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December 8, 2014

DELIVERED BY EMAIL

The Governments of:
British Columbia
Saskatchewan
Ontario
New Brunswick
Prince Edward Island
Canada

The Cooperative Capital Markets Regulatory System
commentonlegislation@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: BLG Comments on Consultation Drafts of the Provincial Capital Markets Act and the federal Capital Markets Stability Act – published for comment September 8, 2014

We are pleased to provide the governments of British Columbia, Saskatchewan, Ontario, New Brunswick, Prince Edward Island and Canada with comments on the above-noted Consultation Drafts, which are designed to be administered by the proposed Capital Markets Regulatory Authority (the Authority). Our comments are those of certain individual lawyers in the Securities & Capital Markets practice group of Borden Ladner Gervais LLP and do not necessarily represent the views of BLG, other BLG lawyers or our clients. We wish to clarify that our comments are designed simply to provide input into the Consultation Drafts, particularly where we consider that the Consultation Drafts are unclear, incorrect or missing some essential or important aspect of modernized securities regulation. We are expressly not commenting on the proposed governance framework that is set out in the Memorandum of Agreement signed by the various governments, given that we believe much more detail is required before we could provide input into the elements included in the MOA.

The lawyers participating in sending this letter would also like to highlight our concerns about the following matters, all of which, we consider essential for the Governments and the proposed Authority to take into account as they move forward:

1. The Consultation Drafts were first published for a 60-day comment period, one which we consider much too short for the potentially far-reaching and significantly amended securities legislation that is being proposed, particularly as the comment period took place

at the same time that a significant number of new initiatives by the Canadian Securities Administrators (CSA) are either being implemented or developed. The Consultation Drafts were published without the explanatory description of the legislation or the table of concordance showing the comparable sections in the existing legislation of the applicable provinces, which became available on the CCMR website by the end of October. We welcomed the additional one-month extension of the comment period, but even with that extension, we consider that we have only been able to properly consider and comment upon a small fraction of the important implications of the changes to securities regulation that are being suggested by the Consultation Drafts, particularly given the concerns we note in this letter. Given the timing, we have not attempted to identify all significant issues with the legislation. We urge the Governments and the Authority not to rush into completion of any of these initiatives, including the establishment of the Authority and the finalization of the Consultation Drafts. We recommend further consultation and we would be happy to participate in any such further consultation, particularly, given our firm expertise, on matters relating to investment funds and registrants, provided we were given sufficient time to undertake this work.

2. In the absence of the "regulations" that will give life to much of the draft legislation, we have deferred comment on many aspects of the Consultation Drafts. We welcome the announcement made on Friday, December 5 that these draft regulations will be published for comment in the early spring of 2015 and will "substantially maintain the harmonization achieved under the current structure". We urge the Governments and the Authority to publish these draft regulations with a very clear table of concordance to existing CSA rules, and with a very clear explanation of the significant changes from the existing CSA rules (keeping in mind that often "insignificant" seeming wording changes can significantly amend the nature of the regulations). Given the expected volume of the initial regulations, we recommend a minimum of a 120-day comment period. Having a clear explanation of changes, along with a table of concordance will allow us to review and comment, at the very least, on selected key regulations during the comment period. We also recommend that the governments publish at the same time, amended versions of the Consultation Drafts of the legislation, so that we can review the regulations against the legislation and vice versa. If this is not possible, it will be critical that we be able to provide additional comments on the Consultation Drafts once we see the draft regulations.

3. We urge the Authority and the Governments to publish as soon as possible, for comment, an explanation of the "interface" that will be put in place, if the legislative and regulatory changes are finalized and the Authority established, with the members of the CSA whose governments will not be joining the MOA. It will be essential for this interface to be as efficient and "user-friendly" as possible and to cause the least amount of "red tape" for Canadian and international capital markets participants. We note that capital markets

participants will be required to comply with the new regime, as well as the "old" regime, accordingly compatibility will be key to the success of the System.

