The Cooperative Capital Markets Regulatory System
Governance and Legislative Framework

I. Overview

This document provides an overview of the governance and legislative framework for the cooperative capital markets regulatory system (the Cooperative System). The governance framework is set out in the Memorandum of Agreement signed by the governments of British Columbia, Ontario, Saskatchewan, New Brunswick and Canada. The legislative framework includes the consultation drafts of two key pieces of proposed legislation, which will be administered by the Capital Markets Regulatory Authority (the Authority). The uniform provincial *Capital Markets Act* (PCMA), which will be proposed for enactment by each participating province and territory, modernizes existing provincial securities legislation and harmonizes the regulatory approaches taken by the British Columbia, Ontario, New Brunswick and Saskatchewan securities acts. The complementary federal *Capital Markets Stability Act* (CMSA) empowers the Authority to collect data and manage systemic risk related to capital markets on a national basis and modernizes capital markets-related criminal offences.

Together with the Memorandum of Agreement (MOA), the publication of these consultation drafts marks a significant step forward in establishing the Cooperative System. A key objective of this initiative is to create enhanced oversight and protection of Canada's capital markets, leveraging resources across participating jurisdictions to achieve consistent, cohesive and timely regulation.

The Cooperative System will foster more efficient and globally competitive capital markets in Canada. It will facilitate the raising of capital within participating provinces and territories from both domestic and international investors through more integrated markets governed by innovative, responsive and flexible regulation based on a single set of regulations that are consistently applied. It will provide increased protection for investors through a combination of more consistent compliance activities, more effective enforcement against misconduct and improved coordination with law enforcement and prosecution authorities both within and outside Canada. To address future threats to financial stability, it will strengthen Canada's capacity to identify and manage capital markets systemic risk on a national basis. Finally, the Cooperative System will enable Canada to play a more empowered and influential role in international capital markets regulatory initiatives.

II. Structure, governance and accountability

The MOA sets out the structure, governance and accountability of the Authority and the Cooperative System. It is envisaged that most of these elements will be included in separate legislation, and that the participating jurisdictions will jointly establish the Authority.

Oversight and governance

The Cooperative System will be overseen by a Council of Ministers (the Council), composed of a Minister from each of the participating provinces and territories and the Minister of Finance of Canada. The Council's responsibilities with respect to appointments, oversight and approvals are

set out in s. 4.2 of the MOA. The Council will be co-chaired by the Minister of Finance of Canada and, on a two-year rotational basis, the responsible Minister from each major capital markets jurisdiction (defined in the MOA as a participating province or territory that represents at least 10 percent of the national gross domestic product derived from financial services).

The Authority will be a jointly established and operationally independent regulator supervised by an expert board of independent directors (the "board"). The board will be composed of at least nine and no more than 12 independent directors (the MOA provides for a smaller board of at least five directors during a transition period). The directors will be appointed by the Council on the recommendation of an expert nominating committee. As a group, the board members will collectively possess the requisite capital markets expertise, including international capital market and venture market expertise, and will be broadly representative of the regions of Canada. The board will recommend a chair from among its members for confirmation by the Council, and will be accountable to the Council for the exercise of its responsibilities as set out in s. 7.2 of the MOA, including supervising the management of the Authority's business and affairs and exercising the power to make regulations under the PCMA and the CMSA.

Integrated structure and management

The Authority will have a Regulatory Division responsible for the policy, regulatory operations, advisory services and enforcement functions of the Authority and an independent Tribunal which will adjudicate enforcement and other administrative proceedings. The Regulatory Division will be led by the Chief Regulator, who will administer a single set of regulations in accordance with common standards. The Tribunal will be led by the Chief Adjudicator and composed of independent adjudicators with capital markets and adjudicative experience, who will be appointed by the Council on the recommendation of an expert nominating committee. The two divisions will interact through their participation in the Regulatory Policy Forum, which will support the Tribunal's expertise and promote a consistent approach to policy, oversight and adjudication.

Each participating province will have a regulatory office that will continue to provide the services that are provided by securities regulators today with local decision-making authority that is exercised in accordance with common standards. Each regulatory office will have the staff, expertise and resources that are commensurate with the regulatory and enforcement demands of the participating jurisdiction. The regulatory offices will deliver consistent regulation in a way that is responsive to the interests and sensitivities of Canada's regions and market sectors. This office structure is intended to leverage the capital markets regulatory expertise that exists across Canada to enhance efficiencies and reduce costs, while remaining responsive to local needs.

