ANDY MITCHELL
President and CEO *Président et chef de la direction*
amitchell@sima-amvi.ca 416 309 2300

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Delivered via Email: tbaikie@osc.gov.on.ca
Timothy Baikie Senior Legal Counsel, Trading and Markets
Ontario Securities Commission

Dear Sirs and Mesdames:

RE: Proposed Amendments to OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions and Proposed Changes to Companion Policy 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions

The Securities and Investment Management Association (SIMA) | Association des marchés de valeurs et des investissements ("SIMA") appreciates the opportunity to comment on *Proposed Amendments to OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions and Proposed Changes to Companion Policy 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions* (the **Proposed Amendments**).

SIMA empowers Canada's investment industry. The association, formerly the Investment Funds Institute of Canada (IFIC), is now the leading voice for the securities and investment management industry. The industry oversees approximately $4 trillion in assets for over 20 million investors and participates in the Canadian capital markets. Our members – including investment fund managers, investment and mutual fund dealers, capital markets participants, and professional service providers – are committed to creating a resilient, innovative investment sector that fuels long-term economic growth and creates opportunities for all Canadians.

We operate within a governance framework in which we gather input from our member working groups. The analyses and recommendations of these working groups are submitted to the SIMA board or board-level committees for direction and approval. This process ensures submissions that reflect the input and direction of a broad range of SIMA members.

Summary:

Integrity and confidence in capital markets achieved by preventing market abuse and manipulation is a critical requirement for effective market functioning. Our members, therefore, are supportive of policy measures aimed at properly addressing manipulative and deceptive trading in our equity markets. While SIMA acknowledges the OSC's concerns surrounding the potential for abusive short selling in connection with securities offerings, our members believe that the Proposed Amendments will have a negative impact on capital formation in Ontario and likely widen new deal discounts.

We encourage the OSC to consider a holistic review of the current regulatory regime to determine whether targeted adjustments to existing mechanisms could achieve the intended policy outcomes without duplicating regulatory efforts or introducing unnecessary complexity or punishing normal and accepted activity, especially for bought deals. Greater focus should instead be directed on evaluation and enforcement of existing regulations. Without a unified national approach an unintended consequence of the proposed amendments is that they would hinder the competitiveness of Ontario's capital markets relative to other jurisdictions within Canada

Additionally, it may not be possible for dealers to determine whether clients are eligible for certain exemptions under the Proposed Amendments. In such circumstances, placing the onus on individual dealers to verify the applicability of exemptions or to assess a client's broader trading conduct would be impractical and unreasonable.

Our members believe that the Proposed Amendments introduce significant risks and additional compliance costs to capital formation in Ontario and present irreconcilable technical challenges to implementation. We believe an alternative path is to strengthen the enforcement regime of existing regulation to address the concerns which are detailed in the Proposed Amendments.

We do applaud the OSC evaluating its principles-based regulation around short selling, but our members believe that Canada's current regulatory regime regarding short selling is sound and has a reasonable balance between risk management and market efficiency.

General Comments

While SIMA acknowledges the OSC's concerns surrounding the potential for abusive short selling in connection with securities offerings, the current regulatory framework governing pre-marketing activities has supported investor protection and market integrity while facilitating capital raising. We are mindful of unintended consequences that may arise from the Proposed Amendments that would detract from efficient capital markets and may negatively impact institutional and retail investor participation in capital raisings. The proposed restrictions should not apply to bought deals, which represent the majority of equity offerings in Canada. In a bought deal, the public dissemination of the pricing and launch of the offering are at the same time (participants would not be aware of a bought deal equity offering prior to launch). Inadvertently limiting the number of potential investors by implementing the proposal would negatively impact offering execution via larger pricing discounts, decreased offering sizes, and/or decreased underwriters' willingness to undertake bought deals. This will have a larger impact in Canada than the U.S. as Canadian markets are smaller and have much less investor depth to start with. We also believe these amendments would result in disproportionate restrictions on large, highly liquid issuers where the impact of individual investors' trading activities (whether long, or short) will not result in a material impact to their share price.

