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Cooperative Capital Markets Regulatory System Governance and Legislative Framework

NATIONAL BUSINESS LAW SECTION AND
CANADIAN CORPORATE COUNSEL ASSOCIATION
CANADIAN BAR ASSOCIATION

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500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association.

TABLE OF CONTENTS

Cooperative Capital Markets Regulatory System Governance and Legislative Framework

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EXECUTIVE SUMMARY

The Canadian Bar Association (CBA) is pleased to comment on the Cooperative Capital Markets Regulatory System (CCMR) Governance and Legislative Framework consultation published on September 8, 2014. The CBA is a national association representing over 36,000 jurists, including lawyers, Quebec notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice.

These comments are the collective work of the Business Law Section and the Canadian Corporate Counsel Association of the CBA (the CBA Sections). Together, these groups comprise expert lawyers from across Canada in all areas of securities law including securities filings, initial public offerings, corporate governance, continuous disclosure, registrants, and other financial instruments including both transactional and regulatory practice and litigation.

Although the CBA Sections commend the intent of the Memorandum of Agreement (MOA) between the participating jurisdictions, the lack of detail in the draft legislation and the desire to settle major issues by way of regulation is concerning. It seems as though there remains a large portion of work to be done in creating a functional governance and legislative framework.

We believe that more time for robust consultation is required. The proposals modify existing securities laws without the usual consultative process of the Canadian Securities Administrators (CSA) and securities commissions.

Our substantive comments are organized according to the topics outlined in the commentary on the CCMR.

Structure, Governance and Accountability – MOA

Since not all provinces and territories will join the CCMR at the same time, if at all, we suggest that the participating governments provide a framework for how the CCMR will operate with the non-participating jurisdictions prior to finalizing the new CCMR. Uniformity is essential to

the cooperative system and without a plan a new regime could result in a system more fractured than the current one.

We urge the drafters to ensure consistency among the definitions in the MOA, the *Capital Markets Stability Act* (CMSA) and the *Provincial Capital Markets Act* (PCMA) as they all cross-references to one another.

The uniformity of fee structure is a great concept, however, every effort must be made to keep fees reasonable. The fee structure under the new regime should be published for a reasonable period of public review and comment, particularly to understand how the cost of the new framework (including the regulatory and adjudicative functions) compares to the existing framework.

We question whether co-chairs is a necessary component of the Council of Ministers. Rotating the chair among the federal and major participating jurisdictions should suffice. There is also a lack of detail on how the Council of Ministers will generate its positions on appointments, oversight, proposing amendments, approving regulations and requesting regulations.

Section 5.2 of the MOA requires clarification on how the initial regulations will be approved. It is also unclear whether the Council of Ministers has the ability to reject the initial regulations.

Under 5.3(d)(ii) of the MOA, if more non-major jurisdictions join the CCMR, a majority may favour rejecting a regulation, but as long as two of BC, Ontario and the federal government vote against, it cannot be approved. It is unclear whether this is an intended consequence of the MOA.

Although under section 5.6 the Council of Ministers may be consulted prior to an amendment to the federal legislation, there is no formal process for approval of the amendment by the participating jurisdictions.

The MOA does not address to whom the Board of Directors is accountable. Is it to the Council of Ministers? The MOA does not address the term of remuneration of the Board of Directors. We believe this should be explicitly spelled out in the legislation.

Section 9.2(b) of the MOA omits the possibility that a current non-major market may ever become a major market. To take this possibility into account, we suggest that the jurisdictions be based on a formula rather than how it is currently presented in the MOA.

Clarity is required under the transition and implementation provisions of the MOA.

Promoting Financial Stability – CMSA

Care should be taken to ensure that the definitions set out in sections 2 and 3 of the CMSA are aligned with definitions in the PCMA,to prevent regulatory gaps.

Under section 12 of the CMSA, it is unclear whether the Capital Markets Regulatory Authority is a provincial or federal government agency and consequently, whether provincial or federal privacy legislation will govern its personal information handling practices. This should be clearly set out in the CMSA.

The CMSA should specify that section 10 is exclusive of the powers of the Authority in Part III and could not be used by the Authority to circumvent the due process safeguards associated with reviews and inquiries.

Subsection 13(1) of the CMSA should be amended by adding "or the Chief Regulator" and deleting the words "and the regulations." Additionally, any exception to the requirement to treat non-public information confidentially should be explicitly set out in the statute as opposed to buried in the regulations.

Under subsection 13(2), the potential recipients who may be considered "a law enforcement agency" should be set out in a definition added to section 2 of the CMSA. For greater transparency, it would be helpful to require a written request from a law enforcement agency prior to disclosure and to specify that the purpose of the disclosure is for administering or enforcing a law or conducting a criminal investigation.

Section 16 of the CMSA should provide additional safeguards for the disclosure of confidential information. For example, it should specify that the agreement on the terms of disclosure be in writing and the terms of disclosure include restrictions on further disclosure by the recipient. Similarly, for disclosure of confidential information within Canada, disclosure should be conditional on the Authority being satisfied that the information will be treated confidentially by the person to whom it is disclosed.

Given the potential significance of the additional regulations to be imposed on designated persons throughout Part 2 of the CMSA, each of sections 18(3), 20(3), 23(3), 27(3), 29(2) should provide the affected person to be heard, in addition to the opportunity to make representations.

Section 22 of the CMSA effectively grants the Bank of Canada the same rule-making authority as the CMSA. The regulation and rule-making process of the CMSA should be independent from the Bank of Canada.

