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Delivered By Email comment@ccmr-ocrmc.ca

Cooperative Capital Markets Regulatory System

c/o The Government of Canada
The Government of British Columbia
The Government of New Brunswick
The Government of Ontario
The Government of Prince Edward Island
The Government of Saskatchewan
The Government of Yukon

Dear Sirs and Mesdames:

RE: Revised Capital Markets Act (CMA) and draft initial regulations

We are writing to provide comments on behalf of the members of The Investment Funds Institute of Canada ("IFIC" or "we") with respect to the revised Capital Markets Act (the "CMA" or "Act") and the draft initial regulations that will underpin the proposed Cooperative Capital Markets Regulatory System ("CCMRS").

Overview

As we noted in our previous submission on the proposed CMA and Capital Markets Stability Act ("CMSA"), the creation of the CCMRS is a watershed moment for Canada's capital markets. We recognize and appreciate the enormity of the task at hand, and we are encouraged that the participating jurisdictions have fostered meaningful stakeholder feedback at each stage in the process.

Harmonizing the securities regulatory frameworks of a number of provinces and territories is an extraordinarily complex undertaking. In certain cases, this harmonization effort has required that the participating jurisdictions make a binary choice between the regulatory approaches taken by different provinces. In these instances, we recognize the need to make a choice in order to create a consistent regulatory approach across the participating jurisdictions. However, in some cases we have concerns with the chosen approach.

Moreover, we note that there are several instances where the approach chosen substantively alters or expands the current framework. Adding new regulatory considerations into the process further complicates an already complex process. We strongly recommend that significant alterations, including the policy rationale for each alteration, should be published separately for comment and considered on their own merits, outside of this wider harmonization effort.

Lastly, we once again urge the participating jurisdictions and indeed all members of the Canadian Securities Administrators ("CSA") to consider carefully how the proposed CCMRS

will interact with the non-participating jurisdictions. Our industry relies upon the smooth functioning of today's generally harmonized and familiar regulatory framework. Great care must be taken to not disrupt this framework or Canada's capital markets more generally.

Below, we provide specific comments on several aspects of the revised Act and the draft initial regulations.

Purpose of the Capital Markets Act

Section 1 of the Capital Markets Act rightly identifies investor protection, fostering fair, efficient and competitive capital markets and ensuring financial stability and integrity as the key purposes of the Act. However, absent from the Act (and the initial draft of the federal Capital Markets Stability Act ("CMSA")) are the fundamental principles contained within Section 2.1 of the Securities Act (Ontario). These animating principles, which include the need for proportionality between business costs and regulatory objectives and the importance of timely, open and efficient administration of securities regulation, provide regulators and capital markets participants with a shared understanding of how the Securities Act should be interpreted and applied. These principles should be carried forward into the CMA and the CMSA.

Civil Liability, Administration, Enforcement and Market Conduct

Numerous civil liability, administration, enforcement and market conduct provisions of the revised CMA deviate meaningfully from the existing regulatory framework. For instance: in an action against a director or expert, Sections 119 and 121 of the CMA shift the onus to that director or expert to show that a reasonable investigation was conducted, while Sections 120 and 122 significantly expand the statutory rights of action related to misrepresentation within disclosure documents. Similarly significant changes are also contemplated for the review, investigation, search and cease-trade powers of the regulator. As noted above, if the participating jurisdictions wish to meaningfully alter the securities regulatory framework within much of Canada – in this case, the civil liability, administration, enforcement and market conduct requirements governing market participants – these proposals, and their policy rationale, should be published separately for comment so they can be fully considered on their own merits.

Definition and Registration Requirements for Investment Fund Managers ("IFMs")

As in its previous iteration, the proposed CMA substantively adopts Ontario's existing definition and registration requirements for IFMs, whereby IFM registration will be required if any fund managed by the IFM has security holders resident within a participating jurisdiction. We noted in our previous submission and continue to believe that the narrower British Columbia approach to IFM registration would be preferable, as it is most closely aligned with the familiar "passport" model of registration and activity and is more appropriately grounded in the IFM needing to have a meaningful connection with the jurisdiction.

New Filing Requirement for Investment Funds

Section 10 of proposed CMRA Regulation 81-501 contains a new requirement for investment funds that are reporting issuers to file with the CMRA a copy of any record that is filed with a government, agency or exchange from a non-participating jurisdiction, provided that the record is not already filed with the Chief Regulator and is material to investors. We do not oppose this new provision, but we request reporting issuer investment funds be provided with additional guidance and clarity on which specific records they will soon be expected to submit to the CMRA as a matter of course.

