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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
Superintendent of Securities, Government of Yukon
Superintendent of Securities, Department of Justice, Government of the Northwest Territories
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Dear Sirs/Mesdames:

Re: The proposed rules for the regulation of securitized products

The Canadian Bankers Association ("**CBA**") works on behalf of 52 domestic chartered banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 267,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The CBA also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

The CBA appreciates the opportunity to provide the Canadian Securities Administrators ("**CSA**") with our comments on the proposed rules for the regulation of securitized products published for comment on April 1, 2011, as supplemented by the CSA Staff Notice 11-315 *Extension of Consultation Period*.

I. General

We understand that the CSA has been guided by three general principles in developing the proposal for the regulation of securitized products, namely (i) ensuring appropriate disclosure in a manner that fosters market efficiency, (ii) facilitating transparency in the securitization market so that it can continue to function even in times of financial stress, and (iii) ensuring that rules are proportionate to the risks associated with particular types of securitized products. While we generally agree with these principles, we are concerned that the proposal does not strike the right balance between them.

While we appreciate what the CSA is attempting to achieve with this proposal, we do not believe that the proposed rules are appropriate in the Canadian marketplace. We believe that the detrimental impact on market efficiency is disproportionate to any gains in transparency, and that changes in respect of the exempt market should not be product-specific. We therefore ask the CSA to reconsider proceeding with this proposal. If, after a careful consideration, the CSA decides to proceed with the proposal, we are concerned that without significant modifications, the proposed rules may reduce issuers' liquidity options and the availability of some of their more cost-efficient alternatives, and undermine, rather than foster, market efficiency. In that light, and subject to the foregoing, please find below for your consideration some of our specific concerns and suggestions for modification of the proposed rules. We would be pleased to discuss our comments with you in further detail.

By way of a general remark, we suggest that the CSA consider distinguishing between high- and low-risk securitized products to ensure that rules are proportionate to the risks associated with different types of securitized products, rather than imposing general requirements applicable to all. In this regard, please consider the fact that in Canada, the bank-sponsored conduit market and the term market have not experienced any of the liquidity issues that arose outside Canada in connection with the recent economic crisis. As such, and as discussed below in more detail, our view is that certain of the proposed requirements are unnecessary in the bank-sponsored conduit market and the term market in Canada.

Also, we believe it may be useful for the CSA to consider introducing a blanket materiality threshold for disclosure. In our view, this is preferable as a guiding principle to the current proposal under which it may be necessary to address numerous enumerated items notwithstanding that they may not be material to the particular issuer. We also think that such approach is consistent with the current continuous disclosure rules in Canada. Along the same lines, enhanced disclosure is required under the current proposal with respect to servicing procedures and credit and underwriting policies of the originator, with no materiality threshold having been specified. We believe that it would be useful for the CSA to provide guidance as to how detailed the information with respect to such items must be, given the highly technical nature of the subject matter. To date, general summaries of such policies and procedures have been accepted by investors as adequate, and the CSA may find that this is sufficient.

II. Prospectus rules

A. Prospectus disclosure

Material conflicts of interest and legal and regulatory actions
Item 1.10(d) of Form 41-103F1 *Supplementary Information Required in a Securitized Products Prospectus* ("**Form 41-103F1**") requires the issuer of securitized products to provide the following prospectus disclosure:

> *whether any person or company for which disclosure has been provided under Items 1.2 to 1.9 [i.e., sponsor, arranger, depositor, originator, issuer, servicer, trustees and any other party with a material role], or any affiliate of the person or company, is engaged in, or has in the 12 months before the date of the prospectus been engaged in, any transaction that would involve or result in any material conflict of interest with respect to any investor in the securitized products being distributed*

We are concerned that, practically, it would be very difficult and onerous for a bank to confirm that all enumerated parties have not entered into a transaction that could result in a material conflict. Also, in order to be able to confirm such statement, a bank would have to rely on third parties, such as officers of those entities, to confirm that no conflicting transaction exists. This would create potential liability of banks for misrepresentations regarding conflicts. As well, in some instances, such as in the case of underwriters, it may be difficult to confirm that no conflicting transaction exists, given that underwriters may enter into transactions affecting both sides of a market in their capacity as market-makers. In light of the foregoing, we think that the requirement to disclose the parties involved in a distribution and their roles is appropriate. However, we believe that a statement on a material conflict of interest would be overly burdensome and should not be required.

We have similar concerns regarding the proposed requirement in item 12 of Form 41-103F1 to provide disclosure of legal proceedings and regulatory actions involving each of the above-listed entities. We think that it would be very difficult and onerous in practice for a bank to provide such disclosure, especially if disclosure is not limited to materially relevant litigation or regulatory action, as applicable. We encourage the CSA to consider limiting disclosure to legal proceedings or regulatory action, as applicable, that would have a material adverse effect on the securitized assets in question or the servicer's ability to service those assets, as reasonably determined by the originator/servicer.