The Regulatory Division will have an Executive Committee that will include the Chief Regulator and the Deputy Chief Regulators. The Executive Committee will serve as the primary executive decision making body for the Regulatory Division, providing input to the Chief Regulator and serving as a forum for the integration of regional and functional perspectives. The Chief Regulator will be accountable to the board for the management of the Regulatory Division's business and operations and will be housed in the Authority's executive head office in Toronto. Deputy Chief Regulators based in a regulatory office in a major capital markets jurisdiction or in a regulatory office in a region will oversee the operations and staff of their office or the offices in

their region, contribute to policy development and provide insight into the needs, interests and perspectives of the regulatory office(s), investors, market participants and other stakeholders in their jurisdiction or region.

Both the PCMA and the CMSA confer important powers on the Tribunal. The Authority's establishing legislation will include provisions to establish the Tribunal as a separate division of the Authority that is independent from the Regulatory Division, and will provide for the appointment of Tribunal members. The Tribunal will have sufficient members to conduct hearings (in both English and French) across Canada, and all Tribunal members will be independent. The establishing legislation will also set out the Tribunal's powers. The Tribunal will be organized along the principles of providing expert adjudication, holding hearings across Canada (as well as the capacity to make orders of national application under the CMSA), and fair and efficient decision-making.

III. Promoting financial stability

The global financial crisis showed that broader systemic risks, previously assumed to be largely confined to the banking sector, can also arise in and be transmitted by capital markets. In an environment where future threats to financial stability will likely arise in new and different ways, the Authority's approach to managing capital markets systemic risk under the federal CMSA will include three interrelated components. First, the CMSA will equip the Authority with national data collection powers so it can monitor activity in capital markets and detect, identify and mitigate systemic risks related to capital markets. Second, day-to-day capital markets regulation will be complemented by empowering the Authority to take decisive action across Canada to address threats to financial stability. Finally, the Authority will cooperate and coordinate with other federal, provincial and foreign financial sector regulatory authorities to contribute to the integrity and stability of Canada's financial system and minimize the burden on market participants.

In the CMSA, systemic risk related to capital markets means:

> a threat to the stability or integrity of Canada's financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have an adverse effect on the Canadian economy.

This definition is based on definitions of systemic risk used by foreign regulators and international financial sector standard setting bodies. The term is used throughout Parts 1 and 2 of the CMSA in regard to the scope of the Authority's information collection powers and to enable it to make orders and regulations to address a systemic risk related to capital markets.

National data collection

Part 1 of the CMSA enables the Authority to make national regulations regarding information and records collection and retention and the provision of information or records to the Authority or a designated trade repository for the purposes of monitoring capital markets activity or detecting, identifying or mitigating systemic risk. As with its regulatory activities more generally, the Authority must coordinate, to the extent practicable, its information collection requirements with other domestic and foreign financial sector regulatory authorities to avoid

imposing an undue regulatory burden. The Authority is required to treat confidential information accordingly, but is permitted to share information with other financial sector regulatory authorities and market infrastructure entities to promote and protect the stability and integrity of Canada's financial system. It may also share information with law enforcement agencies as long as the disclosure is not otherwise prohibited by law.

Addressing systemic risk related to capital markets

Part 2 of the CMSA sets out the framework for the Authority to regulate systemically important market infrastructure entities such as trading facilities (ss. 18-19) and clearing houses (ss. 20-22), credit rating organizations (ss. 23-24) and capital markets intermediaries (ss. 27-29), as well as systemically important benchmarks (ss. 25-26) and products (ss. 30-31), and systemically risky practices (ss. 32-33). In designating a market infrastructure entity, credit rating organization, or capital markets intermediary as systemically important, the Authority must consider a variety of factors and provide the entity in question an opportunity to make representations before coming to the determination that it could pose a systemic risk related to capital markets. In the case of regulating systemically important benchmarks and products, and systemically risky practices, the Authority must similarly consider a number of factors in determining that a product or a practice could pose a systemic risk related to capital markets. Once the relevant determination has been made, the Authority may make regulations to address the systemic risk posed by the entity, benchmark, product or practice. The factors to be considered by the Authority and the regulation-making authorities provided in the CMSA are tailored to reflect the specific characteristics of each entity, benchmark, product and practice and are consistent with internationally recognized assessment criteria and regulatory powers.

The Authority may, with the concurrence of the Bank of Canada, regulate systemically important clearing houses under the CMSA. The Bank of Canada will continue to oversee designated payment and clearing systems under the *Payment Clearing and Settlement Act*.