Outbound Distribution Requirement

The CMA proposes the adoption of the British Columbia regime ("BC Regime") regarding sales of securities by an issuer or selling shareholder that is headquartered in, or has other certain connections to, that participating province which are made to purchasers located outside the

CMRA participating jurisdictions or outside Canada (known as an "outbound distribution"). Under this approach, an issuer that proposes to issue securities in an outbound distribution must either file a prospectus or rely on an available prospectus exemption.

The BC Regime would be disruptive to the operation of Ontario capital markets as it imposes new and unnecessary restrictions on the ability of Ontario market participants to make public offerings in the United States or other countries without also filing a Canadian prospectus, and to make resales of securities purchased under private placement exemptions on exchanges or markets outside Canada. Adopting the BC Regime would significantly alter the regulatory framework governing Ontario market participants, and would force them to change their longstanding and well established financing and investing practices, without any demonstrated corresponding investor protection benefit. We join the Canadian Bankers Association in urging a reconsideration of the decision to propose the BC Regime or the adoption of sufficiently broad prospectus exemptions relating to outbound distributions so that Ontario market participants would not be forced to make unnecessary and prejudicial changes to the practices and procedures they currently follow.

Definition of Security – Individual Variable Insurance Contracts

Within the Act, subsection (f) of the definition of "security" gives the participating jurisdictions the ability to regulate individual variable insurance contracts ("IVICs") under the CCMRS securities regulatory framework. Regulating IVICs under securities law would mark a significant change of approach within the Canadian regulatory landscape. Any substantive consideration of the regulation of IVICs should be conducted transparently and separately from this effort.

Technical, Definitional and Transitional Issues

While we appreciate there has been an effort to substantively maintain the existing securities regulatory framework, there remain throughout the Act and regulations several technical, definitional and transitional issues that warrant further attention. At this time we are raising primarily the following such issues:

First, there are inconsistent definitions of "investment fund" between the CMA and CMRA Regulation 81-501. Within the former, investment funds are defined simply as a mutual fund or a non-redeemable investment fund, whereas within 81-501, investment funds are defined as an investment fund that is (a) a reporting issuer; or (b) a mutual fund that is organized under the laws of a CMR jurisdiction, but does not include a private mutual fund. We ask if this inconsistency was intentional, and if so, for what purpose.

Second, Section 9 of CMRA Regulation 81-501 outlines the transition process for exemptive relief granted under the existing Passport System. Although Section 9(1)(b) and 9(2) state that a person must provide notice that they intend to rely upon an existing exemption under the CCMRS, it remains unclear what this notification requirement entails. For instance, would investment fund managers face a positive obligation to provide notice to the CMRA in order to secure a grandfathering of each existing instance of exemptive relief? We seek further guidance on when this notice should be provided, and in what form.

Third, Section 2 of the CMA appears to use the terms "designated" and "prescribed" interchangeably. For instance, the Act states that a "mutual fund" can be defined as (emphasis added):

(b) an issuer who is <u>designated</u> under subsection 95 (2) to be a mutual fund; or

(c) an issuer who is within a class of issuers that are <u>prescribed</u> to be mutual funds.

Are these terms meant to be used interchangeably? If so, it would be helpful to use one term consistently. If not, what is the intended difference between the two terms? More generally this speaks to the need to collate at least the key definitions spanning the CMA and its associated regulations. Currently, each individual regulation and instrument contains its own definitional

section, rendering it difficult to compare these definitions across the totality of the regulatory framework. This would be the opportunity to rationalize and harmonize them.

Fourth, we note that the registration exemption for financial institutions found in Section 35.1 of the Securities Act (Ontario) is absent from the revised CMA. Given that most Canadian banks conduct their securities and derivatives trading from Ontario and are otherwise regulated by the Office of the Superintendent of Financial Institutions (OSFI) and the Financial Consumer Agency of Canada (FCAC), this exemption is critical to the day-to-day activities of Canada's banks, and its discontinuance could prove disruptive to capital markets both in Ontario and across the participating jurisdictions. Accordingly, we urge that additional guidance be provided on how financial institutions will be regulated under the CMSA and CMA.

More generally, to minimize the threat of disruption to Canada's capital markets, we ask that the transitional measures and interface mechanisms that are envisioned be clarified and expanded upon as the cooperative regulatory system project moves forward.

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We thank you for once again considering our comments on the development of the CCMRS, and we look forward to working with all provincial securities regulators and the new CMRA during the transition to what we hope will be a well-functioning Cooperative System. Should you have any questions or wish to discuss these comments further, please contact me directly, or my colleagues Ralf Hensel, General Counsel, Corporate Secretary and Vice President, Policy at rhensel@ific.ca or Graham Smith, Senior Policy Advisor at gsmith@ific.ca.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

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