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SENT BY E-MAIL (commentonlegislation@ccmr-ocrmc.ca)

To: The applicable legislative working groups of the Governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Canada

Dear Sirs/Mesdames:

The Cooperative Capital Markets Regulatory System

Osler, Hoskin & Harcourt LLP welcomes the opportunity to comment on the consultation drafts of the Provincial *Capital Markets Act* ("PCMA") and *Capital Markets Stability Act* ("CMSA"), and the Capital Markets Regulatory Regime (the "Regime"), more generally.

General Observations and Key Messages

Osler supports the objectives of fostering efficient and competitive markets through a harmonized and streamlined approach to capital market regulation on a national basis. We applaud the efforts of all jurisdictions participating in this initiative. Osler is of the view that the following considerations are critical to this initiative's success, and to ensuring that your efforts improve, and do not inadvertently cause harm to the effectiveness of the current system.

- **For an effective transition, the Regime should largely maintain the substance of existing securities laws, rules, policies and practices. Changes to the *status quo* should be made only where necessary to achieve harmonization among the participating jurisdictions**. Beyond those changes necessary to facilitate harmonization, Osler urges no material changes to substantive securities laws or current practices during this transitional period. Substantive changes to the law, regulations and policies should be resisted, and any potential change that may be seen as desirable should be deferred until after the Regime is established. This will ensure that proposed changes can be properly proposed, considered, examined and debated within the open policy-making approach promised by the proposed governance model. The cost to market participants will be significantly increased if they are required to make material changes to their practices, including their compliance programs, to accommodate substantive changes and new rules without adequate opportunity to assess them.

- **Where changes to the substantive law are necessary to achieve harmonization among participating jurisdictions, those changes should be clearly identified and the policy rationale should be provided for selecting one approach over another. Any changes should be the subject of careful**

consideration and dialogue with the legal and market communities. We understand that certain substantive changes in the law are necessary to achieve harmonization of legal requirements across the participating jurisdictions. We agree that harmonization is desirable. We recognize that where there are differences between laws in participating jurisdictions, care should be taken to minimize changes to prevailing practice, and any changes should be limited to the extent necessary for harmonized rules to prevail.

- **The PCMA and CMSA should ensure that defined terms are consistently used to reflect similar concepts.** For example, we note that the PCMA and CMSA define key terms such as "security", "derivative" and "trade" differently. They also use different defined terms that seem to relate to the same concept – for example, "clearing house" versus "clearing agency." Absent a specific policy reason to use different defined terms or definitions, consistent terms and definitions should be used among the various statutes and regulations.

- **The transition to the Regime should be as seamless as possible**. The regulations, rules and transitional provisions must ensure that current exemptions and practices are available and accommodated under the PCMA. Continuity measures should be transparent and subject to public comment and consultation.

- **The participants in the Regime should clarify how participating jurisdictions will interact with other jurisdictions in a way that promotes coordination and cooperation, and will not be less harmonious than the system that exists today**. It is unclear how participating jurisdictions will interact with non-participating jurisdictions in a manner that does not prejudice market participants or disrupt non-participating jurisdictions. We urge you to provide guidance and provide market participants with an appropriate opportunity to participate in dialogue about this crucial aspect of the initiative.

- **The Regime should not impose any further and undue regulatory costs or burdens on market participants**. Most of the powers contemplated under the "systemic risk" regime of the CMSA are new and untested. Guidance should be provided on all aspects of the Authority's "systemic risk" mandate and the discretion permitted under the CMSA, including the discretion to designate market entities, products and practices as systemically important. Guidance should be provided on how the Authority will exercise its discretion, the rights of interested and affected parties to make representations before such designations are made, rights of appeal, and mechanisms for varying orders and regulations.