In circumstances where there is a systemic risk related to capital markets that is serious and about to be realized, the Authority may make an order in respect of a capital markets intermediary that has been designated as systemically important (s. 29). In such circumstances, the designated capital markets intermediary may be ordered to dispose of a security, derivative or other asset, increase its capital, not enter into a merger, terminate or restrict its activities, or implement its plans for business continuity, recovery or winding up. Before making the order, the Authority must give the affected capital markets intermediary an opportunity to make representations. Due to the significant consequences of these types of orders, the Authority must also obtain the prior approval of the Minister of Finance of Canada, who in turn must give notice about the proposed order to the Council of Ministers.

Part 2 of the CMSA also provides an urgent order making power to address a serious and immediate systemic risk related to capital markets. Section 34 allows the Authority to make a temporary order of national application to prohibit a person from engaging in a practice or activity related to the risk, suspend or restrict trading in a security or a derivative, or suspend or restrict trading on a trading facility. Section 35 enables the Minister of Finance of Canada, after consultation with the Authority and the members of the Council of Ministers representing the major capital markets jurisdictions, to direct the Authority to make, amend or repeal a s. 34

urgent order if, in the Minister's opinion, the direction is necessary to address an immediate and serious systemic risk related to capital markets.

Under Part 3 of the CMSA, if the Tribunal considers it necessary to protect the stability or integrity of Canada's capital markets or financial system, it may, after a hearing, make one or more orders requiring that a person comply with the Act, that trading cease in respect of any security or derivative, that a person cease trading in securities or derivatives, or that systemically important entities, issuers of systemically important securities or parties to systemically important derivatives make changes to their practices and procedures.

The PCMA also includes provisions to integrate the management of capital markets-related systemic risk into the day-to-day regulation of capital markets. One of the purposes of the PCMA is to contribute to the integrity and stability of the Canadian financial system, as set out in s. 1. In keeping with this mandate, ss. 186 and 187 of the PCMA essentially replicate the language of ss. 9 and 10 of the CMSA, allowing the Authority to collect information for systemic risk-related purposes within participating jurisdictions.

Like the CMSA, the PCMA empowers the Authority to make urgent orders in certain circumstances. Similar to s. 2.2 of the Ontario *Securities Act,* s. 86 of the PCMA enables the Authority to make a temporary cease trading order when it is of the view that there are extraordinary circumstances such as a major market disturbance or a major disruption in the functioning of capital markets. Section 86 of the PCMA is the parallel provision to s. 34 of the CMSA, described above, which empowers the Authority to make urgent orders.

IV. A modern regulatory approach

The PCMA updates and modernizes current provincial securities legislation, retaining key components while introducing new elements to promote flexibility within a robust regulatory framework. One difference from current legislation, particularly the Ontario regime, is the extent to which the PCMA takes a platform approach to capital markets regulation. It sets out the fundamental provisions of capital markets law while leaving detailed requirements, including some requirements that are currently contained in provincial securities legislation, to be addressed in regulations. This approach promotes regulatory flexibility, allowing the Authority to respond to market developments in a timely manner and appropriately tailor its regulatory treatment of various entities and activities.

The PCMA is divided into 16 parts. Part 1 contains definitions, most of which are taken from or closely modelled on existing provincial definitions. Parts 2 and 3 address recognized and designated entities, respectively, as well as other marketplaces. Part 4 contains the registration provisions and Part 5 the prospectus requirements. Part 6 sets out the derivatives regime, Part 7 deals with disclosure and proxies, and Part 8 with take-over and issuer bids. Part 9 addresses market conduct, and includes a number of prohibitions. Part 10 addresses orders, reviews and appeals, and Part 11 deals with administration and enforcement. Parts 12 and 13 set out the act's civil liability provisions, while Part 14 contains a number of general provisions. Any interface mechanism between participating and non-participating jurisdictions, such that the Cooperative System is effectively of national application, may also be included in Part 14. Part 15 will

contain the regulation-making powers for areas of provincial jurisdiction, and sets out the regulation-making process. Part 16 will contain transitional provisions.

The transitional provisions in the PCMA will be complemented by implementation legislation which will be proposed for enactment by participating provinces and territories. The implementation legislation will address the application of other provincial or territorial legislation as well as legal continuity issues particular to the jurisdiction.

Recognized and designated entities

Entities that perform a core market infrastructure or subordinate regulatory function under the oversight of the Authority are "recognized" under Part 2 of the PCMA, which establishes a framework for the Authority's oversight of recognized entities consistent with current provincial securities legislation. Recognized entities include exchanges, self-regulatory organizations, auditor oversight organizations and clearing agencies. The Authority will also have the flexibility to recognize persons engaged in prescribed activities. As is the case today, pursuant to s. 8, exchanges and clearing agencies must be recognized in order to carry on business, while other entities may choose whether to apply to the Authority for recognition. Detailed requirements applicable to recognized entities will be set out in the regulations and in the entities' recognition orders.