Significant obligors of pool assets, credit enhancement and other support
Item 2 of Form 41-103F1 requires prospectus disclosure of significant obligors of pool of assets, including in some instances, financial information for such entities. If such obligors are public entities, we believe it is appropriate to allow issuers of securitized products to direct the reader to appropriate public sources of such information (e.g., SEDAR). If such obligors are private entities, imposing a requirement on issuers to obtain financial information for such entities may preclude sellers from accessing the market due to a refusal of the seller's underlying customers to provide such information. Our recommendation is to focus on the disclosure of the significant obligor of pool assets, direct the reader to available public information regarding those obligors, if any, and not require disclosure of private and/or confidential information. It would then be up to investors to decide whether they wish to participate in a transaction that involves a private obligor that is a significant obligor.

Similarly, we think that the same principle should apply to the proposed requirement to disclose information about credit enhancement and other support in item 8 of Form 41-103F1. The requirement to provide full disclosure of the identity of the entities involved is supported, but we

think that it would be appropriate to direct the reader to publicly available information, and allow investors to make the decision whether to invest if the transaction involves a private entity that is providing credit enhancement or other support.

Revolving asset master trusts
One of the proposed requirements in item 4.3 of Form 41-103F1 is to provide for revolving asset master trust information about cumulative losses and prepayments in appropriate separate increments based on the date of origination of the pool of assets, if material and applicable. Notably, when reporting on revolving programs, measures such as cumulative losses and prepayments can be misleading. If a revolving asset master trust has been in existence for a number of years, short-term losses could be high, even if the annual losses are low, when calculated based on the date of origination of the pool assets. We therefore think that it may be appropriate to require disclosure of losses and other similar portfolio performance measures on an annualized basis given the revolving nature of the assets.

Material changes and significant events
We are concerned about the ability to provide disclosure of material changes and significant events within the proposed two-day period, especially when the public standard is ten days. Also, as such disclosure is required to be provided to securityholders, we query whether this requirement could practically be met, especially in respect of securityholders holding securities through intermediaries.

In addition, we question whether all of the listed "significant events" would be significant in all contexts. Rather than using a generic list, we recommend that the focus should be on the events that are outlined in the documentation for the applicable securitized product. If an event is listed as "significant" in such documentation, it is presumably because it is important and should be monitored. We therefore suggest that it would be more appropriate to focus on disclosing actual, program-specific significant events, which would result in the disclosure being specifically focused in terms of a particular investment.

B. 5% vertical slice risk retention

Our view is that the 5% vertical slice risk retention as an additional eligibility criterion for the shelf system is not necessary in the Canadian market. In Canada, the market convention has been for the issuer to retain a subordinated interest in securitized transactions. Unlike in the United States, where the 5% vertical slice risk retention has been proposed[1], the bank-sponsored conduit market and the term market in Canada have not had any of the market-risk issues that arose outside Canada in connection with the recent economic crisis. In particular, outside the area of commercial mortgage-backed securities, the Canadian market has not utilized an originate-to-distribute model, which was a source of market-risk issues in the United States. In these Canadian transactions, the most deeply subordinated investors have had the ability to negotiate controlling class rights for their protection.

III. Exempt distribution rules

A. Disclosure

Extent of disclosure
The proposed rules set out a requirement to provide very detailed disclosure in an information memorandum that must be current for each issuance of securities in the exempt market. We are concerned that this may be impractical given that a bank-sponsored conduit would be purchasing

[1] See United States Securities and Exchange Commission's April 2010 notice of proposed rule-making relating to asset-backed securities and other structured finance products.

these securities on a regular basis, and also issuing such securities daily. We ask the CSA to consider whether monthly asset-reporting would be more appropriate, in terms of both the administrative requirements or market participants, and the requirement to provide information to investors.

Also, regarding the proposal to add disclosure for short-term securitized products, we note that such disclosure for banks has largely been addressed through the introduction of global-style liquidity requirements and increased disclosure for bank-sponsored conduits. The increased disclosure has also been required by the Bank of Canada in order to permit the posting of short-term securitized products as collateral. We encourage the CSA to consider whether these proposed rules are proportionate to the risks associated with bank-sponsored short term securitized products, especially given the performance of the bank-sponsored conduit market and the term-market in Canada during the most recent economic crisis.

Exceptions to disclosure requirements

We suggest that the CSA consider allowing for exceptions to the disclosure requirements in appropriate circumstances. For instance, it would be appropriate to consider providing a general exemption from the proposed disclosure requirements for sellers to conduits for asset-backed commercial paper ("**ABCP**"). Such ABCP conduits specifically negotiate the transaction documents with sellers and we see no policy reason to provide regulatory protection to sophisticated purchasers whose business it is to understand these products. Providing such exemption would provide balance between the interests of sellers and purchasers in the sale of securitized products to ABCP conduits. For clarity, the seller would continue to be required to provide the information and reporting required for the protection of the purchaser, as well as the reporting and disclosure required by the end-investor in the ABCP (i.e., the information related to assets, liquidity support, risks and material changes).