A Modern Regulatory Approach – PCMA

The requirement in section 9(2) for an opportunity to make representations on potential conditions, restrictions or requirements on a recognition appears to be a lower standard than the requirement for a hearing in the British Columbia *Securities Act* (BCSA). Is this intentional?

We question the breadth of section 10 of the PCMA and the lack of protection for privileged information in section 16(5) which appears to modify section 15(3) for disclosure of information by a recognized auditor oversight agency.

Paragraph 27(2) of the PCMA introduces a new concept under Canadian securities laws by allowing securities to be distributed without filing a prospectus. While we have no objection to the notion of a flexible regulatory regime, it is not possible to provide meaningful comments in the absence of details on how the required prescribed disclosure document in this section would function within the PCMA regime.

The term "prescribed disclosure document" is used in parallel with prospectus throughout Part 12 of the PCMA on Civil Liability. There is no indication whether the initial draft regulations scheduled for release in December 2014 will include a regulation detailing the requirements of a prescribed disclosure document.

Under section 37(1) of the PCMA, is there a reason why a time period to file a prospectus was omitted from the PCMA? Is a time period intended to be addressed through regulation? It would be helpful to clarify if there is any intent to change the existing two day delivery requirement under existing securities legislation.

The revisions to section 40 of the PCMA, relative to the comparable provision proposed for the Ontario *Securities Act* (OSA) as found in the table of concordance, result in some uncertainty whether certain exchange traded and other derivatives would be subject to a prospectus requirement.

We agree that, as a general principle, the commercial expectations of contracting parties to a derivatives transaction should be respected, as contemplated by section 42 of the PCMA. Is

there any basis to carve out certain widely distributed or "retail" derivatives from the scope of this clause?

Sections 64 and 65 of the PCMA contain new prohibitions relating to benchmark manipulation. Manipulation of benchmarks is a worthy target of proscription in light of recent high-profile cases of apparent benchmark manipulation, but caution needs to be exercised. We recommend the inclusion of a knowledge requirement in section 65(1) and (2) by way of a defence.

We support the inclusion of the disclosure requirement in section 74 of the PCMA as it enhances transparency. We also support the inclusion of whistleblower protections as contemplated by section 77 of the PCMA. It is consistent with international efforts to increase transparency, even if the prohibition likely already exists in the corporate policies of many or most reporting issuers.

The section 78 breach of trust provision of the PCMA includes a prohibition that does not appear in the existing securities legislation. While we do not object to this, we are curious whether this is designed to fill an existing gap in applicable legislation and regulation.

Under the civil liability provisions in Part 12 and 13 of the PCMA, the word "plaintiff" should be a statutorily defined term which includes either a group of plaintiffs or a plaintiff class under a class proceeding especially as the litigation reality under the PCMA is that most will be by way of class action.

I. INTRODUCTION

The Canadian Bar Association (CBA) is pleased to have the opportunity to comment on the consultations published September 8, 2014 on the Cooperative Capital Markets Regulatory System (CCMR) Governance and Legislative Framework. The CBA is a national association of 36,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. These comments are the product of the Business Law Section and the Canadian Corporate Counsel Association of the CBA (the CBA Sections). Together, these groups comprise expert lawyers from across Canada in all areas of securities law including securities filings, initial public offerings, and other financial instruments including both transactional and regulatory practice and litigation.

While we commend the intentions of the Memorandum of Agreement (MOA), we are concerned with the lack of adequate time to assess and analyze the consultation. The proposals modify

existing securities laws without the usual consultative process that the Canadian Securities Administrators (CSA) and securities commissions in Canada have typically used. For example, the Ontario *Securities Act* (OSA) sets out the requirements for a comment process and the contents of a notice (section 143.2) that includes: statement of the substance and purpose of the proposed rule; a summary of the proposed rule; a reference to the authority under which the rule is proposed; a discussion of the alternatives to the proposed rule that were considered and the reasons for not adopting the alternatives; reference to any significant unpublished study, report or other written materials on which the Commission relied on in proposed the rule; a description of costs and benefits of the proposed rule; a reference to every regulation of provision to be amended or revoked to bring the proposed rule into effect. Rushing through the consultation process may result in inadequate and incomplete legislation and overlooks the value of public consultation.

For ease of reference, our comments are organized under the general headings of the commentary on the CCMR. We address the Memorandum of Agreement under Part II, the CMSA under Part III and the PCMA under Part IV.

II. STRUCTURE, GOVERNANCE AND ACCOUNTABILITY – MOA

1. Context

While we note the intentions of the Memorandum of Agreement (MOA), the current proposals may fall short of achieving the goals for a number of reasons.

There is no clear plan to integrate the non-participating jurisdictions under the CCMR. For example, what will happen to TSXV-listed companies that are automatically reporting issuers in British Columbia and Alberta? Because not all provinces and territories will join the CCMR at the same time, if at all, we suggest that the participating jurisdictions provide a framework for how the CCMR will operate with the non-participating jurisdictions prior to finalizing the new CCMR. Without a plan, a new regime could result in a system more fractured than the current one. Uniformity in all aspects of securities regulation across all Canadian jurisdictions is critical to reap the benefits of a single securities regulator.

In addition, participating and non-participating jurisdictions can still pass provincial securities legislation. This could result in further lack of uniformity in securities laws across Canada.

The MOA provides for decisions affecting each participating jurisdiction to be made on a majority basis. This opens the way for the participating jurisdictions to pass additional securities laws which would result in a lack of uniformity of legislation even among the participating jurisdictions, notwithstanding section 3(a)(i) of the MOA.

Unless all provinces and territories are party to the Cooperative System, a bifurcated, overlapping and inconsistent legislative and regulatory framework may exist, creating the potential for inefficient capital markets in Canada.

