



CANADIAN PUBLIC ACCOUNTABILITY BOARD
CONSEIL CANADIEN SUR LA REDDITION DE COMPTES

Via email: commentonlegislation@ccmr-ocrmc.ca

December 8, 2014

RE: Cooperative Capital Markets Regulatory System - Provincial Capital Markets Act Consultation Draft

The Canadian Public Accountability Board (“CPAB”) welcomes the opportunity to provide comments with respect to Part II of the Provincial Capital Markets Act (the “PCMA”) Consultation Draft. In doing so, we recognize that the PCMA is intended to serve as framework legislation and that, assuming CPAB is recognized as an auditor oversight organization, it will have broad rule-making authority, subject to the conditions of its recognition. We assume that some of the concerns noted below will be addressed in such a recognition order or in the initial regulations under the PCMA. That said, we believe there are several key issues which the Implementation Team should consider in the context of the Consultation Draft and may wish to address in the PCMA.

Access to Privileged Information

S.11(4)¹ of the CPAB Act allows the CPAB to require the provision of information that is the subject of solicitor-client privilege if access to such information is “absolutely necessary” to the purpose of the review of the audit. While the CPAB has never had to formally rely on this power, its existence has facilitated the CPAB’s ability to conduct reviews effectively, without incurring the costs and delays inherent in a consent model.² We believe that the “absolutely necessary” model has worked well in practice and is generally favoured by the major audit firms and reporting issuers.

¹ s.11(4) The Board may require the provision of information or the production of documents under subsection (1) [the Board’s access to all documents and information that a participating audit firm obtains or prepares in order to perform the audit of a reporting issuer] that is, or are, the subject of solicitor-client privilege if access to the information or the documents is absolutely necessary to the purpose of the review of the audit.

² s. 32.3(3) of the British Columbia Securities Act adopts a consent model, whereby the CPAB’s ability to require the production of information that is subject to solicitor-client privilege is subject to the audit firm obtaining consent from the person in respect of which the solicitor-client privilege exists.



Confidentiality of Information Provided to the CPAB

S.11(2) of the *Canadian Public Accountability Board Act* (Ontario) (the “**CPAB Act**”) restricts disclosure of documents and other information prepared for or received by CPAB in the exercise of its mandate and all deliberations of the Board of CPAB and its employees and agents in connection with its work without the written consent of all persons whose interests might reasonably be affected by the disclosure or a court order³. This provision protects the integrity of the CPAB’s review process and its relationship with audit firms and issuers. There should be an equivalent provision in the PCMA.

Provision of Information to the Chief Regulator

Sections 10 and 15 of the Consultation Draft overlap and might be combined. In addition, it should be made clear that s.15(3) is subject to s.16(5).

As a general principle, the Chief Regulator should access information directly. If the concern is one of ensuring that the recognized auditor oversight organization proactively alerts the Chief Regulator to potential breaches of the law, this might best be provided for by the inclusion of an equivalent to s.13 of the CPAB Act⁴, and/or in an MOU (as in the case of the MOU between the CPAB and the Ontario Securities Commission).⁵

³ s.11(2) All documents and other information prepared for or received by the Board in the exercise of its mandate and all deliberations of the Board and its employees and agents, in connection with an inspection, investigation or review panel proceeding carried out by the Board’s oversight program, are confidential and may not be disclosed without,

- a) the written consent of all persons whose interests might reasonably be affected by the disclosure, or
- b) a court order authorizing the disclosure.

⁴ S.13(1) Despite subsection 11(2) [see fn. 1 above] if the Board is provided with any document or information that provides reasonable grounds to believe that any person or company may have contravened any law, the Board may notify the Commission, any regulatory authority, law enforcement agency or professional regulatory authority as the Board considers appropriate that it has discovered evidence of a contravention of the law, but the Board shall not disclose,

- a) privileged documents, privileged information, or information based on privileged information or documents, or
- b) any specific information relating to the business, affairs or financial position of a participating audit firm or the client of any participating audit firm except to the extent that the disclosure is authorized in writing by all persons and companies whose interests might reasonably be affected by the disclosure.

⁵ An MOU covering Consultation, Cooperation and the Exchange of Information between the OSC and the CPAB (entered into on November 27, 2013) contemplates that the CPAB will share certain information with and provide assistance to the OSC in obtaining and interpreting information relating to potential violations of securities laws.



International Cooperation

S.14 of the CPAB Act specifically authorizes the CPAB to provide documents or other information (other than privileged information or information based on privileged information) to a foreign auditor oversight body if such information is relevant to that body's review of an audit carried out on a reporting issuer that carries on business in that body's jurisdiction.⁶ The CPAB has entered into MOUs with eight foreign auditor oversight bodies, is currently negotiating such MOU's with six others, and has plans to seek several more. It is a founding member of an active participant in the International Forum of Independent Audit Regulators (IFIAR). These working relationships are essential to the effective discharge of the CPAB's mandate. Similar authorization should be provided for in the PCMA.

Freedom of Information Concerns

The Consultation Draft does not appear to contemplate the exemption of information sharing with other regulatory bodies from otherwise applicable requirements under freedom of information legislation. This is critical to the extent the CPAB is to share confidential information with the Chief Regulator.

As a general matter, consideration should be given to providing an a freedom of information exemption such as those that the Office of the Superintendent of Financial Institutions enjoys by being classified as a governmental institution in Schedule 1 of the Access to Information Act (and under comparable exemptions in provincial freedom of information and protection of privacy legislation).

Clarifying the CPAB's Authority, Process and Accountability

S.15(1) of the Consultation Draft is not an accurate description of what the CPAB does. For example, the CPAB does not set standards of practice (which is within the purview of the

⁶ s.14(1) Despite subsection 11(2), the Board may provide documents or other information to a foreign auditor oversight body relevant to that body's review of an audit carried out on a reporting issuer that carries on business in that body's jurisdiction

s.14(2) The Board shall not provide privileged documents, privileged information or information based on privileged information to a foreign auditor oversight body.



provincial Institutes). We would be pleased to work with the Implementation Team to formulate a clear statutory mandate for a recognized auditor oversight organization.

There should also be improved clarity around the manner in which a recognized auditor oversight organization may adopt regulatory instruments and their legal effect. Issues such as the applicable notice and comment regime and whether Chief Regulator (or Ministerial) review will be required should be addressed, either in the PCMA or the regulations thereunder.

Testimony in Civil Procedures

Unlike s.11(3) of the CPAB Act, which exempts the CPAB and its representatives from giving evidence about information obtained in the performance of its duties in any proceeding (other than a proceeding under the CPAB Act)⁷, s.16(6) of the Consultation Draft only provides for such an exemption in respect of civil proceedings in which the recognized auditor oversight body is not a party. This narrower exemption could impair the ability of the CPAB to obtain information from audit firms and issuers.

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We hope these comments are of some assistance and look forward to working the Implementation Team in refining the PCMA and related regulatory instruments.

Yours truly,



Brian A. Hunt

Chief Executive Officer

⁷ s.11(3) No member of the Council of Governors or the Board and no officer, employee, agent or representative of the Board shall be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to documents or information that the person is prohibited from disclosing under this Act.