4. We are grateful for the Table of Concordance that was published by the Authority – however, we found its utility limited, given that it does not highlight the many changes that were made to the legislation that exists in the various applicable provinces. The provincial model securities legislation contains much that is new and different from existing securities regulation. It would have been preferable to have been able to review this legislation against a detailed explanation as to the reasons for such changes. We would have preferred a short description of where changes were made – and the reasons for those changes, and as outlined above, we urge the Governments and the Authority to do this in conjunction with the publication of the draft regulations. In our view, this is important in allowing industry participants to meaningfully participate in the consultation process.

Comments on the Consultation Draft – Provincial Capital Markets Act (PCMA)

1. **Overall --** It is not clear to us why some sections are included in the framework PCMA and others (from existing legislation) are not. Significant changes are being proposed to existing securities regulation and it is very difficult to adequately assess the changes in the kind of vacuum that the publication of the Consultation Drafts represent.

2. **Definition of "investment fund manager" –** The definition is an expanded definition from any that is contained in current CSA member securities legislation and in any of the CSA rules. We are concerned particularly that this seems to suggest that investment fund *managers* will be regulated – and potentially required to register - in each province and territory where investors in their funds reside, which is contrary to the long history of investment fund regulation in Canada, and we consider unnecessary in light of the strong regulation of the investment funds being distributed. We provided extensive commentary on the various CSA members' split decision in how to regulate investment fund managers in Canada in the various comment periods for Multilateral Instrument 32-102 *Registration Exemptions* and Multilateral Policy 31-202 *Registration Requirement for Investment Fund Managers*. We consider that the "rest of Canada's" approach to such regulation inherent in Multilateral Policy 31-202 to be much more logical and consistent with reality and regulatory policy and reach. We urge the Governments to return to the existing definition of investment fund manager. This is an example where the published Table of Concordance is somewhat misleading, because it suggests this definition is simply lifted from existing legislation, when it is not.

3. **Definition of "security"** - We are disappointed that the PCMA does not clarify in the definition of "security" that products that are governed by other regulatory regimes (such as guaranteed investment certificates and segregated funds) are excluded from the

definition of security. The lack of clarity on this issue has long been a significant cause of concern for many in the industry and has led to confusion as to the scope of regulation by the various members of the CSA and the SROs.

4. **Sections 9 and 14 – Recognition of entities** and **Delegation to Self-Regulatory Organization –** It is not clear to us whether the Authority will automatically recognize existing SROs, exchanges, clearing agencies etc. We recommend this be clarified as soon as possible – along with an explanation of what the Authority intends with section 14 of the PCMA. In keeping with our views that implementation of the System should cause the least amount of disruption to the capital markets as possible, it would be our strong recommendation that no further action be required to be taken by the existing recognized entities and that the Authority simply deem such entities to be so recognized under the PMCA under the existing terms and conditions that apply to such entities.

5. **Section 37 – Obligation to send prospectus, etc. -** Although some amendments to this section have been made from existing legislation, we are curious as to the lack of a time period prescribed for the required delivery. Presumably this will be established in the regulations – but we note that the legislation does not provide for the time period to be prescribed by regulation. It is also unclear whether current post-transaction delivery requirements will be changed. We also urge the Governments to reconsider the phrase "other than a person acting as a purchaser's agent" contained in the legislation. This is a phrase that is used in existing legislation that has not ever been completely understood and clouds the delivery mechanics under existing legislation. We also find the various subsections confusing. For example, subsection (3) could be combined with subsection (1).

6. **Part 4 Registration -** We are disappointed that the Governments have not taken this opportunity to build in the platform required to permit registered representatives of dealers and advisers to operate their dealing and advising businesses through a professional corporation. We know that the various members of the CSA take the position that legislative changes are required before they will permit this form of business structure, which many, including governments, consider not to be prejudicial to the capital markets and to the investing public. We urge the Governments to consider the legislative amendments recently proposed by the Government of Alberta, which we consider to be preferable to those passed by the legislature of Saskatchewan (the latter legislation is too narrow in who can own a professional corporation, which restriction is not contained in the Alberta legislation). In our view, there is no need for further debate on the issue of professional incorporation for representatives, such that the framework legislation to be passed by the provinces should at least allow for this, which will allow the Authority to properly provide for this issue in the regulations in due course.

