ANDREW J. KRIEGLER
President and Chief Executive Officer

December 7, 2015

Via email to: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Comments on the Revised Consultation Draft *Capital Markets Act*

Thank you for this opportunity to provide comments on the *Revised Consultation Draft Capital Markets Act (*the *"CMA"*).

The Investment Industry Regulatory Organization of Canada ("IIROC") is the national self-regulatory organization which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada.

Section 9(1) of the *CMA* provides for the Authority to make an order recognizing a self-regulatory organization ("SRO"). Section 11 sets out the duty of a recognized SRO:

> *A recognized self-regulatory organization or a recognized exchange must, with a view to pursuing the public interest, regulate the operations, standards of practice and business conduct of its members or participants and their representatives in accordance with its by-laws, regulatory instruments, policies, procedures, interpretations and practices.* (emphasis added)

In our initial comment letter (a copy is attached hereto), we discussed a provision which would provide immunity from civil actions in circumstances involving the good faith exercise of delegated or recognized regulatory authority by the SRO and its staff. This letter supplements that submission, and also discusses the ability of recognized SROs to enforce disciplinary hearing decisions under the *CMA,* as well as public access to information exchanged between SROs and the Authority.

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1. Section 201(3) Immunity of Recognized SROs

We understand from the published commentary that the request made in our initial comment letter is under consideration. We thank you for your consideration and wish to offer additional assistance in the form of proposed wording.

Currently, this section provides as follows:

> *(3) No action for damages lies, and no action may be commenced, against a recognized self-regulatory organization or a director, officer, employee or agent of the organization for any act done in good faith in the performance or intended performance of any duty or in the exercise or the intended exercise of any power that has been delegated to the recognized self-regulatory organization under section 14, or for any neglect or default in the performance or exercise in good faith of such duty or power.* (emphasis added)

This provision is linked to section 14 of the *CMA* and, as discussed in our previous letter, results in a recognized SRO's immunity being limited to those acts undertaken or powers exercised within the narrow scope of the delegation of the registration function made under that section. However, this function constitutes only one element of IIROC's overall regulatory responsibilities. There are other regulatory functions which IIROC performs involving member and market regulation which have been *effectively* delegated to IIROC by the Participating Jurisdictions (pursuant to recognition orders), but will not be explicitly delegated by the *CMA*. IIROC is seeking immunity for its good faith performance of the regulatory functions it performs, whether specifically delegated under the *CMA* or pursuant to its recognition orders. With our proposed provision, where a recognized SRO performs a regulatory function at the behest of the Authority, the SRO will be entitled to the same immunity as that afforded to the Authority, were it to perform the function itself.

We propose that good faith regulatory acts undertaken or regulatory powers exercised by a recognized SRO and its staff *in accordance with the terms of its recognition order* to be made under section 9(1) of the *CMA* be included within the ambit of section 201(3). Our proposed provision would read (changes are underlined):

> *(3) No action for damages lies, and no action may be commenced, against a recognized self-regulatory organization or a director, officer, employee or agent of the organization for any act done in good faith in the performance or intended performance of any duty or in the exercise or the intended exercise of any power <u>under a recognition order made under section 9(1), or</u> that has been delegated to the recognized self-regulatory organization under section 14, or for any neglect or default in the performance or exercise in good faith of such duty or power.*

The securities administrators in each Participating Jurisdiction have made recognition orders in favour of IIROC. (Similarly, under the CMA, a recognition order will be made by the Authority pursuant to section 9 of the *CMA*.) These recognition orders set out the scope of IIROC's regulatory responsibilities – the regulatory duties IIROC must perform and the regulatory powers it must exercise.

IIROC's current recognition orders are substantially identical and require IIROC to, among other things:

i. Regulate investment dealers, including alternative trading systems and futures commission merchants ("Dealer Members");
ii. Establish, administer and monitor its rules, policies and other similar instruments; and
iii. Enforce compliance with its rules by Dealer Members and others subject to its jurisdiction. [1]

[1] The Appendix to the Recognition Order sets out the Terms and Conditions of IIROC's recognition and includes Criteria for Recognition.

IIROC's actions and operations as a regulator are undertaken under the authority of the recognition orders and must be carried out in the public interest. Based on the assumption that the recognition order to be made by the Authority would be substantively similar to the current recognition orders, the immunity under our proposed provision would only apply to IIROC's regulatory actions (or inactions) which are determined by a court to fall within the terms of its recognition order.[2]

As discussed in our initial comment letter, IIROC and its directors, officers, employees and agents (including our disciplinary hearing adjudicators) are potentially exposed to the threat or taking of legal action by individuals or entities that are not members of IIROC based on regulatory actions taken or regulatory powers exercised in the course of IIROC carrying out its public interest mandate, even when those actions are taken in good faith.[3] This risk of liability may hinder IIROC and its staff's ability to take appropriate regulatory action with a view to pursuing the public interest when private interests will be adversely affected.