2. Definitions, Jurisdiction and Interpretation

2.1 Definitions

The MOA is the backbone of the CCMR and the definitions in the MOA will be pivotal to the CCMR. Given the political nature of the MOA and the difficulty in amending it we question whether this is the proper approach.

Several pivotal definitions in the provincial and federal legislation are cross referenced back to the MOA. For example, the *Capital Markets Stability Act* (CMSA) and *Provincial Capital Markets Act* (PCMA) refer back to the MOA for the definitions of Council of Ministers, Authority, Tribunal, Major Capital Market Jurisdictions, among others.

There is at least one inconsistency in the definitions. The definition of "Memorandum of Agreement" is different in the MOA and the PCMA. In the PCMA the definition includes a reference to the four participating provinces (which is already out of date since PEI joined in October 2014).

2.2 Jurisdiction

The MOA states that "each of the participating jurisdictions is addressing matters within its constitutional jurisdiction and is neither surrendering nor impairing any of its jurisdiction, with respect to which it remains sovereign." It is unclear whether the provinces and territories are agreeing not to have any other securities legislation other than the uniform PCMA.

2.3 Interpretation

We question whether section 2.3 is meant to deal with inconsistencies or to provide a method of amending the definitions in the MOA. How does this work when the legislation refers to the MOA for the creation of the CCMR and its various components?

3. Principal Components of the Cooperative System

Section 3(a)(i) – Uniform provincial and territorial legislation

All jurisdictions can still theoretically pass their own provincial or territorial securities legislation, which may result in a lack of uniformity. Without complete uniformity, this positive is lost.

Section 3(a) (ii) Complementary federal legislation

It is not clear how the jurisdiction given to the federal government in sections 18, 20, 27, 30 and 24 will impact or interact with provincial jurisdiction in the securities area or the operation of the PCMA.

Section 3(a)(iii) Regulator

It is unclear whether each participating jurisdiction and the federal government are to approve the single set of regulations, or whether these regulations are made by the Capital Markets Regulatory Authority (CMRA).

A single set of regulations and CMRA Charter Documentation should be published for a reasonable period of public review and comment. The provisions refer to a "regulatory division and an adjudicative tribunal" followed by a definition of "Tribunal" that administers the PCMA and the CMSA. This may require a defined term after "regulatory division".

Section 3 (a) (iv) Council of Ministers

The Council of Ministers introduces a political dimension to the development of securities legislation, which could result in inefficiencies and regional differences being highlighted.

Section 3(a)(v) Offices

It is difficult to imagine how the "same range of services" could be provided in the regional offices as they will no longer have their current rule making, adjudicative, enforcement and oversight responsibilities. There should be consideration to expanding the range of services offered at local offices.

3(a)(vi) Fees

The uniformity of fee structure is a great concept, however, every effort should be made to keep fees reasonable. The fee structure should be published for a reasonable period of public

review and comment, particularly to understand how the cost of the new framework (including the regulatory and adjudicative functions) compares to the cost of the existing framework.

4. Council of Ministers

4.1 Co- Chairs of the Council of Ministers

We question the purpose of having co-chairs especially as there is no special weighting given to chair votes. This also seems impractical to administer. There should instead be a single chair who is rotated among the federal government and the major markets. Under the proposed arrangement, the co-chairs have to be from Major Capital Markets Jurisdictions, meaning unless Alberta and Quebec opt in, the co-chairs will always be from BC and Ontario with the other participating jurisdictions left out (this is inconsistent with the current CSA policy).

4.2 Responsibilities of the Council of Ministers

There is a lack of process and detail on how the Council of Ministers will generate its positions on appointments, oversight, proposing amendments, approving regulations and requesting regulations. Will there be a parallel division in each of the provincial governments to carry out this role or will the Council rely on the CCMR?

5. Council of Ministers Decision Making Process

5.1 Voting on the Appointment of Boards of Directors and Tribunals Member and Interface with Non-Participating Jurisdictions

It is unclear what is meant by the term “interface mechanism” as it is not defined.

5.2 Voting on a regulation made by the Board of Directors

What decision making process will be involved in section 5.2(a) in the approval of the Initial Regulations? It seems as though the Initial Regulations are not capable of being rejected by the Council of Ministers.

It is unclear how this section may work in some circumstances. For example, if two other non-major jurisdictions opted in, there could be substantial opposition to a regulation. However, under section 5.3(c)(ii), as long as BC, Ontario and the federal government vote for it not to be reconsidered, they could force it through. Similarly, under 5.3(d)(ii), a majority may be in favour of rejecting a regulation, but as long as two of BC, Ontario and the federal government vote against, it cannot be approved. It is unclear whether this was the intent.

5.3 Voting on a request to CMRA to consult and consider making a Regulation

It will be necessary for any participating jurisdiction to get the approval of at least one of the major market participants and 50% of all council members to consider a regulation. This suggests that it will be difficult for the non-major market participants to have their issues considered.

5.4 Specific Economic Development Initiatives

There is no substantive definition of "specific economic initiatives" making it difficult to gauge the scope of economic development initiatives captured by this provision. As a result, we are left with many questions.

What is the legislative basis for a provincial or territorial participating jurisdiction to request the Board of Directors of the CMRA to consult and consider making a regulation to accommodate provincial or territorial government programs that relate to specific economic development initiatives in that jurisdiction? How does this section interact with section 5.3?

What recourse does the province or territory have if the Board of Directors does not approve a request on the basis that, in the Board's opinion, the proposed regulation will adversely affect the fundamental principles of the CMRA, affect market participants or investors in other jurisdictions or involve other matters of national importance? Will the participating jurisdiction have the ability to request its legislative body make a regulation for the initiative?