7. **Sections 55 and 56 Duty to client *and* Duty to investment fund -** In our view, these standards of conduct are appropriate and should be enshrined in legislation, rather than in regulations (as is the case today with the standard of conduct for registrants other than investment fund managers). These are the appropriate standards of conduct for the applicable registrants in our view, given that they do not impose a "fiduciary" standard for registrants other than investment fund managers.

8. **Section 57 Conflicts of Interest (COI) -** While we agree that a registrant must identify, manage and disclose conflicts of interest – we are uncertain about the addition of the reference to an "investment fund". Most (if not all) Canadian investment funds have a manager or administrator – it is this entity that must manage, disclose and identify the COI with respect to its management of the investment fund, which is the concept enshrined in National Instrument 81-107. The "investment fund" does not have a COI – unless it is somehow "self-managed" with employees and agents directly engaged by the investment fund, which for the vast majority of investment funds in Canada, is not the case.

9. We wonder why the PCMA omits a number of provisions contained in Part XXI of the Ontario Securities Act as it applies to investment funds? These provisions have been operative for over 40 years and we believe that these should be included in the framework legislation, rather than left to the regulations.

10. **Section 70 Unfair Practice -** We agree that the PCMA appropriately can prescribe what will be unfair practices, however, we note that this provision seems very sweeping indeed, with much that could be open to much and very differing interpretation. We consider that if this section is to be retained, the legislation should provide for a description of the criteria that a person must consider in determining whether an investor is "ignorant" or "illiterate" or too old, such that selling a security to that individual will be an unfair practice.

11. **Sections 138, 139, 140, 141, 142 – Rescission rights -** We are confused as to the purpose and effect of all these sections – at least a couple of them appear to be duplicative and give investors similar, but slightly different rights. We urge the Governments to consider past submissions made over the past twenty years on rescission rights, particularly in the context of mutual funds and work to rationalize these sections. We know that The Investment Funds Institute of Canada provided detailed submissions to the CSA over the years on sections in existing legislation that should be re-examined in light of the opportunity provided by the Consultation Drafts. We also urge the Governments to reconsider the continued *need* for these rights, particularly if prospectus documents are to be provided to investors in advance of a trade. The theory supporting a post-trade delivery mechanism is that investors have a right to "rescind" or withdraw their purchase

once they receive the prospectus document and have an opportunity to review it. There does not appear to be such a need if the document is provided to the purchaser before the trade. Further consideration of the regulatory policy behind these sections appears to be necessary.

a. **Section 138 -** This section appears to give purchasers of securities a broad "rescission" right – but it is not clear what this means – what is the purchaser entitled to receive back – particularly in the case of mutual fund securities? NAV at the time of purchase or NAV at the time of giving the notice? Do they receive back their sales commission paid? Who must give this money back? The issuer or the dealer (which received the sales commission)?

b. **Section 139 -** This section applies if the purchaser acquires a security after the time a prospectus for a security in continuous distribution has expired. Many of the same questions as above apply here – except that it is clear (from paragraph (2)) that the dealer is required to refund any sales charges.

c. **Section 140 -** the similar section in the Ontario Securities Act is rightly criticized as giving the savvy investor a "put" right to ostensibly get out of a mutual fund purchase if the NAV of the securities have increased in value since the date of acquisition (this right is in addition to the standard right to redeem a mutual fund at NAV at the date of redemption). This section appears to be unnecessary in light of the long-standing criticism by the industry, as well as the proposals of the CSA that investors in mutual funds receive the prescribed disclosure document in advance of any trade.

d. **Section 141 -** We consider this section appropriate so long as it is clarified that this right is not to be combined with section 138 for instance. This is the section that gives investors in scholarship plans their cooling off rights and cancellation provisions and given that it is in accordance with the long-standing practice of the scholarship plan industry (since at least the 1960s), we consider this section appropriate for the framework legislation.

e. **Section 142 -** We fail to understand what this section is intended to accomplish and urge the Government to reconsider it and/or better describe what is intended with this section.

