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December 23, 2015

SENT VIA EMAIL: comment@ccmr-ocrmc.ca

**To: To the Council of Ministers
Cooperative Capital Markets Regulatory System (CCMR)**

RE: Capital Markets Act: A Revised Consultation Draft - August 2015

The Portfolio Management Association of Canada (**PMAC**) through its Industry, Regulation & Tax Committee, is pleased to have the opportunity to participate in the consultations regarding the draft uniform provincial and territorial capital markets act (the **CMA**) along with the drafts of the initial regulations (the **Initial Proposed Regulations**) proposed for adoption by the participating provinces and territory under the draft uniform act. The consultation draft of the CMA was initially published for comment in September 2014 along with the proposed federal *Capital Markets Stability Act* (the **CMSA**) which, together, creates the legislative framework (the **Framework**) that underpins the Capital Markets Regulatory Authority (the **CMRA**).

We support the commitment by the governments of British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan, Yukon and the Federal government of Canada to establish the CCMR. As we have noted previously, we believe that the CCMR, if properly constituted, can better protect investors, enhance Canada's financial services sector and global reputation, support efficient capital markets and strengthen the management of systemic risk.

About PMAC

As background, PMAC represents investment management firms registered to do business in Canada as portfolio managers. The Association has grown steadily to over 200 members from across Canada that are comprised of both large and small firms managing total assets in excess of \$1 trillion for institutional and private client portfolios. Many of our Members are also registered as investment fund managers (IFMs) offering a variety of investment fund products to institutional investors and private clients. Our mission is to advocate the highest standards of unbiased portfolio management in the interest of the investors served by Members. For more information about PMAC and our mandate, please visit our website at www.portfoliomanagement.org.

General Comments

PMAC has long advocated that Canada adopt a national securities regulator and get in step globally with the administration of securities regulation. We truly believe that a national securities regulator is in the best interests of Canadians and are pleased that the Federal

Government has taken a leadership role in and has prioritized the creation of a cooperative securities regulator. We are finally nearing a point of making this a reality for Canada and its investors. We believe continued consultations and dialogue with provinces and territories on establishing a cooperative securities regulator is of paramount importance so that full participation can be achieved.

PMAC supports the formation of the CCMR and believes resolving the short term challenges presented by this new regime will help market participants realize the long term benefits to capital market regulation in this country that a common securities regulator could deliver. While we acknowledge that the cooperative nature of the new regulator poses some significant challenges and obstacles, we believe that these can be overcome so that the end result is a regulatory organization with true national character.

Notwithstanding our support for the CMRA, we do have some comments on certain provisions of the CMA and also seek clarity on certain issues as discussed below. We note that there are a number of other related and critical pieces to properly evaluating the CMA which have not yet been published. In particular, we are very interested in the content of the revised CMSA in light of the importance of the proposed systemic risk powers and the impact of such powers on our Members. We are also seeking information on how the CMRA will interact with non-participating jurisdictions and the details of an interface mechanism. These are just a few of the key items we believe need to be addressed urgently and require a sufficient opportunity for market participants to comment.

Set out below are comments on certain sections of the CMA and the Initial Proposed Regulations. Our comments are generally focused on the provisions that impact registrants and in particular, portfolio managers and investment fund managers.

- ***Investment Fund Manager Definition and Registration Requirements***

As noted in our previous submission, we do not agree with the approach taken in the CMA to adopt the Ontario model regarding the definition of and registration requirements for IFMs. We believe this approach will create more fragmentation and uncertainty around IFM registration issues and we recommend that an effort be made to streamline the registration requirements such that we have a level playing field between participating and non participating provinces. We recommend that the approach to such regulation inherent in the BC approach (Multilateral Policy 31-202) is most consistent with current business practice, more appropriately premised on the IFM having a meaningful connection to the jurisdiction, and should be the regulatory policy adopted.

- ***Conflicts of Interest***

The Commentary states that a reference to “investment funds” in s. 57 is intended to provide a platform for prescribing prohibitions and restrictions relating to conflicts of interest of investment funds consistent with current securities legislation. This section would apply a duty to disclose and manage conflicts to both investment fund managers and investment funds. The current requirement in NI 81-107 only applies to fund managers. We note this is a significant departure from the current rules and requires further clarity.