The provisions in Part 2 of the PCMA specific to recognized auditor oversight organizations are similar to provisions in current British Columbia, Saskatchewan and New Brunswick securities legislation. (It is anticipated that the Ontario implementation legislation would propose the repeal of the Ontario *Canadian Public Accountability Board Act (Ontario), 2006*.) Decisions of recognized entities, including auditor oversight organizations, are subject to review by the Tribunal pursuant to s. 13, on application by either the Chief Regulator or a person directly affected by the decision.

In addition to providing for recognition orders, the PCMA allows certain entities that provide specific services within the capital markets to apply to the Authority for a designation order under Part 3 of the legislation. As set out in s. 17, an entity may be designated in one of six specific categories: a trade repository, a credit rating organization, an investor compensation fund, a dispute resolution service, an information processor, or a marketplace. Entities may also be designated under a general category of persons that provide prescribed services to investors or market participants. While designation orders are not mandatory, various regulations will require them as a precondition for certain types of market activities, for example in connection with trade reporting requirements or issuing a credit rating in circumstances where one is required.

Unlike recognized entities, designated entities are not required by the legislation to regulate the operations, standards of practice and business conduct of their members or participants. Similar to recognition orders, however, it is expected that the Authority will impose a number of requirements on designated entities through their designation orders and the regulations.

Registration, prospectuses, continuous disclosure and take-over bids: continuity of current regulation

The framework for registration, contained in Part 4 of the PCMA, remains essentially unchanged from existing provincial legislation. Section 22 requires firms and individuals who act as dealers, advisers and investment fund managers to register in accordance with the regulations. The Chief Regulator is required to grant, reinstate or amend registration on application, unless it appears that the applicant is not suitable or the registration, reinstatement or amendment is objectionable. The Chief Regulator may suspend or impose conditions on a registration, and may require an applicant or registrant to provide affidavit evidence or to submit to examination under oath.

The PCMA's prospectus provisions are also consistent with the current regulatory approach, with core requirements set out in Part 5 and details to be included in the regulations. Section 30 stipulates that a prospectus must provide full, true and plain disclosure of all material facts relating to the securities to be issued, and s. 27 provides that a receipt for a final prospectus must be issued prior to a distribution. A copy of the prospectus must be sent to the securities' purchasers. In a change from the current regulatory approach, and consistent with a more flexible regulatory regime, the PCMA also permits the Authority to make regulations prescribing alternative disclosure documents to be filed, receipted and sent to purchasers in lieu of a prospectus.

Part 7 of the PCMA adopts the platform approach to continuous disclosure and proxy requirements from the British Columbia *Securities Act* and supplements it by extending these requirements beyond reporting issuers to other issuers in a prescribed class, such as those engaged in crowd-funding. Section 43 provides that the regulations will contain the periodic and material change disclosure obligations.

Similar to current British Columbia, New Brunswick and Saskatchewan securities legislation, the PCMA also takes a platform approach to take-over bids and issuer bids. As set out in Part 8, take-over bids and issuer bids may be made only in accordance with the regulations. In the event of non-compliance, an interested person (including the Chief Regulator) may apply to the Tribunal or to a superior court for a rectifying order.

A modern approach to derivatives regulation

The term "derivative" is broadly defined in Part 1 of the PCMA to allow for a flexible regulatory framework. However, not all derivatives, derivatives trading or derivatives market participants will be regulated. Consistent with the existing Ontario legislative approach, the type and scope of regulation will depend on various factors and categorizations. Paragraph (p) of the definition of "security" allows the Authority to prescribe classes of derivatives to be securities. As an example, derivatives sold as retail investment products are expected to be classified and regulated as securities.

Part 6 of the PCMA addresses trading in derivatives, adopting a platform approach while drawing on yet to be proclaimed provisions in the Ontario *Securities Act*. Section 38 prohibits a person from trading in a designated derivative unless a prescribed disclosure document has been filed and, where required by the regulations, a receipt has been issued by the Chief Regulator. It is anticipated that designated derivatives will include derivatives that raise investor protection

concerns, but for which traditional securities regulatory requirements are not appropriate. The regulations will prescribe varying levels of disclosure depending on the specific circumstances, including the nature of the product and the identity of the parties.

