CANADA PENSION PLAN INVESTMENT BOARD

OMERS ADMINISTRATION CORPORATION

ONTARIO TEACHERS' PENSION PLAN BOARD

September 27, 2017

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Dear Sirs/Mesdames:

Re: Proposed Amendments to National Instrument 45-102 – *Resale of Securities*

We are writing in response to the Canadian Securities Administrators' (the "**CSA**") Notice and Request for Comment (the "**Notice**") in respect of proposed amendments to National Instrument 45-102 – *Resale of Securities* ("**NI 45-102**") and proposed changes to Companion Policy 45-102CP to NI 45-102 (collectively, the "**Proposed Amendments**").

I. THE FUNDS

Together, our funds total over $590 billion and pay (or provide for the payment of) pensions to, and invest plan assets on behalf of, more than 20 million working and retired Canadians. While our individual statutory mandates are framed in slightly different language, each of us has the basic responsibility to invest in the best interests of the contributors to, and beneficiaries of, our plans with the objective of maximizing investment returns without undue risk, having regard to the requirements of our plans and the ability to meet the financial obligations under the plans. Our ability to successfully discharge our mandates is impacted by, among other things, our ability to monetize our investments. Investing in a broadly diversified global portfolio is central

to our respective investment strategies and the sustainability of our respective plans. Our ability to monetize our investments through sales outside of Canada is and will continue to be crucial to our success over the coming years.

II. OSC PROPOSED RULE 72-503 AND THE INITIAL COMMENT PERIOD

In September 2016, we submitted a comment letter (the "**2016 Comment Letter**") in respect of the Ontario Securities Commission's (the "**Commission**") Proposed OSC Rule 72-503 – *Distributions Outside of Canada* (the "**OSC Rule**"). We would like to express our support for the way in which these comments were received by the Commission, and the extent to which they have been considered and reflected by the CSA in the Proposed Amendments. As we noted in the 2016 Comment Letter, the historical uncertainty surrounding Ontario's "distributions out" regime has prevented selling securityholders such as ourselves from easily monetizing their investments, or otherwise forcing them to seek comfort in what can often be imperfect solutions, including reliance upon the existing exemption in section 2.14 of NI 45-102 (the "**Existing Exemption**"). Most significantly, the Existing Exemption itself carries considerable uncertainty, particularly with respect to determining whether residents of Canada own more than 10% of the outstanding securities of an issuer, or represent greater than 10% of the total number of the issuer's securityholders. Such uncertainty has historically required us to devote significant time and resources to ensuring these requirements are met, which can result in us being placed at a disadvantage relative to our global peers and potentially lead to negative consequences on our performance and, by extension, the well-being of Canadian pensioners. In our view, it is imperative that we be able to monetize our investments in foreign markets, in order to compete with our global peers and fulfill our mandates.

We further support the CSA's efforts in harmonizing the resale regimes across Canada for outbound securities, and the OSC's removal of the resale provisions from the OSC Rule. We believe that our concerns regarding an uncertain resale regime are to a great extent alleviated through the CSA's Proposed Amendments, and we therefore make no comment at this time to the changes proposed to the OSC Rule in the OSC's Second Notice and Request for Comment dated June 29, 2017.

III. THE PROPOSED AMENDMENTS

We believe that the Proposed Amendments will provide much-needed certainty to Canadian investors as they relate to the resale of securities of foreign issuers. Nevertheless, we believe there are certain components of the Proposed Amendments that could be slightly adjusted in order to continue to ease the regulatory burden on selling securityholders, while still maintaining the integrity of the Canadian capital markets and the protection of Canadian investors.

A. Definition of "Foreign Issuer"

We believe that the proposed definition of "foreign issuer" is an improvement over the 10% ownership tests that must be considered in the context of the Existing Exemption. Nevertheless, we believe that the definition could be refined in some respects.