- ***Duty of Fair, Honest and Good Faith Dealing***

Section 55 of the CMA imposes a duty on registrants to deal fairly, honestly and in good faith with their clients and to meet *such other standards as may be prescribed*. This change allows the CMRA to mandate that registrants meet a higher standard of care. The introduction of such standards would be subject to public notice and comment requirements and Council of Ministers

approval. PMAC supports the adoption of a statutory best interest standard but recognize this discussion is outside the scope of the draft CMA (in its current version). We do, however, believe this does fall within the scope of the CMRA's regulation-making authority and agree with the revised language in section 55 that clarifies this regulation-making authority.

In the context of OTC derivatives transactions, we believe the reference to *clients* in section 55 is unclear; because both parties are counterparties with the transactions bilaterally negotiated, there is not necessarily a party that could be described as the "client" or, indeed, each party may be a client of the other. We believe this requires further clarification.

- ***Registration in the Participating Provinces and Territories***

We support the proposal that a person that becomes registered in one participating province or territory is automatically registered in all participating provinces and territories. However, we query how the registration process will work with the non-participating provinces. We recommend that if there are non-participating provinces and/or territories then a system similar to that of the current passport system be retained to deal with registration in multiple jurisdictions.

- ***Civil Liability, Enforcement and Market Conduct***

Certain sections in the CMA expand the statutory right of action provisions in current securities regulation. For example, section 122 of the CMA expands the current right of action for misrepresentation in an offering memorandum to apply to any document given to an investor in the course of a prospectus exempt distribution. In our view, this section is too broad, as it would potentially capture a number of documents including, for example, promotional material, not currently captured under the current rules.

We also have some concerns with the expanded review, investigation and search powers as currently proposed in the CMA. In particular, section 102 which require a registrant to provide the Chief Regulator with any information, record or other thing in the registrant's possession. Similarly, section 103 of the CMA includes broad powers to enter the business premises of a registrant. Given the expansive powers of these provisions and the unfettered nature of these powers, we believe certain confidentiality and other protections and are missing from the CMA.

- ***Derivatives Adviser Registration Requirements***

The CMA provides that all dealers and advisers must be registered with the CMRA unless an exemption is applicable. An "adviser" includes a person who engages in the business of advising others with respect to trading derivatives.¹ CMRA Regulation 91-501 *Derivatives and Strip Bonds* provides that the registration requirement does not apply in respect of a trade in an "OTC derivative" where each party to the trade is a permitted client or a qualified party, each acting as principal.² In addition, the registration requirement will not apply to contracts or instruments that are of certain types (same as for prospectus requirement).³ The new NI 31-103 provides in section 1.2(2) that in Alberta and a CMR Jurisdiction a reference to "securities" includes "derivatives" unless the context otherwise requires. By deeming derivatives to be securities, new NI 31-103 has the effect of requiring registration in one of the existing categories of registration in order to deal in or advise with respect to OTC derivatives, unless, an exemption under Regulation 91-501 *Derivatives and Strip Bonds* is available. This means that a portfolio manager would need to either rely on an available exemption (advise only permitted clients or qualified

¹ CMA, s.2.

² Reg. 91-501, s.10

³ Reg. 91-501, s.3.

parties) or obtain a new registration. It is not clear how this would work. The adviser registration requirements in CMRA Regulation 31-501 *Registration Requirements, Exemptions and Related Matters* coupled with the requirements in Regulation 91-501 *Derivatives and Strip Bonds* unnecessarily causes confusion and we believe that advising in derivatives is already sufficiently covered under securities registration legislation.

To reiterate the view stated in one of our submissions to the provincial regulators on this matter⁴, we do not believe that a new registration category for advisers that is based solely on an asset class is necessary. In our view, just as investment fund managers will continue to be regulated under securities legislation regardless of the assets held by the fund, we believe portfolio managers should be treated equivalently. Derivatives are one of the many types of securities that portfolio managers may include in a client managed portfolio on a discretionary basis to meet a client's investment objectives. We do not believe that a new registration category for advisers should be predicated on the type of assets being advised on as opposed to the established business triggers set out in National Instrument 31-103. For entities that may not otherwise be registered under securities laws, we believe that if such entities advise with respect to derivatives, a registration under securities laws is adequate. If an individual is already registered as an adviser under provincial securities laws, there should be no additional registration requirements under a derivatives regime to register. The act of advising on derivatives, in and of itself, in our view is not required to trigger a registration requirement in a separate category and under a separate regime. Particularly, since many of the proposed registration requirements for a derivatives adviser would simply duplicate many of the existing requirements under securities laws.

While we have specific concerns around the registration requirements for advisors, we note the broad definition of "derivatives" in Part 1 of the CMA and agree that the legislation in this area needs to be flexible and responsible as the landscape for derivatives regulation in Canada is ever-changing and continues to evolve. We have concerns in this area with how regulation of derivatives under the CCMR will interface with derivatives legislation in non-participating provinces.