As provided by s. 40, trades in derivatives are generally exempt from the prospectus requirements in Part 5 and the related regulations. However, classes of derivatives may be made subject to any prescribed provision of the Act or the regulations, allowing the applicable requirements to be tailored to the class of derivative and to address other relevant factors such as the type of counterparty and the method of transacting.

Certain instruments, including commodity contracts entered into for purely commercial physical delivery purposes or contracts that are otherwise regulated (e.g., electricity contracts in some provinces), are not intended to be regulated under the PCMA. These contracts may be excluded from the definition of "derivative" by order or regulation.

Sections 30 and 31 of the CMSA would allow the Authority to designate a class of derivatives as systemically important and regulate them nationally if, in the Authority's opinion, they could pose a systemic risk related to capital markets.

The *Economic Action Plan 2014 Act, No. 1* amends the *Bank Act* to provide the Governor in Council with the power to make regulations respecting banks' activities in relation to derivatives. The CMSA (s. 7) enables the Minister of Finance, after consultation with the Council of Ministers, to make an order assigning the administration of those regulations to the Authority. This will facilitate the integration and coordination of derivatives regulations with the Authority when it becomes operational.

Regulatory obligations and prohibitions under the PCMA

Part 9 of the PCMA sets out the fundamental obligations and prohibitions that apply to persons who participate in the capital markets in the participating jurisdictions. A breach of these provisions may give rise to an administrative proceeding or the prosecution of a regulatory offence under Part 11.

Obligations under Part 9 of the PCMA are largely consistent with those set out in current provincial securities legislation, including record-keeping duties for all market participants and other duties specific to registrants and investment fund managers. Obligations to identify, disclose and manage conflicts of interest are platform in nature, with specific requirements to be dealt with in the regulations. Consistent with the British Columbia and New Brunswick securities legislation, the PCMA imposes a disclosure obligation in connection with investor relations activities. Part 9 includes a platform for regulations aimed at protecting the interests of minority investors in connection with certain transactions. It also imposes specific obligations to comply with a decision of, or a written undertaking given to, the Authority, Chief Regulator or the Tribunal.

Many of the prohibitions under Part 9 are also consistent with current provincial legislation, addressing conduct such as insider trading, front-running and fraud. With respect to insider trading, the definition of "special relationship" in s. 7 of the PCMA has been expanded from the current definitions in provincial securities statutes to include circumstances prescribed by

regulation. Market manipulation and attempted market manipulation are also prohibited, including market manipulation in connection with the underlying interest of a derivative. Other prohibitions address misrepresentations and unfair practices such as putting unreasonable pressure on a person to purchase, hold or sell a security or trade in a derivative. Consistent with British Columbia, New Brunswick and Saskatchewan securities legislation, s. 76 of the PCMA prohibits the actual or attempted destruction or concealment of evidence in connection with a compliance review, an investigation or a proceeding.

Part 9 also includes several new provisions relating to market conduct. In keeping with regulatory reform in other jurisdictions, ss. 64 and 65 introduce prohibitions against benchmark manipulation which forbid the submission of false or misleading information as well as conduct that may improperly influence a benchmark's determination or produce or contribute to a false or misleading determination. In addition to fraud, s. 63 prohibits unjust deprivation, while other provisions address conspiracy, aiding and abetting, and counseling a contravention of capital markets law. The prohibitions in ss. 63 to 65 also include attempts to engage in the prohibited conduct. Part 9 also introduces a whistle-blower provision, prohibiting employers from retaliating against their employees for providing information to the Authority or a law enforcement agency or testifying in a related proceeding, or for expressing an intention to do so.

V. Strengthening enforcement

The Cooperative System will provide the comprehensive enforcement capacity needed to quickly detect and take action against misconduct. A common database will contain information obtained from surveillance, complaints, compliance reviews, and administrative investigations, providing staff in any regulatory office with the tools to detect market abusers. Staff with specialized expertise will be available to assist in investigations conducted by any office, to ensure that consistent standards and approaches are applied and that the most current knowledge is brought to bear on each case. Staff will be able to apply to the independent Tribunal under the PCMA for administrative orders (e.g. market conduct orders and monetary sanctions) that would apply across participating provinces and territories. Tribunal orders obtained under the CMSA to protect the stability or integrity of Canada's capital markets or financial system would apply nationally.

The consolidation of administration and enforcement under the Authority will also facilitate better cooperation with law enforcement agencies, prosecution services and other foreign and domestic regulatory authorities by providing a single point of contact.