How will local economic development initiatives be balanced relative to the grounds upon which the Board can determine not to approve the regulation-making request?

5.6 Consultation on Proposal to amend federal legislation

This allows the federal government to make changes to the CMSA without a formal process or approval by the participating jurisdiction. Will the non-participating jurisdictions be consulted? Given the far-reaching powers of the CMSA and the lack of definition of systemic risk or "systemically important" this seems inconsistent with the tone and purpose of the CCMR concept.

6. Nominating Committees

6.1 Establishment and Composition of Nominating Committees

The ability of the members of the Council to directly appoint members of the nomination committee is inconsistent with the independence requirement in section 6.2. Additionally, there is no definition of "independence".

7. Board of Directors of CMRA

7.1 Composition and Meetings of the Board of Directors

The legislative framework should include standards for assessing independence of director nominees. What qualifies as independent? What constitutes a "larger office"? Does that mean only the major capital markets jurisdictions? What constitutes on a "regular" basis?

7.2 Responsibilities of the Board of Directors

These provisions specify responsibilities of the Board of Directors, but the MOA does not address to whom the Board of Directors is accountable. Is it to the Council of Ministers?

7.3 Appointment of the Board of Directors

The MOA does not address the remuneration of directors nor their term other than stating "for a fixed term, which can be renewed." It is also unclear whom the nominating committee reports to – the Board of Directors or the Council of Ministers? Will the Board of Directors also have a nominating committee that makes recommendations for the Board? It would appear that under section 6.1(b) the Board will play a role in Board selection through its designates on the nominating committee.

There are two standards of care set out for directors, one in the MOA and another in section 107 of the CMSA. Section 107 suggests that the directors have no liability. The MOA states that the highest level of corporate governance will apply to the Board. Directors should be subject to the same standard of care and duty of care as under Canadian corporate legislation.

7.4 Chair of the Board

The confirmation process is unclear. It is not evident how the Council would decide on a chair as this is not dealt with in section 5.

8. Cooperative System Legislation

8.1 Provincial Capital Markets Act

As noted above, each component of the Cooperative System framework should be published for public review and comment. Do the provincial legislators have any jurisdiction to amend the PCMA or must they pass it word for word? Will there be a provincial committee process, for example, to review the proposed legislation? The process for amending in section 5.5 suggests that the provincial legislatures will not control the content or amendments to the PCMA.

8.2 Initial Regulations

This provision states that the Initial Regulations will be approved "as a condition subsequent to" the MOA. Does this mean that the Initial Regulations are adopted? Are they passed under the MOA? Does this not have to be passed by some legislative body?

Section 8.2 sets out considerations (economic and geographical interests and need of local markets) for their development and a comment process. Were the Initial Regulations not developed when the MOA was signed? Have they been adopted since the MOA was signed?

8.3 Federal Legislation

It appears that the participating jurisdictions have considered and approved the CMSA. If the CMSA is later amended in Parliament, what is the provincial consultation process? How does this section interact with section 5.6?

8.4 CMRA Charter Documentation

It appears that the participating jurisdictions have agreed to the documentation before it has been created.

9. Principal Components of CMRA

9.1 Principal Components of the CMRA

Subsection 9.1 (a) refers to "common standards", but the term is not defined. Are the "common standards" outside the legislation? Are these the product of regulatory or adjudicative decisions, or separate statements on the interpretation of various legislative provisions? We believe that in order to foster fair and efficient capital markets common standards and common interpretations, they need to be publicly available and need to be published for public review and comment prior to implementation or amendment. Are common standards and

common interpretations analogous to policy statements, or regulations? What is the consequence of non-compliance with common standards?

9.1(c) – Whom does the Regulatory Policy Forum report to? What is the process for getting their recommendations put into law?

9.1(d) – Was the omission of the territories purposeful? What about the intention for local representation?

9.2 Regulatory Division of CMRA

Under section 9.2 (a), who appoints the Chief Regulator? Does the Council have any input?

In section 9.2(b) only the major market participants will have their own Deputy Chief Regulators. The non-major participating jurisdictions get two combined. The two Deputy Chief Regulators of the non-major participating jurisdictions will need to "travel regularly among the regulatory offices in their assigned jurisdictions". This suggests some uneven parity among the regions.

This section also assumes none of the current non-major markets will ever become a major market. The jurisdictions should be based on a formula rather than how it is currently presented in the MOA.

Section 9.2(d) suggests that the majority of the executive committee, made up of the Chief Regulator and the Deputy Regulators, would be based in Toronto. We find the overall meaning of this section unclear as well as the description of the "nationally integrated executive management team" and its intended role.

Section 9.3 Office Structure

We have a number of questions stemming from the paragraphs in this section.

- Who decides staffing of the regulatory offices: the Regulatory Division; the Board of Directors, Council, the Executive Committee?
- The meaning of this paragraph is unclear and it seems to give some authority to the local offices but only to continue the current staffing.
- Does the director only report to the Deputy Chief Regulator? This seems to add another level of bureaucracy over current structures where each province has an Executive Director. In the CCMR there will be a director reporting to a deputy director which will report to a Chief Regulator. See section 9.2(b).

- The granting of local approval powers is crucial to the success of the CMRA. Will these be made at the regulatory office level? See our comments on common standards and interpretations.
- Is there a formal mechanism to achieve the goal of sharing information on best practices like the Canadian Securities Administrators?
- How does this fit in with the Regulatory Policy Forum and how are these policy and operational decisions implemented?