12. **Section 205 -** We strongly object to the proposal that the Authority can publish proposed changes to a previously proposed regulation with as little as a 30-day comment period. This is not enough time for market participants to consider the changes, and therefore we consider this comment period to be virtually meaningless. We also consider that the Authority should be required to publish a notice of the comments received on its prior

proposals and its response to all of the comments (not just those the Authority considers significant). Given the framework structure of the PCMA, it is vital that the Authority be held accountable and give capital markets participants sufficient information and time to consider its regulations.

13. **Section 212 -** We strongly object to the proposed 30-day time period for industry comment on Chief Regulators policy statements, for the same reasons as provided for above. We consider this vital for the appropriate accountability of the Authority. We also consider it vital that the Chief Regulator be required to describe the policy rationale for any policies and point to specific rules and legislation that the policy guidance is designed to fit with. All too often in recent years, in our view, the members of the CSA have come out with guidance that is not published for comment and that expands on and is clearly rule-like or substantially supplements existing rules and regulations. We consider that this is essential for the proper operation and accountability of the Authority.

Comments on the Consultation Draft – Capital Markets Stability Act (CMSA)

We are very concerned with this draft legislation and its potentially very far-reaching effects. We know that many in the industry will be providing detailed comments on this draft legislation and we urge the Governments to reconsider this draft legislation in light of these comments and particularly to take account of the continuing global controversy over designating capital markets participants, such as investment fund managers, investment funds, dealers and portfolio managers, as "systemically risky". In our view, it's premature for Canada to simply adopt this concept without fully understanding all of its implications and where the other global regulators will land on these issues, and indeed without fully understanding what the Authority and the Governments may do in administering this draft legislation. The draft legislation is drafted so broadly that is really impossible to identify all of the elements that are of concern, but the following are the main issues that we consider deserve the highest attention of the Governments:

1. Under what rationale would investment funds (regulated by the Authority and the other members of the CSA) as well as their managers ever pose a risk to financial system stability that would warrant their designation as systemically important, particularly given the strong regulatory regime that applies to these entities? This has been an on-going debate in the United States for some years and we understand that the applicable regulators in the United States are considering carefully the many reasons why these capital markets intermediaries should never be so considered a systemically important. This issue must be resolved before the CMSA is enacted.

2. Which capital market markets' intermediaries should be subject to the CMSA? And why?

3. More discussion of due process is necessary – including, without limitation, the ability of the entity proposed to be designated as systemically important to provide submissions to the applicable Government (Authority) on why they should not be so designated. What criteria will the applicable Authority use to make such a determination?

4. What is intended with the extra-territoriality of this legislation? Can non-Canadian market participants be designated as systematically important? Why? What will be the impact of this?

5. What will it mean for an entity – Canadian or non-Canadian – to be so designated as systemically important?

6. The collection of data provisions are so broadly drafted as to cover virtually anything and we are concerned as to the accountability, confidentiality and due process issues associated with broad, far reaching data requests. Would the Authority expect non-Canadian market participants to be obliged to provide such data? Under what authority?

7. What is intended with the additional clauses allowing the Governments to designate a "benchmark" as systemically important or a specific class of securities or derivatives? There is no explanation of these provisions, which we find curious in light of the other avenues for regulatory intervention with these kinds of matters. We are not aware that other global regulators are delving into these matters and we consider the Governments must explain their intentions in this regard.

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We very much appreciate the opportunity to comment on the Consultation Drafts. The implementation of the System and the establishment of the Authority are both very important initiatives and we urge caution, care and additional consultation in moving forward with both in order to preserve the proper administration of the securities laws of Canada and its application to the Canadian capital markets.

The following lawyers have developed this comment letter. Please contact any of us at the contact details provided below if you would like further elaboration of our comments. We would be pleased to meet with you at your convenience. We would be very open to considering reviewing in advance specific sections of the regulations to ensure their appropriateness, provided we are given enough advance notice.

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Yours very truly,

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