Compliance and enforcement tools

Effective enforcement is essential to protecting investors and preserving the integrity and efficiency of our capital markets. Part 11 of the PCMA provides the Authority with the necessary tools to assess compliance with capital markets law and investigate possible contraventions. Section 102, which is based on s. 141 of the British Columbia *Securities Act* and is similar to s. 170 of the New Brunswick *Securities Act* and s. 14.1 of the current Saskatchewan legislation, allows the Chief Regulator to order that a market participant provide the Authority with specified records or information in its possession or under its control. Section 103 authorizes the Chief Regulator to designate persons or classes or persons to exercise the compliance review powers

set out in that section. Those powers include the ability to enter the business premises of any market participant during business hours and make inquiries, examine data, and require records to be prepared.

Section 104 allows the Chief Regulator to make investigation orders, and outlines the tools that are available to authorized persons once an order is obtained. Consistent with current provincial securities legislation, investigators may compel evidence and records, and (as is the case under the New Brunswick and Ontario securities acts) may inspect the business premises of persons named in the order. In addition, investigators may conduct searches where they satisfy the Chief Regulator by affidavit evidence that there are reasonable grounds to believe that a place contains anything related to the investigation. Where the place in question is a home, however, a judicial search warrant is required. As is the case under the British Columbia and New Brunswick securities acts, the PCMA permits the Chief Regulator to prohibit the communication of information related to the investigation for a specified period, other than to the person's counsel. This approach represents a departure from the current Saskatchewan and Ontario legislation, which imposes a broad confidentiality requirement with respect to compelled evidence.

Part 10 of the PCMA also contains tools to protect investors during an investigation. To prevent the dissipation of assets during an investigation or proceeding, regulatory staff may apply to the Tribunal for a freeze order. Similar to the current procedure in Ontario, an order may initially be made without notice for a period of up to 15 days, but notice must be given where an extension is sought. Another protective tool is temporary orders such as cease trade orders, which may be sought to protect investors prior to a regulatory proceeding. The Chief Regulator is authorized to make a temporary order of up to 15 days' duration, and may apply to the Tribunal for an extension of the order.

Similar review, inquiry and Tribunal order powers are included in Part 3 of the CMSA to enable the Authority to administer and enforce that Act.

To facilitate inter-jurisdictional enforcement in connection with securities-related misconduct, the Chief Regulator may seek an order from the Tribunal under s. 89(3) reciprocating an order or finding made by a foreign or domestic court, or an order by or agreement with another capital markets regulator.

Production orders

Part 11 of the PCMA and Part 3 of the CMSA introduce new evidence gathering tools to facilitate the investigation of criminal and quasi-criminal offences. Peace officers and certain Authority staff may apply to court for a variety of production orders tailored to capital markets (the *Criminal Code* includes more general production order powers). These orders can be used to compel a trading facility, marketplace, clearing house or agency, self-regulatory organization, or dealer to provide the names (or, in the case of a trade repository, the legal entity identifiers) of all persons that traded a specific security or derivative during a specified period. This will allow Authority staff and law enforcement authorities to gather the information required to investigate trading misconduct, such as market manipulation and insider trading. Production orders may also be sought to compel a capital markets intermediary/dealer, a party to a derivative or an issuer to

provide certified records or written statements in response to the information sought in the order. Production orders may not be sought against individuals.

Regulatory proceedings, orders and sanctions

Other than criminal proceedings, enforcement proceedings under both the PCMA and the CMSA must be commenced within six years after the day on which the last event that gave rise to the proceeding occurred. Following a regulatory proceeding under the PCMA, the Tribunal may impose a range of market conduct and monetary sanctions in the public interest, similar to the public interest orders currently available under provincial securities acts. Where the Tribunal determines that a person has contravened capital markets law, under s. 90 it may impose an administrative penalty of up to $1 million per contravention and/or make a disgorgement order. This provision is similar to current securities legislation in British Columbia and Ontario, but represents a change from the New Brunswick and Saskatchewan legislative regimes. In New Brunswick the Tribunal may impose administrative penalties of up to $750,000, while in Saskatchewan the maximum penalty is $100,000 per person or company and there is no mechanism for ordering disgorgement.

Under a new power in the PCMA, the Tribunal may also order the person to pay compensation or restitution. To facilitate settlements, the Chief Regulator may impose sanctions and make monetary orders on consent. Section 200, located in Part 14 of the PCMA, permits the Chief Regulator to collect unpaid regulatory sanctions from a third party who owes money to a person on whom a monetary sanction has been imposed. The PCMA does not provide for costs orders.