9.4 Tribunal

Our comments refer to the various paragraphs under this section.

(a) More details should be included about the Tribunal, particularly given that the definition of Tribunal in the PCMA is crossed referenced back to the MOA. The legislative framework should include standards for assessing independence of tribunal nominees.

(b) See our comments relating to section 7.3 . The MOA does not address the term and remuneration of adjudicators.

(c) See our comments on section 9.2(a).

10. Transition and Implementation

10.1 Agreement

Under paragraph (c), the services agreements should be available for public review and comment. Are all current assets of the Commissions to become the assets of the Authority?

Initially, a secondment of employees is contemplated. Will the current employees eventually become employees of the Authority? Will the Authority be a federal crown corporation? If the employees remain employees of the provincial crown, do they not have a duty of loyalty to the provincial crowns? The provisions require all staff to be fully accountable to the CMRA in all of their activities.

10.2 Oversight of Implementation

When will the transition period commence? How does this impact on this comment process?

10.3 Implementation Milestones

The goal to enact legislation by June 30, 2015 and be operational by fall 2015 seems ambitious. Will there be an “interface” mechanism in place at that time? How is the staff at the Commissions being briefed on the new system and their roles?

10.4 Funding of Transition by Canada

Who bears the cost for the transition? Participants in the capital markets should not have to shoulder the costs of implementation.

10.5 Interface with Non-Participating Jurisdictions

A CMRA interface mechanism with jurisdictions that are non-participating jurisdiction needs to be in place before the CCMR is finalized. The mechanism should be made available for public review and comment.

11 Accession to the MOA

Is all that is required once a new participating jurisdiction is approved under section 5.7(b) to to submit a completed signature page?

12 Dispute Resolution

It seems unlikely that a dispute under the MOA could be settled via consultation. How does this proposed consultative process interact with section 5.7 (fundamental changes)? We believe there should also be a definition for the term "dispute".

13 Withdrawal from this MOA

Is six months sufficient time for other jurisdictions to respond to the change in circumstance? Is there a minimum number of jurisdictions that need to stay in the CCMR to continue operation? What would happen, for instance, if Ontario gave six months notice to withdraw?

III. PROMOTING FINANCIAL STABILITY – CMSA

1. Definitions

As a general comment, care should be taken to ensure the definitions in sections 2 and 3 of the CMSA are aligned with definitions in the PCMA to prevent regulatory gaps. They should also have sufficient specificity to ensure that persons are not inadvertently captured or excluded from the CMSA. For example:

- in the definition of "capital markets intermediary", would subsection (b) of the definition also capture private equity, and if so, is that the intention?
- under the definition of "clearing house", the term "clearing and settlement" may inadvertently capture persons that have traditionally been excluded from the concept of clearing (ex: netting) due to lack of specificity. The definition of "clearing house" in

the CMSA is different and less flexible than the definition of "clearing agency" in the PCMA, which may result in regulatory gaps; and

- the concept of "trading facility" in the CMSA is different than the comparable concept of "market place" in the PCMA, and, may result in regulatory gaps.

The definition of "systemic risk related to capital markets" in section 3 of the CMSA also causes some uncertainty. The definition relies significantly on the interpretation of the terms "stability" and "integrity". "Integrity" is further defined, however "stability" is not. We suggest including a further definition of the term "stability" or deleting the term altogether if it does not add anything beyond what is included in the definition of "integrity".

We question whether the term "potential to have an adverse effect on the Canadian economy" should be qualified by a materiality or significance standard. The term is inconsistent with the purposes of the CMSA in subsection 4(a), which is to promote and protect the stability and integrity of Canada's financial system, not to prevent adverse effects on the Canadian economy.

The elements of the "integrity of Canada's financial system" in subsection 3(2) are stated in general terms, and are non-specific, which may lead to difficulties in measurement, evaluation, application and accountability.

2. Information Collection and Disclosure – Part 1 of the CMSA

(a) It is unclear what privacy legislation will govern the personal information handling practices of the Authority.

Section 12 of the CMSA permits a person to disclose personal information to the Authority if the disclosure is for the purpose of the administration of the CMSA or of assisting in the administration of capital markets or financial legislation in Canada or elsewhere.

The Authority is defined as "the Capital Markets Regulatory Authority established in accordance with the Memorandum of Agreement". It is envisioned that the Authority will be jointly established by the participating jurisdictions and have national data collection powers. It is unclear whether the Authority is a provincial or federal government agency and consequently, whether provincial or federal privacy legislation will govern its personal information handling practices. This should be clearly set out in the CMSA. For example, the *Privacy Act (Canada)* covers the personal information handling practices of federal government institutions. If the intent is that the Authority will be subject to the Privacy Act (Canada), the

consequential amendments in Part 8 of the CMSA should include an amendment to the *Privacy Act* Schedule of Institutions to add the Capital Markets Regulatory Authority.

(b) Why is section 10 of the CMSA necessary?

Section 9 envisions regulations that will prescribe the records and information that must be provided to the Authority for purposes of monitoring activity in capital markets or detecting, identifying or mitigating systemic risks related to capital markets; or conducting policy analysis related to the Authority's mandate and the purposes of the Act. It should be possible to amend the regulations if is determined that other types of information not already specified in the regulations should be provided to the Authority. Consequently, it is unclear why it is necessary under section 10 that the Chief Regulator may also require a person to provide records and information for the same purposes as under section 9. Further, a person has no choice but to comply with the request (or face a monetary penalty for failing to comply). In those situations, a person should be able to make representations to the Chief Regulator or have an opportunity to say why disclosure should not be required. For example, if the records and information are not required for the specified purposes or providing the information would cause undue hardship.

