17 The stated purpose of imposing a new liability standard on CROs is greater investor protection – a purpose that S&P Ratings Services supports. However, it is S&P Ratings Services' position that the goal of investor protection will be better achieved through other proposed regulatory initiatives applicable to CROs found in the Proposed Instrument, such as the code of conduct requirements in Part 3, the conflict of interest rules in Part 4 and the annual filing requirements in Part 6. These initiatives have not yet become law and their positive effects have not yet been observed. We think it would be a mistake to impose potential liability on CROs, a measure that may have such serious negative effects on

capital flows, market growth and efficiency, when the goal such a measure seeks to achieve may effectively be met by other less harmful means.

4. Conclusion

4.1 We very much wish to play a full and constructive role in assisting the CSA with finalizing a suitable and appropriate approach to regulating CROs in Canada. We hope that there will be further meaningful opportunities for consultation before the regulatory framework is finalised so as to arrive at a result that is practicable, proportionate and meets the needs of the Canadian securities regulators, CROs, the users of ratings and the investing public.

We would welcome the opportunity to discuss our comments further with you. Please do not hesitate to contact myself or Rita Bolger, Senior Vice President and Associate General Counsel by phone: + 1-212-438-6602 or by email: rita_bolger@standardandpoors.com.

Respectfully,

Tom Connell
Managing Director