- ***Past Exemptive Relief***

We have concerns with the statements in the Commentary regarding Part 16 of the CMA that state the Chief Regulator and the CMRA will have the ability to vary or revoke prior decisions made under prior securities legislation. We believe this implies that past exemptive relief may not, in all cases, be grandfathered under the new CMRA regime. We seek clarification on this point. In regard to registrants that have obtained exemptive relief from securities laws in the past, what will the effect be of such relief once the CCMR is operational and how will relief obtained in a non-participating province or territory be applied in a non-participating province? We recommend that exemptive relief previously obtained have the same effect on a go forward basis and be grandfathered under the new regime and that the transition provisions clearly set out the expectations of the CMRA in regard to grandfathered relief.

OTHER ISSUES

There remain significant operational challenges with the new CCMR. Our views on some of these issues are set out below. We recognize there will certainly be other operational issues to consider that have not been reflected here.

- **Revised Federal CMSA and Systemic Risk Power**

⁴ See PMAC Submission dated June 17, 2013 in response to CSA Consultation Paper 91-407 Derivatives: Registration.

We are eagerly awaiting a revised draft of the CMSA and in particular, interested in the response to our concerns regarding systemic risk powers and how these powers apply to portfolio managers and investment fund managers. As stated in our 2014 submission, certain provisions in the CMSA, advanced in the name of promoting financial stability, may be far broader than necessary and sweep beyond any demonstrable risks. We continue to question the systemic importance of certain registrants and products. The inclusion of these entities as “capital market intermediaries” (CMIs) under the systemic risk powers of the CMSA has raised significant concerns among our Membership. We also question the lack of due process contemplated in systemic risk provisions of the CMSA. We look forward to a revised draft of the CMSA as soon as possible.

- ***Interface with Non-Participating Jurisdictions***

If the Authority is unable to negotiate and implement an interface mechanism with each non-participating jurisdiction that would effectively make the CCMR of national application, we believe that other interface options must be considered to ensure that the CCMR does not create a less desirable system than what is currently in place.

We urge the participating jurisdictions and Authority to publish for comment as soon as possible a detailed proposal relating to the legislative and regulatory framework for an interface with non-participating jurisdictions. We are most interested in how the CCMR will interface with non-participating provinces on administrative issues, regarding oversight of registrants registered in multiple jurisdictions, and in the context of enforcement matters. There are a number of areas where we foresee operational issues and anticipate there to be significant challenges for capital market participants. Specifically, there will be issues for registrants who are registered in multiple provinces that are both a part of the CCMR as well as non-participating provinces.

While less than full cooperation of all jurisdictions would not be the ideal outcome of the CCMR, it would be beneficial to understand, sooner rather than later, how the Authority plans to work with any non-participating provinces and territories and how registrants can expect to conduct their own regulatory and compliance affairs if they are registered in non-participating jurisdictions.

- ***Fee Structure***

First, we understand that a simplified fee structure is contemplated however; details on the fee structure have not yet been provided. While we believe that a cooperative regulator will achieve fiscal savings by eliminating the duplication of regulatory functions performed in participating jurisdictions, we query how the fee structure will address registrants that are currently registrants in both participating and non-participating jurisdictions. Finally, we query whether fees may increase initially to address the additional responsibilities of the Authority and the overlay of the council, the Board and deputy chief regulators.

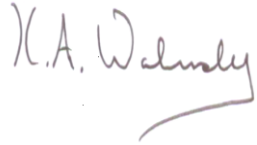
CONCLUSION

We encourage the CCMR to remain consultative with industry and stakeholders throughout the coming year to ensure that issues are identified quickly and addressed thoughtfully and proactively. We believe continued consultations and dialogue with market participants is critical to the success of the CCMR. Equally, adequate comment periods should be provided to market participants once the CMRA publishes the revised draft Federal Act and other outstanding legislation. The industry needs sufficient time to provide meaningful input once all of the various pieces of legislation and framework have been made available.

We continue to support the CCMR and believe that in order to move ahead with this much needed improvement in Canada, we as an industry, must be engaged and willing to work through the issues and address the concerns. We would be pleased to discuss our comments with you further and answer any specific questions you may have. Please do not hesitate to contact Katie Walmsley (kwalmsley@portfoliomanagement.org) at (416) 504-7018 or Julie Cordeiro at (416) 504-1118 ext 202.

Yours truly;

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

A handwritten signature in dark ink, reading "K.A. Walmsley". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Katie Walmsley
President, PMAC