At a minimum, the CMSA should specify that section 10 is exclusive of the powers of the Authority set out in Part III and could not be used by the Authority as a means of circumventing the due process safeguards that are associated with reviews and inquiries.

(c) Subsection 13(1) should be amended by adding "or the Chief Regulator" and deleting the words "and the regulations."

There should be a balance between the purposes specified for the collection of information by the Authority and the need to maintain confidentiality and security over the information collected. Any exception to the requirement to treat non-public information confidentially should be explicitly set out in the statute as opposed to buried in the regulations. Also, subsection 13(1) of the CMSA omits the Chief Regulator even though there are separate provisions requiring information to be provided to the Authority and the Chief Regulator. We recommend amending subsection 13(1) to read:

"Information obtained by the Authority or the Chief Regulator under this Act that is not publicly available information is, subject to sections 14 and 15, confidential and must be treated accordingly."

(d) The disclosure of confidential information to a law enforcement agency under subsection 13(2) should be more clearly defined.

This subsection provides one caveat to the sharing of non-public confidential information with law enforcement agencies — that the disclosure is not otherwise prohibited by law. At a minimum, the potential recipients who may be considered "a law enforcement agency" should be set out in a definition added to section 2 of the CMSA. For greater transparency, it would be helpful to also require a written request from a law enforcement agency prior to disclosure and to specify that the purpose of the disclosure be for administering or enforcing a law or conducting a criminal investigation. Notably, under Part 3 of the CMSA, peace officers and certain Authority staff may apply to court for a production order. Before making the order, the judge or justice must be satisfied by information on oath in writing that there are reasonable grounds to suspect that (a) an offence under the CMSA has been or will be committed; (b) the information that is to be produced will assist in the investigation of the offence; and (c) the person that is the subject of the order has possession or control of the information that is to be produced. Subsection 13(2) does not have any such requirements meaning law enforcement could potentially obtain disclosure of confidential information from the Authority without requiring that it be related to law enforcement purposes.

(e) Appropriate safeguards should accompany the disclosure of information under the CMSA.

Sections 14 and 15 each contain broad descriptions of the purposes for which confidential information may be disclosed by the Authority and the Chief Regulator. Section 16 requires that prior to disclosing information to a person, authority, entity or agency outside Canada, the Chief Regulator must enter into an arrangement or agreement regarding the terms of disclosure. We believe that section 16 should provide additional safeguards for the disclosure of confidential information. For example, it should specify that the agreement regarding the terms of disclosure be in writing and include restrictions on further disclosure by the recipient. Similarly, for disclosure of confidential information within Canada, the disclosure should be conditional on the Authority being satisfied that the information will be treated confidentially by the person to whom it is disclosed [see for example s. 22(2) of the *Office of the Superintendent of Financial Institutions Act*]. It is not clear whether a designated trade repository will be able to make disclosure of information collected for purposes of the CMSA to third parties on behalf of the Authority and the Chief Regulator or on its own accord.

3. Systemic Risk – Part 2 of the CMSA

(a) Importance of Regulations

Part II of the CMSA defers significantly to requirements, prohibitions and restrictions to be prescribed by regulations. The rule-making process on the drafting of regulations in sections 85 through 95 is of significant importance, and should also contain a requirement for accountability and regular monitoring and reporting on the observed impact of regulations following their implementation.

(b) Opportunity to be heard and Burden of Proof

Given the potential significance of additional regulations to be imposed on designated persons throughout Part 2 of the CMSA, each of sections 18(3), 20(3), 23(3), 27(3), 29(2) should provide the affected person to be heard, in addition to the opportunity to make representations.

In addition, the CMSA is not clear on the burden of proof that must be discharged prior to making an order designating a person under sections 18(1), 20(1), 23(1), 25(1), 27(1), or making an order under section 29(1), and who bears that burden. For example, is it the Authority who must demonstrate that the person is systemically important, or is it the person who must demonstrate that they are not systemically important?

(c) Concurrence of the Bank of Canada

Section 22 of the CMSA requires the concurrency of the Bank of Canada before making an order under section 20 or a regulation referred in section 21 of the CMSA. Although co-ordination amongst government agencies is an important goal, the regulation and rule-making process of the CMSA should be independent from the Bank of Canada. Section 22 of the CMSA effectively grants the Bank of Canada the same rule-making authority as the CMSA in this area.

(d) Exemption of Canadian financial institution from Section 27(1) of the CMSA

Section 27(1) of the CMSA describes the ability of the CMSA to make an order designating a capital markets intermediary, other than a Canadian financial institution or an agent of Her Majesty in right of Canada or a province, as systematically important. As Canadian financial institutions are among the most significant capital markets participants in Canada, it is important that the CMSA is able to both ensure that systemic risk is addressed and that there is a level playing field among bank-owned and non-bank owned capital markets intermediaries,

especially dealers. How will the CMSA ensure that equivalent regulation is applicable to a Canadian financial institution or an agent of Her Majesty in right of Canada or a province?

IV. A MODERN REGULATORY APPROACH – PCMA

1. Overview

As noted in the consultation documents, many of the obligations and prohibitions reflect those already in provincial securities Acts. We focus our comments on certain provisions that are in none or only some of the existing legislation.

Generally, the rationale for most of the proposed changes is not disclosed. Knowing the rationale for the proposed changes would facilitate comprehension of the significance of the changes.

As the commentary on the framework states, the PCMA is "platform" in nature, meaning that much detail will be fleshed out in the regulations. Commentary on the PCMA will be necessarily limited, pending publication of the draft regulations, scheduled for December 2014.