With our proposed change to subsection 201(3), a recognized SRO which is mandated by the *CMA* to regulate with a view to pursuing the public interest would be eligible for immunity for acts done in good faith in the performance of a regulatory duty or in the exercise of a regulatory power.

2. Section 199 Enforcement by Court

The *CMA* currently allows for decisions made by the Tribunal or the Chief Regulator to be filed with a superior court and enforced as an order of that court (under section 199). As a result, fines ordered under section 90 of the *CMA* (as administrative monetary penalties) can be

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[2] This is not dissimilar to the analysis undertaken by the Ontario Court of Appeal in *Morgis v. Thomson Kernaghan & Co.*, [2003] O.J. No. 2504, where the Court stated (at para. 32) that "the conduct of the IDA's affairs and the nature of its regulatory functions were not exclusively self-selected. They were subject to the terms and conditions imposed by the Commission as a condition of recognition as a self-regulatory organization under s. 21.1 of the Act… those factors inform the analysis of the IDA's status and duties as a regulator, notwithstanding that its relationship with its members is contractual in nature."

[3] Section 14.1 of IIROC By-law No. 1 precludes a regulated person from commencing an action against IIROC, its Board, or any of its employees, officers or agents.

collected by the Tribunal through the courts. However, SROs do not have the same ability under section 199 for fines levied as a result of their disciplinary hearings.

Instead, the commentary to the *CMA* suggests that section 89(1)(a) can be used by recognized SROs to enforce decisions. Section 89(1)(a) states:

> *89. (1) If the Tribunal considers that it is in the public interest to do so, the Tribunal may make one or more of the following orders after a hearing:*
> *(a) that a person comply with capital markets law, with a decision as defined in subsection 13 (7), or with a regulatory instrument of a recognized entity;* (emphasis added)[4]

An order made by the Tribunal under this section could *then* be filed in a superior court pursuant to section 199. However, there are significant practical considerations which adversely affect the feasibility of this approach and its likely value in the pursuit of the public interest and protection of investors.

Currently, IIROC has the ability to directly file hearing panel decisions in the courts of Alberta, Quebec and the territories pursuant to provisions in their respective provincial and territorial securities legislation.[5] In Alberta, we have successfully used this authority to more effectively collect fines from former registrants for many years and the collection rate for fines is considerably higher than the rate for Canada as a whole.[6]

In both Alberta and Quebec, no additional hearing or opportunity to be heard is required once the IIROC disciplinary hearing has concluded and a written decision (including a monetary sanction) has been rendered.

[4] Subsection 13(7) defines a "decision" to include a decision made by "a recognized entity under a by-law, policy or other regulatory instrument or policy of the recognized entity". IIROC would be a "recognized entity" under sections 2 and 9 of the *CMA*.
[5] In PEI, authorization in the form of an order from the Superintendent of Securities is required first.
[6] The collection rate for the six years ended September 30, 2015 was 30% in Alberta compared to 19% nationally. IIROC obtained the power to enforce its decisions in Quebec only recently, in mid-2013, so meaningful data is not yet available for that province.

In contrast, section 89(1)(a) requires that a hearing be held by the Tribunal before it can make an order that a person comply with a hearing panel decision of a recognized entity. This may be the case even if the IIROC hearing panel decision has already been the subject of a hearing and review and confirmed by the Tribunal under section 13. Unlike the process in Alberta and Quebec, s. 89(1)(a) requires the expenditure of multiple resources and risks delay in order to ultimately file an IIROC decision with a superior court:

i. An IIROC disciplinary hearing is held and a written hearing panel decision, including a monetary sanction, is rendered, with all of the attendant procedural protections, including a right of hearing and review by the Tribunal;
ii. A review hearing may be held by the Tribunal, if one of the parties exercises its right under section 13;
iii. IIROC must make an application under s. 89(1)(a) to enforce the hearing panel sanction decision. A Tribunal hearing is then held with respect to the same matter, possibly as a hearing *de novo* with witnesses and other evidence called, and staff of the Authority and staff of IIROC each appearing as parties along with the respondent;[7]
iv. The Tribunal renders a decision; and
v. A certified copy of the decision made by the Tribunal is filed with the court by Authority or IIROC staff.