Should the OSC proceed with the Proposed Amendments Dealers executing short-sale transactions on behalf of, or placing newly distributed securities with clients, should not have to assume any new gatekeeper responsibilities as a result of the Proposed Amendments. Given that investors frequently engage multiple intermediaries to execute their trading strategies, it will be challenging for dealers to obtain a comprehensive view of a client's overall trading intentions or activity. Further, it may not be possible for dealers to determine whether clients are eligible for certain exemptions under the Proposed Amendments. In such circumstances, placing the onus on individual dealers to verify the applicability of exemptions or to assess a client's broader trading conduct would be impractical and unreasonable. Responsibility for compliance with the Proposed Amendments should rest with the individual market participants (i.e., the investor seeking to purchase the offering of securities), and not with the dealers facilitating their transactions. Any obligation on dealers to monitor short seller participation in offerings must be reasonable and clearly defined in the Proposed Amendments. The restrictions should also not apply to dealers' market making activities, which occur separately from underwriting activities and are an essential part of an efficient capital market.

We encourage the OSC to consider a holistic review of the current regime to determine whether targeted adjustments to existing mechanisms could achieve the intended policy outcomes without duplicating regulatory efforts or introducing unnecessary complexity. Measures to prevent abusive short selling, particularly when timed to benefit from participation in a new offering, should be carefully designed to close regulatory gaps while avoiding undue burdens on market participants acting in good faith. Trading while in the possession of MNPI is already illegal, however restrictions that capture legitimate short selling risks over-reaching and limiting participation of investors who engage in short selling as part of their normal course strategies. The OSC should prosecute malfeasance with other policy tools. In considering how best to address concerns around short selling in connection with prospectus offerings and private placements, we suggest that the OSC explore whether existing regulatory frameworks, including National Instrument 41-101 General Prospectus Requirements, can be revisited or refined to more effectively target problematic activity.

Questions and SIMA responses are provided in Appendix A.

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Conclusion

SIMA is pleased to have the opportunity to comment on the Proposed Amendments. Please feel free to contact me by email at amitchell@sima-amvi.ca. I would be pleased to provide further information or answer questions you may have.

Yours sincerely,

THE SECURITIES AND INVESTMENT MANAGEMENT ASSOCIATION

By: Andy Mitchell
President and CEO

APPENDIX A

Responses to Questions Posed in Proposed Amendments to OSC Rule 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions and Proposed Changes to Companion Policy 48-501 Trading During Distributions, Formal Bids and Share Exchange Transactions

1. **Will the Proposed Amendments address concerns with short selling making pricing and completion of offerings more difficult?**

   SIMA Response:

   The Proposal has the potential to decrease investor appetite and activity on domestic new issue offerings and private placements and introduces additional regulatory burden and cost.

   Clarity is needed on how the proposed amendments will be enforced including whether it is the intention of the OSC to extend the Proposed Amendments to the activities of retail investors.

2. **Will the Proposed Amendments have any unintended consequences, such as (i) making it more difficult for certain reporting issuers to raise capital or (ii) requiring a greater price discount on offerings?**

   SIMA Response:

   The Proposed Amendments only applying to distributions made by issuers who are reporting issuers in Ontario increases the risk regulatory fragmentation and creates opportunities for regulatory arbitrage. The OSC should consider the CSA's role in harmonizing this rule nationally to avoid aforementioned market fragmentation risk.

   The Proposed Amendments will create additional regulatory barriers and compliance costs for institutional investors and dealers, potentially reducing access to capital and liquidity for issuers, hindering capital formation in both public and private markets.