Our comments respond to the various sections of the draft PCMA.

2. Recognized Entities – Part 2 of the PCMA

Section 9 – Recognition of entites

While generally consistent with existing legislation, a number of terms in this section are not defined, and absent details of proposed regulations, the full scope of the recognition requirement is not clear. The requirement in section 9(2) for an opportunity to make representations about potential conditions, restrictions or requirements on a recognition appears to be a lower standard that the requirement for a hearing in the British Columbia *Securities Act* (BCSA).

Section 10 – Duty to provide information

We question the breadth of this provision and the lack of protection for privileged information in section 16(5) which appears to modify section 15(3) for disclosure of information by a recognized auditor oversight agency. While other self-regulatory organizations or other recognized entities may be less likely to come into possession of privileged information than an auditor oversight agency, there appears to be no policy reason for not offering the same

protection. More generally, we question whether other exceptions to the disclosure requirement may be appropriate.

3. Designated Entities and Other Market Places – Part 3 of the PCMA

Section 17 – Designation of entites and Section 18 – Duty to provide information

The comments to sections 9 and 10 apply equally to sections 17 and 18, respectively.

4. Prospectus Requirements – Part 5 of Prospectus Requirements

Paragraph 27(2) – Voluntary filing

This provision introduces a new concept under Canadian securities laws by allowing securities to be distributed without filing a prospectus. Specifically, it contemplates that securities can be distributed by filing with the Chief Regulator a "prescribed disclosure document" as an alternative to a prospectus filing. The PCMA contains no definition of the term “prescribed disclosure document”. Section 31(1) simply states: "A prescribed disclosure document must comply with the prescribed requirements", meaning the regulations made by the Authority from time to time. This is acknowledged in the commentary on the framework to be a change from the current regulatory approach in order to provide a "more flexible regulatory regime".

While we have no objection to the notion of a flexible regulatory regime, we cannot provide meaningful comments without details on how the prescribed disclosure document would function within the PCMA regime. For example, it is unclear whether the prescribed disclosure document would follow the same regulatory review process of that of a prospectus, where there is receipting for both the preliminary and final prospectus. Section 31(2) only provides that a receipt must be issued for a prescribed disclosure document "if a receipt is required by the regulations", subject to a public interest qualifier. To the extent that the concept is extended to a "preliminary" prescribed disclosure document, the receipt provision should follow that of the receipt provision for a preliminary prospectus in section 29(2), being without a public interest qualifier.

The term “prescribed disclosure document” is used in parallel with prospectus throughout Part 12 on Civil Liability of the PCMA. There is no indication in the commentary on the framework whether the initial draft regulations scheduled for release in December 2014 will include a the requirement of a prescribed disclosure document. Given the acknowledgment in the

commentary on the framework that this represents a change from the current regulatory approach, it causes some concern that there is no ability to make more substantive commentary on this change.

Section 37(1) – Obligation to send prospectus etc.

This section does not contain any reference to the time period in which the prospectus must be sent to the purchaser of the security. Presumably, the intention is that the time period will be prescribed in the regulations. Section 37(1) closely tracks the platform approach found in the BCSA. However, the equivalent section 83(1) of the BCSA sets out the time period that the prospectus must be sent to the purchaser of the security, i.e. before entering into the written confirmation or not later than midnight on the second business day after entering into the agreement. Whether this was intended to be included in the regulations or unintentionally omitted from the PCMA, it would be helpful to clarify if there is any intention to change the existing two day delivery requirement under existing securities legislation.

Section 37(2) – Obligation to send prospectus, etc.

This section contains the identical heading of section 37(1). Perhaps section 37(2) was intended to have a different heading such as "Exception: prescribed disclosure document".

5. Trading In Derivatives – Part 6 of the PCMA

Section 38 – Requirement re trades in designated derivatives

The platform approach on the requirement for approved disclosure materials in connection with trades in designated derivatives is generally consistent with the approach that had been proposed in the amendment to the Ontario *Securities Act* (OSA). Similar to our comments on the prospectus requirement, it is not possible to provide meaningful comments in the absence of details as to which derivatives would be "designated derivatives", which “designated derivatives” would be accompanied by the requirement for a "prescribed disclosure document" and what the content and liabilities associated with that prescribed disclosure document are. The commentary on the framework also lacks guidance on the delivery obligations and other mechanics associated with the prescribed disclosure document. The added clarification, relative to the OSA – that a prescribed disclosure document may be effective over a series of transactions in a definitive derivative, for a period of time – can potentially streamline the regulatory regime.

Section 39 – Duty to provide information

We question whether the breadth of this provision, extending to any person who "trades in…derivatives" is appropriate. The detail of the prescribed information to be provided is absent. In contrast, securities regulators have relied upon more targeted information gathering authority when seeking details from market participants (a more narrowly defined class) in relation to trades in securities.

Sections 40 and 41

The revisions to section 40, relative to the comparable provision proposed for the OSA, result in some uncertainty whether certain exchange traded and other derivatives would be subject to a prospectus requirement (or perhaps the expectation is that those derivatives will not be designated as securities). The drafting in section 41 is also confusing. Is the intent that derivatives in a prescribed class in paragraph (p) of the definition of "security" are "securities" for all purposes, but all other derivatives are only to be treated as securities for more limited, prescribed provisions? It is difficult to provide meaningful comments on the implications of these provisions absent further details on the planned regulatory approach, although we agree with the general principles outlined in the commentary.