Most notably, although the CSA seeks to incorporate an "asset-based test" as a means of ensuring a minimal connection to Canada, we do not view an asset-based test as an appropriate proxy to determine whether there is a risk of a market for a particular issuer's securities developing in Canada. We are particularly concerned that it may not be feasible or convenient in all cases to determine whether the majority of an issuer's consolidated assets are located in Canada. While, theoretically, investors may be able to obtain a representation from the issuer to this effect at the time of the distribution, such an approach may require certain revisions to what are otherwise the issuer's standard-form subscription agreements which, in turn, may create delays or even a disinclination to solicit Canadian investors. In other words, the steps that must be taken at the time of distribution in order to ensure the ultimate availability of the proposed exemption may inhibit our ability to participate in the offering of foreign securities in the first instance. We believe that the asset-based test could be removed from the definition of "foreign issuer" and believe that the remaining components of the definition (e.g., the location of the head office, the jurisdiction of formation, etc.) are sufficient to ensure the that a market for the securities does not develop in Canada.

While we consider that a removal (rather than a replacement) of the asset-based test in the definition of "foreign issuer" will allow us to most easily monetize our investments without negatively impacting the integrity of the Canadian capital markets, we would suggest that, as an alternative, the CSA consider a test similar to the one set out in connection with the determination of whether a security is an "eligible foreign security", as defined in OSC Rule 45-501 *Ontario Prospectus and Registration Exemptions* ("**OSC Rule 45-501**"), ASC Rule 45-511 *Local Prospectus Exemptions and Related Requirements*, and Regulation 45-107 *Respecting Listing Representation and Statutory Rights of Action Disclosure Exemptions*:

> "**eligible foreign security**" means a security offered primarily in a foreign jurisdiction as part of a distribution of securities in either of the following circumstances:
>
> (a) the security is issued by an issuer
>
> (i) that is incorporated, formed or created under the laws of a foreign jurisdiction,
>
> (ii) that is not a reporting issuer in a jurisdiction of Canada,
>
> (iii) that has its head office outside of Canada, and
>
> (iv) that has a majority of the executive officers and a majority of the directors ordinarily resident outside of Canada; or
>
> (b) the security is issued or guaranteed by the government of a foreign jurisdiction;

The proposed definition of "foreign issuer" is similar in many respects to definition of "eligible foreign security" used and applied in CSA jurisdictions the context of cross-border offerings. For instance, paragraphs (a)(i), (a)(iii) and (a)(iv) of the definition of "eligible foreign security" already form part of the proposed definition of "foreign issuer", while paragraph (a)(ii) is otherwise captured by paragraph 2.14(1)(b) of the proposed exemption. We respectfully submit that, in the same way that the CSA declines to incorporate an asset-based test in the definition of "eligible foreign security", the definition of "foreign issuer" need not incorporate such a test in

order to determine an issuer's connection to Canada in circumstances where the security was acquired as part of a distribution made primarily in a foreign jurisdiction.[1]

As a secondary matter, we note that under the proposed definition, a "foreign issuer" must not have a majority of its executive officers or directors ordinarily resident outside of Canada. Many of our investments are in issuers that are structured as limited partnerships (particularly for investments in investment funds and private equity funds). Given that limited partnerships would generally not have "directors" as is the case with corporate entities, we believe that it would be helpful to provide guidance on how this component of the definition could be satisfied in the context of a limited partnership. We understand that such guidance may be available elsewhere (e.g., a definition of "director" is included in OSC Rule 45-501), and we believe that incorporating a similar definition in NI 45-102 would serve to enhance clarity.

While we believe that the foregoing incremental changes to the Proposed Amendments would further ease the burden on selling securityholders without sacrificing the protection of Canadian investors and the integrity of the Canadian capital markets, we would like to conclude by reiterating our support for the CSA's efforts in simplifying the Canadian resale regime. We expect that the Proposed Amendments will only assist us in becoming increasingly competitive in the foreign markets, allow us to better fulfill our mandates and in turn contribute to the well-being of Canadian pensioners.

Please do not hesitate to contact us if you would like to discuss any of the matters outlined in this letter.

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[1] We note that there is a certain symmetry to incorporating the "eligible foreign security" definition into Canada's "distributions out" regime, given its relevance in the Canadian "wrapper" rules (e.g., rescission rights disclosure) which are often implicated when investors first subscribe for the securities of foreign issuers.

Yours very truly,

CANADA PENSION PLAN INVESTMENT BOARD

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