Canadian Bond Investors' Association
Association canadienne des investisseurs obligataires
123-20 Carlton Street, Toronto, Ontario, M5B 2H5 Canada
Tel: 1-416-585-3000 Fax: 1-416-585-3005

**SUBMISSION TO THE
SENATE BANKING, TRADE AND COMMERCE COMMITTEE
ON BILL C-97, AN ACT TO IMPLEMENT CERTAIN PROVISIONS OF THE BUDGET
TABLED IN PARLIAMENT ON MARCH 19, 2019 AND OTHER MEASURES**

May 15, 2019

1. Introduction by Joe Morin:

   a. We appear before you on behalf of the Canadian Bond Investors Association (*CBIA*) to make brief submissions in respect of certain of the amendments proposed to the *Bankruptcy and Insolvency Act (BIA)* and the *Companies' Creditors Arrangement Act (CCAA)* under Bill C-97.

   b. The CBIA was established in 2011 and represents over 50 of the largest fixed income institutional investor organizations in Canada with over $1.2 trillion in fixed income assets under management. Member organizations come from the insurance, asset manager (including bank-owned), pension and investment counsel sectors. As such, the CBIA is the voice of Canadian institutional bond investors, and hence of millions of pensioners, policyholders and retail investors who depend on CBIA members and other similar industry participants for the sound management of these investments.

   c. Any amendments to insolvency legislation can have significant consequences to the CBIA's members and their constituents. Accordingly, the CBIA has previously submitted a letter dated August 19, 2014 to Industry Canada with the CBIA's feedback on the public consultation and review of the BIA and the CCAA and is here today to make certain further submissions specifically on the proposed amendments under Bill C-97.

   d. I am joined by Raj Sahni, an insolvency law partner with the law firm of Bennett Jones LLP, which is assisting the CBIA in making its submissions.

2. Submissions by Raj Sahni

   a. In the interest of time, we are focusing only on those submissions which are of particular interest to the CBIA.

   b. An insolvency proceeding, whether under the BIA or under the CCAA is often very frightening, uncertain and intimidating for creditors, including bondholders, who will see their interest payments being suspended/stayed and may face the prospect of recovering only a fraction of their principal. Any changes to these insolvency statutes should be made only if necessary and helpful and should be avoided if they increase uncertainty or may result in inconsistent results as compared to existing, well established rules and legal principles. The CBIA's view is that several of the proposed amendments are unnecessary and will harm rather than help creditors and the insolvency processes under the BIA and CCAA.

   c. **CCAA s. 11.9(1)-(3):** ***Disclosure of financial information:*** The CBIA's submissions with respect to this proposed amendment were set out in detail in the August 2014 letter. In summary, the Courts in Canadian insolvency proceedings have recognized that a creditor is entitled to assert the full face value of its claim, regardless of whether or not that creditor may have acquired the claim at a discount. The secondary market for bonds creates important liquidity for bondholders and, as noted in the CBIA's August 2014 letter, requiring creditors to disclose the discounted value at which they might have purchased those bonds may significantly hamper the secondary markets and the liquidity they create, particularly if there is any suggestion that the claim cannot be voted or receive distributions for its full value in an insolvency proceeding. There would be no incentive for secondary market purchasers to take the risk of buying bonds if, in addition to taking risks that interest payments may be stayed there would be a risk that they might not be able to claim and vote the full face amount of the bonds, which may likely already receive less than 100% recovery in an insolvency proceeding.

   d. ***Duty of Good Faith (CCAA 18.6 and BIA s. 4.2)*****:** There is already a requirement on the part of the debtor company to show is acting in good faith in connection with obtaining and extending protection and the bankruptcy trustees, receivers and monitors are court officers that similarly have a duty of good faith to act in the interests of the estate and creditors generally. To impose an unclear, undefined good faith requirement on the part of creditors toward each other and toward the estate is unnecessary and will lead to uncertainty, increased disputes and potentially unpredictable and unfair results if a court is given the power to make "any order it considers appropriate in the circumstances." It is unnecessary because the rights and claims of creditors are determined based on their legal positions and statutory priorities (for example, secured vs. unsecured) and there are safeguards in the insolvency statutes already to address any improper payments that have been received by a creditor as a preference or transfer at undervalue (BIA sections 95 and 96). Creditors are stayed from enforcing their rights during the pendency of an insolvency proceeding unless the court orders that the stay can be lifted, in which case the court will review whether the creditor is acting in good faith *vis-a-vis* its legal rights and priorities. Beyond that, there is no need for imposing a loose overarching duty of good faith on creditors, which must be allowed to advocate for the best possible results in line with their legal rights and priorities. Doing so will lead to uncertain results based on an unclear concept of "good faith" and wide discretionary powers on the part of the courts. Moreover, since bondholders are often pension funds, the bondholders may already owe fiduciary duties to the pensioners and other constituents who are the funds' beneficiaries and those duties must be paramount. The statute should not be amended to create potentially conflicting duties and this issue must be much more thoroughly examined and considered before implementation.

Thank you for this opportunity to appear before the Standing Senate Committee on Banking, Trade and Finance. If the CBIA has any further submissions, we would request an opportunity to make those in writing to the Committee.