Section 42 – Effect of failure to comply

We agree that, as a general principle, the commercial expectations of contracting parties to a derivatives transaction should be respected, as contemplated by the wording of section 42. This is particularly in the case of bilateral transactions between sophisticated parties. We question whether, from a public policy perspective, there may be a basis to carve out certain widely distributed or "retail" derivatives from the scope of this clause. For example, where there is a failure to prepare or deliver a "prospectus-like" prescribed disclosure document to an investor in a derivative. Alternatively, rules pertaining to the prescribed disclosure document for a particular designated derivative could establish the remedies available in the event of non-compliance with capital markets law.

6. Disclosure and Proxies – Part 7 of the PCMA

Paragraph 44(b)

This paragraph should end with the words "required by regulations". This is consistent with the drafting in section 42(c) and elsewhere in the PCMA.

Section 46 – Requirement to solicit proxies

This section purports to trigger a requirement for management to send proxies to all holders of voting securities an information circular if soliciting proxies. This appears to broaden the scope of the requirement beyond that of existing securities legislation, which limits the requirement to holders of voting securities in the particular province. It would logically follow that the requirement to send proxies in section 46 of the PCMA should be limited to holders of voting securities in "participating provinces or territories".

7. Market Conduct – Part 9 of the PCMA

Sections 64 and 65 – Benchmark Manipulation

The PCMA contains new prohibitions for benchmark manipulation. There are no stated defences as there are, for example, to the insider trading and tipping prohibitions in section 68.

Manipulation of benchmarks is a worthy target of proscription in light of recent high-profile cases of apparent benchmark manipulation, but caution needs to be exercised. Do regulators (particularly IIROC) consider that existing rules do not prohibit this conduct, or is the goal is to highlight and clarify an existing prohibition?

The application of sections 65(1) and (2) is potentially very broad. There is no requirement that a person have knowledge that their conduct might "relate to a benchmark" or that the conduct is likely to "improperly influence" the benchmark. There is no guidance as to what these words mean. We recommend the inclusion of a knowledge requirement in section 65(1) and (2) by way of a defence. This could take the form of a new section 65(3) that reads:

> A person does not contravene either of subsections 65(1) or (2) unless, at the time, the person knew or reasonably ought to have known that the conduct related to a benchmark.

Alternatively, the legislation could incorporate some level of remoteness or foreseeability, beyond which one's actions would not contravene the prohibition. For example, a defence could provide:

> A person does not contravene either of subsections 65(1) or (2) unless, at the time, the person knew or reasonably ought to have known that the conduct could influence the determination of the benchmark or produce or contribute to the production of a false or misleading determination of the benchmark.

Section 66 – Insider Trading

In section 66(1) the proscribed action relates to securities of both "reporting issuers", as in the existing legislation, and "issuer[s] whose securities are publicly traded". Since the definition of "reporting issuer" includes issuers that are prescribed by regulation, it is unclear how an issuer could have its securities be publicly traded but avoid the "reporting issuer" designation.

Section 74 – Investor Relations Activities

This section requires the disclosure of "investor relations activities" as is currently the case in British Columbia and New Brunswick. The definition of "investor relations activities" is also consistent with existing legislation and largely consistent with the TSX Venture Exchange Corporate Finance Manual.

We support the inclusion of this disclosure requirement in the PCMA, in that it enhances transparency.

Section 77 – Whistleblower Protection

We support this inclusion in the PCMA. Imposing prohibitions on reprisals against whistleblowers, which are not in the existing legislation, is consistent with international efforts to increase transparency, even if the prohibition likely already exists in the corporate policies of many or most reporting issuers.

We query whether the implementation of a whistleblower protection regime is being contemplated. For example, will there be a potential monetary reward for whistleblowers, as in the United States?

Section 78 – Breach of Trust

Section 78 includes a prohibition that does not appear in the existing securities legislation. While we do not object to this provision, we are curious whether there is an existing gap in applicable legislation and regulation that this is designed to fill. If not, we would question underlying reasons behind the new prohibition.

Sections 84 and 85 – Aiding, Abetting, Counselling and Conspiracy

Our comments on section 78 above apply equally to the sections 84 and 85 which do not appear to exist in current securities legislation.

8. Civil Liability – Part 12 and 13 of the PCMA

The participating jurisdictions may wish to consider making the word "plaintiff" a statutorily defined term which includes either a group of plaintiffs or a plaintiff class under a class proceeding. Most civil litigation pursued under the PCMA will be by way of class action litigation (rather than individual lawsuits) and various sections of the PCMA may operate inadequately without the legislation providing a definition of the term "plaintiff" that suits that litigation reality.

As described in the beginning of this submission, the bifurcated legislative and regulatory framework that will exist after implementation of the MOA (if some jurisdictions adopt the cooperative system, while others do not) will conceivably create problems for civil liability issues as well. For example, if a securities class action is brought in Ontario, even if the proposed shareholder class is framed as being on behalf of all Canadian shareholders of a given issuer, relief to shareholders may not be possible in non-participating jurisdictions.

Additionally, the cap on damages in section 129(2)(a) may be insufficient in discouraging insider trading, as the damages (or civil penalty for insider trading) is the "lesser" of the two subsections proposed.

V. CONCLUSION

We appreciate the opportunity to comment on the CCMR Governance and Regulatory Framework. We encourage further consultations with the public and interested stakeholders on any regulations published pursuant to the current consultation. We hope our comments will assist Finance Canada and all participating jurisdictions, as well as non-participating jurisdictions that may join the CCMR in the future in creating a streamlined and efficient securities regulatory system. The CBA Sections would welcome the opportunity to be of further assistance through future consultations, reviews or development of proposed legislation and regulations, or through any future dialogue.