While the CMSA does not contemplate public interest orders, as described above (under "Promoting Financial Stability"), Part 3 empowers the Tribunal to make a number of orders to protect the stability or integrity of Canada's capital markets or financial system. The CMSA also includes provisions for assessing administrative monetary penalties for contraventions of the Act, except for the criminal offence provisions. As is the case with monetary sanctions under the PCMA, the purpose of CMSA's administrative monetary penalties is to promote compliance with the Act rather than punish wrongdoing. The maximum amount of a penalty is the sum of the amounts obtained or losses avoided as a result of the contravention, plus $1 million in the case of an individual, or $15 million in the case of any other person. In assessing the amount of the penalty, a number of factors must be considered, including the nature of the conduct and the seriousness of any systemic risk related to capital markets that could have been caused by the contravention. Upon receipt of a notice of violation, a person may either pay the penalty or make representations to the Chief Regulator, whereupon the Chief Regulator must decide whether the person committed the violation and if so, whether to impose, reduce or eliminate the proposed penalty. The decision of the Chief Regulator may be appealed to the Tribunal.

Appeals and judicial review

More broadly, Part 6 of the CMSA and Part 10 of the PCMA both provide that a person that is directly affected by a decision of the Chief Regulator may apply to the Tribunal for a review of that decision, with one key distinction. Under the CMSA, where the subject of the review is the Chief Regulator's determination that something could pose a systemic risk related to capital markets, the Tribunal may only substitute its determination for that of the Chief Regulator if the Chief Regulator's determination is unreasonable.

Under the PCMA, any final decision of the Tribunal, including a freeze order, may be appealed to a court by the Chief Regulator or a person directly affected by the decision. The appeal route from a Tribunal decision will be determined by provincial legislation and procedural rules and will not necessarily be the same in each jurisdiction. The CMSA, by contrast, does not provide for appeals from Tribunal decisions. Rather, judicial review to the Federal Court may be available for a person directly affected by a Tribunal order made under the CMSA. Judicial review is available under the PCMA with respect to decisions made by the Authority (i.e. the board). Board decisions may not be appealed to the Tribunal or to court.

Regulatory and general offence provisions

Both the CMSA and the PCMA allow the Authority to pursue cases of more serious misconduct in court, and to seek significant fines and incarceration where warranted. Part 11 of the PCMA includes the statute's regulatory offence provisions, which are similar to those under existing provincial securities legislation, while Part 4 of the CMSA includes a general offence for contraventions of the Act. Under the CMSA, proceedings by way of indictment may result in a fine of up to $5 million and/or imprisonment for up to five years for an individual found guilty of an offence and a fine of up to $25 million in the case of a person other than an individual. Summary convictions carry a fine of up to $250,000 and/or imprisonment for not more than a year for an individual and a fine of up to $5 million for a person other than an individual. Under the PCMA, s. 112 provides that persons who are found by a court to have contravened capital markets law are guilty of an offence and may be imprisoned for up to five years less a day, and may also be required to pay a fine of up to $5 million, and/or to pay disgorgement or restitution. The PCMA provides for increased fines for insider trading, tipping, front-running, market manipulation, benchmark manipulation and fraud.

Criminal offences

While many cases of misconduct can be adequately addressed through administrative or quasi-criminal proceedings, the most serious cases must be dealt with by criminal prosecution. Part 5 of the CMSA moves existing offences from the *Criminal Code* and updates them. It also adds a few new offences to reflect modern capital markets. Criminal offences under the CMSA include fraud relating to securities or derivatives, deceitfully affecting market price, market manipulation, insider trading, misrepresentation, criminal breach of trust by dealers and investment fund managers, forgery of securities or derivatives-related documents, and manipulating financial benchmarks. The Attorney General of Canada and the Attorney General of a province or territory will have concurrent jurisdiction over the prosecution of these offences, as is currently the case for securities-related offences in the *Criminal Code*. The inclusion of criminal offences and additional production order powers in the CMSA will better position the Authority to contribute to the investigation of capital markets criminal offences.

As is the case under the PCMA, the CMSA also includes measures designed to promote voluntary witness cooperation in capital markets-related investigations. For example, it is a criminal offence under the CMSA to retaliate against employees who cooperate in investigations or refuse to undertake a course of action that would contravene the Act. Additionally, in certain circumstances immunity from civil action is provided to persons who disclose information to the Authority or to a peace officer that they reasonably believe is true.