In a similar vein, we believe that highly sophisticated purchasers in general should be afforded the opportunity to waive the right to receive some or all of the prescribed disclosure. We see no policy reason for providing regulatory protection to such highly sophisticated purchasers, including banks, bank-owned dealers and bank-sponsored conduits, whose business it is to understand the risks associated with these products, and who may not require such disclosure. Based on their product knowledge and risk assessment capabilities, such purchasers would be in a good position to decide whether, and what kind of disclosure is appropriate. Our view is that without this option, the proposed disclosure requirements applicable to sophisticated parties would unnecessarily undermine, rather than foster, market efficiency.

B. Further limits on distributions and class of investors

We understand that enhanced disclosure and transparency may be appropriate in particular contexts, and recognize that some of the proposed exempt distribution rules are consistent with the evolving rules for securitized products internationally. However, we question the need for imposing a special exemption for the distribution of securitized products to eligible investors, thereby further limiting this class. We do not think that such restrictions are necessary in the Canadian market. We also believe that treating securitized products as completely different from other similar investment products will likely create an inaccurate perception that these products potentially pose greater risk than others.

Through appropriate disclosure, tailored to the needs of the final investor, market participants would be able to provide the end-investors with the information they need to make well-informed investment decisions, including the information about the unique attributes of securitized products. Appropriate and balanced disclosure would also address policy concerns regarding the risks associated with particular types of securitized products, and contribute to a level playing field for securitized products in relation to other products. If balanced and appropriate disclosure

requirements are in place, there should not be a need for further limits on distributions of the class of eligible investors.

C. Certification requirement

We understand that the proposed certification requirements are part of the intended extension of statutory liability for disclosure in information or offering memoranda for securitized products to include third parties such as sponsors and underwriters. Although the standard of disclosure in a private securitized products transaction will not on its face be the same as in a public transaction (which requires full, true and plain disclosure of all material facts), our concern is that underwriters would cease to draw much of a distinction between public and private offerings of securitized products going forward. Similar to the point made above regarding the requirement to deliver an information memorandum in the exempt market, we think that the CSA should consider allowing certain sophisticated purchasers, such as banks and bank-sponsored conduits that specifically negotiate the transaction documents, to contract out of the certification requirements. On a related issue, we assume that new certificates would not be required for each update of the disclosure. We would appreciate confirmation that this is the case.

IV. Other

A. Definition of securitized products

We are concerned that the definition of "securitized products" is not sufficiently clear. In particular, we are concerned that the definition may capture banking products such as (a) credit-default swaps, total return swaps, or swaps generally, which are either based on or collateralized by pooled or revolving assets, (b) structured notes, such as credit-linked notes, or notes that base their return on either pooled or revolving assets, and (c) innovative Tier 1 capital structures. We doubt that the intention of the CSA was to include these types of products in the definition of the term "securitized products". However, a strict and literal interpretation of the definition could lead one to conclude that such products are captured therein, which would in turn subject them to the new disclosure requirements set out in the CSA proposal.

B. Right of withdrawal

We understand that the CSA is still considering whether to give a securitized product investor a two-day right of withdrawal for a purchase in the exempt market. Given that securitized product commercial paper is issued on a daily basis, we think that it is not appropriate for a right of withdrawal to be introduced where the type of investors that can purchase it in the exempt market is already limited to sophisticated investors.

C. Dissemination of information

We think that the appropriate method for disseminating information about securitized products would be through SEDAR for public transactions, and a password-protected website or as mutually agreed between the parties for private transactions. In regards to the website disclosure, issuers of securitized products should be allowed to discharge their disclosure obligations by providing disclosure on such websites, and investors should be responsible for accessing those websites to inform themselves about the performance of their investments. Any requirement for issuers to directly advise investors would be a significant departure from current practice, administratively burdensome and, in the case of transactions where the assets are deposited to the Canadian Depository for Securities Limited, very difficult to trace through to the end investor.

D. "Grandfathering" and/or transition provision

The CSA indicates that the proposed continuous disclosure requirements apply in respect of all securitized products issued by the reporting issuer, regardless of whether they were distributed under a prospectus or on a prospectus-exempt basis. The CSA further notes that it is not proposing to "grandfather" current outstanding securitized products or implement a transition period. We are concerned that a lack of any flexibility in this regard on the part of the CSA could prevent issuers from continuing with the issuance of outstanding series or classes of securitized products.

E. Registration exemption for distribution of commercial paper

We note that the registration exemption for short-term debt that was previously in National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**") and available across Canada has been repealed, while the prospectus exemption for short-term debt in NI 45-106 remains in effect. In Ontario, the registration exemption in section 35.1(1) in the *Securities Act* (Ontario) resolves the registration issue for banks in Ontario, but a registration exemption to distribute corporate-issued CP or ABCP in the other provinces is not available. We query whether the registration issue will be resolved in the other provinces, and when.

We are grateful for the opportunity to comment on the CSA's proposal for the regulation of securitized products. We would be pleased to discuss our comments with you in further detail and to answer any questions you may have.

Yours truly,

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