In some cases, this approach could result in a near-complete duplication of a lengthy IIROC hearing with the attendant delay, required costs and resources outweighing the fine sought to be enforced.[8] In 2014, in the Participating Jurisdictions, IIROC had 33 hearing panel disciplinary decisions involving individuals. Of those decisions, 18 involve respondents whose fines remain unpaid. If section 89(1)(a) of the CMA were in effect, at least 18 hearings would need to be held by the Tribunal in one year solely in order to allow IIROC to enforce hearing

[7] In Ontario, for example, OSC staff are a party to all hearing and review applications and appear and make submissions at the review hearing.
[8] In *Re Black*, OSC staff sought orders against the respondents based on the interjurisdictional enforcement provisions of subsection 127(10) of the *Securities Act* which permits the Commission to issue orders based on convictions for a securities-related offence of a person or company in any jurisdiction. (Those provisions are similar to those contained in s. 89 of the *PCMA*.) In that case, the convictions had been rendered by a U.S. federal court. The hearing before the OSC took 5 days, resulted in a 47 page decision, and Staff claimed costs of over $160,000 which represented a 62% discount in the actual costs incurred. Ultimately, although staff were successful, the Commission declined to award costs in that case.

panel sanction decisions, in addition to any review hearings held with respect to the merits of those same decisions.

In the absence of a revision to the *CMA,* IIROC respondents who engage in misconduct and are sanctioned by an IIROC hearing panel in a Participating Jurisdiction could not be compelled to pay any fines ordered once they cease to be an IIROC registrant, unless IIROC and Authority staff undertake a potentially lengthy and expensive process. Only in Alberta and Quebec will IIROC be able to effectively and efficiently legally enforce compliance by a former registrant with the decision of the IIROC hearing panel. In our view, the public interest favours an approach similar in application to the existing Alberta and Quebec provisions.

Consequently, we propose that section 199 of the CMA be amended as follows (changes are underlined):

> *199.*(1) *A certified copy of a decision made by the Tribunal under this Act or a decision made by the Chief Regulator under subsection 90 (4)*, or a decision made by a recognized self-regulatory organization after conducting a hearing *may be filed with the superior court and, upon being filed, the decision may be enforced as if it were an order of the court.*
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> 199. (2) A decision made by a recognized self-regulatory organization may not be filed with the court under subsection (1) until the time permitted for an application to review the recognized self-regulatory organization's decision pursuant to section 13(1) has expired.

This provision would give SROs the ability to enforce payment of their hearing panel monetary sanctions only after the time for review of the decision has expired.

Amending section 199 in this manner would ensure that all securities industry participants in Canada are subject to uniform treatment, regardless of whether a proceeding is held by the Tribunal or a hearing panel of a recognized SRO. More importantly, investors in the Participating Jurisdictions will have the confidence of knowing that the regulatory system works to hold all market participants accountable, regardless of which province they operate in.

3. Exchange of Information

We note that the response to a comment submitted on this issue states that while the issue remains under development, it is anticipated that one or more of the current freedom of information and protection of privacy regimes will apply and that carve-outs from freedom of information disclosure will be proposed in the implementation legislation.

In Ontario, under s. 153 of the *Securities Act*, information exchanged between the Commission and SROs is exempt from disclosure under the *Freedom of Information and Protection of Privacy Act* if the Commission determines that the information should be maintained in confidence.

We submit that a similar provision be included in the *CMA*. In the course of discharging our regulatory responsibilities it may become necessary to provide information to or receive information from the Authority. Our current recognition orders also set out certain reporting obligations for IIROC to the provincial securities authorities, which would likely be repeated in the recognition order to be made under the *CMA*. In some instances, the maintenance of confidentiality over this information is integral to our respective abilities to effectively regulate in the public interest. Provided that it considers the public interest in doing so, we submit the Authority should retain the ability to maintain the confidentiality of certain information despite the application of other provincial legislation which may require its disclosure.

Conclusion

Our proposed provisions involving immunity and the enforcement of decisions are based on existing provisions in the *CMA*. In both instances, we are seeking only to amend these existing provisions to level the regulatory field for IIROC and other recognized SROs who, together with the Authority, will regulate the capital markets and its participants in the Participating

Jurisdictions in the public interest and for the protection of investors. Our proposed provision involving the exchange of information will allow SROs and the Authority to exchange information and maintain the confidentiality of this information where necessary for the furtherance of our regulatory goals and the public interest.

We would be pleased to discuss our submissions with you further.

Yours very truly,

Andrew J. Kriegler