VI. Civil liability

The regime's civil liability provisions are contained in Parts 12 and 13 of the PCMA, and are based on the substantially harmonized primary and secondary market statutory civil liability regimes of current provincial securities legislation. While necessarily less platform-based than other parts of the PCMA, Parts 12 and 13 introduce a degree of flexibility to the civil liability regimes. The PCMA, for example, provides a right of action for misrepresentation of a "prescribed disclosure document". Both Part 12 and Part 13 impose procedural requirements to provide notice of important dates and copies of certain court filings to the Chief Regulator, who is empowered to intervene in both primary market and secondary market proceedings.

Part 12 modifies some aspects of the defences currently available under provincial securities legislation. For example, the burden of proof for certain defences has been reversed, placing the onus on the defendant to prove that a reasonable investigation has been conducted or that the defendant believed that there had been no misrepresentation. This change aligns the primary market provisions in Part 12 with the equivalent secondary market provisions in Part 13.

Part 12 also provides a broad right of civil action for insider trading and related offences, complementing the PCMA's regulatory prohibitions. Similar to s. 136 of the British Columbia *Securities Act*, where the defendant has contravened the prohibition against insider trading, tipping and recommending in Part 9, s. 129 of the PCMA provides a private right of action to all persons who purchased or traded a security during the period described, regardless of whether they purchased the securities from, or sold them to, the defendant. The PCMA does not include specific rights of action for misrepresentation in sales literature or for verbal misrepresentations, which are expressly provided for in New Brunswick's and Saskatchewan's legislation.

An additional distinction between the PCMA and current New Brunswick and Saskatchewan securities legislation is the limitation period for primary market claims other than actions for rescission. While the PCMA, similar to current British Columbia and Ontario legislation, requires that an action under Part 12 be commenced no later than the earlier of six months from the plaintiff's first knowledge of the facts giving rise to the action and three years after the transaction or contravention, the current New Brunswick and Saskatchewan statutes double those time periods.

A notable addition to Part 13 of the PCMA is s. 171(2), which suspends the limitation period for commencing a statutory secondary market civil liability claim when the plaintiff files a notice of application seeking leave to commence the action. This provision is similar to the recently amended s. 161.9 of the New Brunswick *Securities Act* and s. 138.14 of the Ontario *Securities Act.* Sections 163 and 165, which address the calculation of damages and liability limits, are substantively similar to the equivalent provisions in current provincial securities acts, but are organized differently to simplify the applicable calculations.

VII. Other matters

Confidentiality and disclosure

Part 14 of the PCMA and Part 1 of the CMSA contain provisions related to interjurisdictional co-operation, confidentiality and information-sharing. Pursuant to s. 196 of the PCMA and s. 17 of the CMSA, the Chief Regulator is authorized to share compelled testimony only after providing the person who gave the evidence with an opportunity to make representations. The Tribunal may make an order authorizing disclosure without notice on application by the Chief Regulator. Disclosure in the context of a proceeding or the examination of a witness is carved out from these requirements.

Regulations

The regulation-making processes under the CMSA and the PCMA are similar, with both statutes empowering the Authority to make regulations for carrying out the purposes and provisions of the legislation. Consistent with the Memorandum of Agreement, Part 6 of the CMSA and Part 15 of the PCMA set out a detailed public consultation and approval process that the Authority must undertake before making a regulation. To promote transparency, the regulation-making provisions include a mandatory notice and comment period, a requirement to republish when a material change has been made to a proposed regulation, and oversight by the Council of Ministers. Both statutes also include provisions for urgent regulation-making, and contemplate that the Council of Ministers may request that the Authority consider making a regulation on a particular subject. The CMSA includes regulation-making authorities in respect of national data collection and addressing systemic risk related to capital markets. Specific heads of regulation-making authority for the PCMA will be developed in conjunction with the draft regulations.

VIII. Conclusion

The release of the consultation drafts of the PCMA and CMSA marks an important milestone in the transition towards the Cooperative System. Work to implement the Cooperative System, including finalizing the processes for appointments to the Authority's board of directors and Tribunal, will continue. Draft initial regulations for the Cooperative System are targeted to be released for public comment by December 19, 2014.

IX. Comments

The governments of British Columbia, Ontario, Saskatchewan, New Brunswick and Canada invite comments on the PCMA and CMSA until December 8, 2014. Comments can be submitted on the website for the Cooperative System at www.ccmr-ocrmc.ca.

Please note that we cannot keep submissions confidential. It is important that you state on whose behalf you are making submissions. All comments will be posted on the Cooperative System website.

The governments of British Columbia, Ontario, Saskatchewan, New Brunswick and Canada continue to invite other provinces and territories to participate in the Cooperative System.