   Large institutional investors active in both primary and secondary markets will have to implement further costly enhancements to their compliance programs, including training for their investment managers and traders, and establish pre-trade checks to confirm eligibility before participating in offerings. Trading errors or failure to check short positions before participating in offerings may occur frequently. Furthermore, the restrictions may result in decreased investor appetite to participate in equity offerings as a means to avoid the risk of compliance failures (as is seen in the U.S. market).

   The Proposed Amendments appear to introduce a strict liability provision, meaning the OSC does not need to prove intent or knowledge to establish that a violation has occurred. Investors and dealers can be held liable even if the violations occur inadvertently or due to factors beyond their control and they had no intention to violate the Proposed Amendments. This could lead to arbitrary and disproportionate enforcement particularly on smaller market participants. The risk of inadvertent violations may dissuade market participants from subscribing to securities offerings or compel them to introduce blanket restrictions on short selling generally – both would detract from the effective functioning of our capital markets.

   It is not clear whether investment funds (including pooled funds), or managed accounts managed by the same investment fund manager or portfolio manager would be subject to the rule as it applies to a "person or company". We believe that including these funds, or managed accounts would have a negative effect on the capital markets, decrease competition, be unfair to investors and represent a disproportionate regulatory compliance burden on asset managers and recommend excluding them

from this rule. If the rule is enacted and funds are part of the rule, we recommend that affiliated investment funds (including pooled funds), or managed accounts should qualify as separate accounts under the Rule 48-501 exemptions.

Member firms would like the OSC to clarify that funds or managed accounts are excluded. If the rule is enacted and they are not excluded, there should be an exemption for affiliated funds or managed accounts.

3. Is the definition of "short sale" in the Proposed Amendments adequate for achieving the purposes of the Proposed Amendments?

SIMA Response:

The definition of "short sale" should not be limited or tailored to the activity the Proposed Amendments seek to prevent and should be consistent with the definition in UMIR. The definition of short sale covering sales with borrowed securities even if the seller otherwise has a long position in the security may chill legitimate trading or force market participants into more complex settlement arrangements to avoid triggering short sale obligations.

4. Should the Proposed Amendments apply to distributions of securities of a broader or narrower group of issuers? If so, what criteria should be used to define this population?

SIMA Response:

The Proposed Amendments only applying to distributions made by issuers who are reporting issuers in Ontario and as mentioned above, may create undue complexity, increase regulatory fragmentation and create opportunity for regulatory arbitrage. It would be preferable for any rule on this issue to be addressed on a uniform basis across all jurisdictions of Canada through the Canadian Securities Administrators.

5. Are the securities covered by the Proposed Amendments correctly scoped?

SIMA Response:

What is proposed is fundamentally too broad and is a departure from the U.S's regulatory approach in this area. Our members pointed out that in referencing the U.S. Rule 105 more explicit explanations should consider exclusions for private placements and bought deals, which differ significantly in structure and timing from domestic markets.

Private placements and agency offerings are often highly negotiated with individual investors over a longer period than a traditional underwritten prospectus offering. Consequently, it would be impractical to try to fit a set restriction window to cover this variability in timing and approach to negotiation. Furthermore, purchasers under a private placement would be subject to a 4-month hold and an investor who had sold short before an offering would still face meaningful market risk on their net position as they waited for the hold period to elapse.

The vast majority of follow-on offerings in Canada are bought deals where the public dissemination of the pricing and launch of the offering are at the same time. Market participants would therefore not be aware of a bought deal equity offering prior to launch or, if widely expected by the market (i.e. an issuer has publicly stated a financing need), investors would not have specific insight on timing, price, or execution style (bought vs. marketed).

The proposed restrictions will have unintended consequences in potentially limiting the number of investors which could participate in an offering, which would negatively impact offering execution. For

risk trades (i.e., bought deals) the added risk needs to be reflected via larger pricing discounts, decreased offering sizes, and/or decreased underwriters' willingness to undertake bought deals.

6. Is the prohibition on buying and selling short a security "of the same class" too narrow?

SIMA Response:

The scope should not be broadened and in fact should be narrowed.

7. Is the exemption under section 4.1.2(b) of the Proposed Amendments appropriate?

SIMA Response:

Most seem appropriate, but other exemptions may need to be included. The separate account exemption should be expanded to recognize how trades, including trades for underwriter and facilitation accounts, are executed by dealers. It is recommended that the OSC clarifies how exemptions should be applied and who bears compliance responsibility.

8. Are there other types of distributions or securities that should exempted from the Proposed Amendments?

SIMA Response:

Our members have general agreement that the Proposed Amendments should be more closely aligned with U.S. Rule 105 and should exclude bought deals and private placements.

The concern addressed by U.S. Rule 105 and the Proposed Amendments would arise in the context of marketed offerings, where investors have visibility on pricing and timing ahead of the launch of an offering. This creates the potential for investors to short sell before launch in order to benefit from buying into the offering at a lower price. Bought deals and private placements, however, do not involve this type of marketing dynamic.

In bought deals, pricing and launch of the offering occur simultaneously, with no marketing period. Investors would not have the type of opportunity to short sell prior to launch of an offering as would be the case with marketed offerings. Even where there may be market expectations of a bought deal, investors will not be aware of specifics on timing or pricing of the bought deal. In practice, the policy rationale underlying the proposed amendments does not apply to bought deals. While certain institutional investors may be wall-crossed prior to launch, these scenarios are already subject to strict confidentiality and trading restrictions.

Similarly, for private placements, the execution dynamics differ significantly from public offerings. Private placements are privately negotiated with a limited group of investors and are not broadly marketed. Terms are disclosed only to participants that are subject to confidentiality restrictions, and the broader market will not be aware of the offering.

9. The 5-day period is based on Rule 105 and is intended to ensure that, in a marketed offering, a short seller intending to participate in the offering would not have an opportunity to adversely affect the market price of the offering through short sales immediately before pricing of the offering, as any activity from before that period should no longer be reflected in the market price of the offered securities. Is this assumption correct?

SIMA Response:

While we acknowledge that the 5-day period in the Proposed Amendments is modeled after U.S. Rule 105, the assumption is that a short seller is not aware of an offering until it becomes public. There are existing prohibitions on market manipulation and trading on material non-public information that

address the concerns being raised. Furthermore, it is unclear whether the Canadian market can accommodate the same period due to smaller market size, differences in regulation of activities by distribution participants, and greater impact on capital formation.

10. Should the restricted period be extended for a period of time following pricing?

SIMA Response:

No restriction following pricing.

Rule 105 is a strict liability provision designed to prevent manipulation in the pricing of a firm commitment registered public offering of equity securities. The policy basis, of including post pricing considerations for strict liability Proposed Amendments designed to prevent manipulation in the pricing of a prospectus offering or private placement of equity securities, is unclear.

11. Does your answer to Question 9 depend on whether the issuer made a press release announcing the offering and when the press release was issued?

SIMA Response:

The assumption is that investors are not aware of an offering until it has been generally disclosed.

Canadian processes differ from U.S. practices.

12. Is the assumption that the separate account exemption will be sufficient for underwriters and market makers correct? If not, please provide specific examples of how the Proposed Amendments would adversely affect their activities.

SIMA Response:

The separate account exemption does not and should consider that within most dealers, the same trading desks execute trades for underwriter and facilitation accounts, albeit with different decision making and controls. Dealers already maintain robust internal controls, including wall-crossing protocols and compliance policies.

As currently written the exemption is not clearly stated.

13. Are there any additional foreseeable costs if the Proposed Amendments are adopted? Can these costs be mitigated?

SIMA Response:

The additional costs and complexity for syndicate or selling group members to monitor participation by short sellers in offerings has been underestimated.

The rule may impose significant operational burdens for firms overseeing both institutional and retail accounts. We reiterate our view that investors subscribing to the securities offering should individually be responsible for ensuring they are in compliance with the proposed amendments.