Premature to Fully Assess and Comment on the Substance of the Two Consultation Drafts

We recognize the practical desirability of a "platform" approach to the legislated regulatory regime. However, this approach is largely unfamiliar in Ontario securities law and, as such, the approach represents a meaningful change for many who do business, or advise those doing business, in Ontario. Until the full scope of how regulations will be made, the terms of the proposed regulation-making authority (which have been omitted from the consultation draft legislation), the basis and extent for full public or market input, the lines of accountability, the composition of the Board (which we understand will be responsible for making the regulations) and the decision making process proposed for the Board and the council of Ministers are fully articulated in legal instruments, we are not able to fully comment on the substance of the legal framework and its requirements.

Similarly, we reserve comment on the structure and composition of the Tribunal. We understand from the accompanying documentation that the Tribunal members will be selected through a merit-based selection process overseen by a nominating committee. We support this: it is critical to ensure that the Tribunal and its members are independent and have the necessary expertise.

There are a number of procedural safeguards and protections that will need to be included in the regulations to the CMSA and subject to further comment. For example, under the designation powers, the availability and form of notice to affected parties, and the right of affected parties to make representations, ought to be considered and be the subject of broad dialogue. Procedural safeguards are also needed in relation to the Chief Regulator's power to issue administrative penalties under section 44.

As stated above, Osler is unable to fully assess and comment on the substance of the consultation drafts of the PCMA and CMSA in the absence of the detailed proposed regulations, complete draft legislation (dealing with governance, accountability and key aspects of the Regime) and the guidance described above. We therefore hope to have the opportunity to comment on ***all*** aspects and other matters of the Regime, including the PCMA and CMSA again, once the detailed regulations are released for comment and the entire Regime has been proposed.

Investors, Market Participants and their Legal Advisors Should Have Greater Engagement and Ongoing Input

It is critical that more dialogue between participating jurisdictions and the market be encouraged and facilitated before the legal framework establishing the Regime is settled. As this process evolves, we hope that there will be greater opportunity for more direct dialogue and consultation with market participants, investors and legal professionals on the proposed approach. Since it is imperative that the legal requirements, duties and

obligations remain largely unaffected by the evolution to the proposed new regime, a degree of vigilance is required to ensure that what may appear to be nuanced wording changes, and attempts to harmonize, do not undermine that imperative. For this reason, we feel that it would be useful, going forward, to have a more consultative approach.

Osler suggests the establishment of an advisory body made up of knowledgeable legal experts to assist with the development and implementation of the legal framework, including the next draft of the PCMA and CMSA and the Regulations.

Non-Harmonizing Changes Should be Reconsidered

Apart from those acceptable and readily identifiable revisions needed to achieve harmonization, we note a number of proposed wording and concept changes between the existing Regime's legal requirements and obligations which seem to be "net new" to Canadian securities law and may be significant. Many of these have not been specifically identified in the accompanying commentary or the subject of dialogue with market participants.

A number of changes have been proposed that raise concerns, and for which no justification has been articulated. For example:

(a) The definition of "misrepresentation" has been revised and expanded from the current understanding reflected in both the Ontario and British Columbia legislation to include the concept of a "misleading" statement.

(b) Some of the newly introduced prohibitions, such as "obstruction", may, in practice, have an impact beyond what is intended by the change, since by including the concept of "withholding" within its scope (inadvertently or otherwise), it may have created positive obligations on affected persons.

(c) The PCMA omits the "policies and procedures" defence to insider trading that is contained in section 175(3) of the General Regulation under the Ontario legislation.

These are but a small sample of what may, at first blush, be subtle changes, but which may have unintended or significant consequences. Any potentially substantive wording changes deserve further consideration and broader consultation with those potentially affected.

Proposed Enforcement and Adjudication Protocols Need to Be Clarified

Significant changes in the areas of enforcement are contained in the draft legislation. Some of these include:

(a) establishing a separate, expert Tribunal to adjudicate matters under both Acts and make decisions in the "public interest";

(b) creating a common database of information obtained from surveillance, complaints, compliance reviews and administrative investigations for use across the country;

(c) implementing statutory "whistle blower" protections;

(d) introducing Criminal Code provisions that enhance the ability of the Authority to police a broad range of possible "white collar" misdeeds that may demand regulatory, civil or criminal responses;

(e) introducing a restitution power to directly address investors losses in certain circumstances; and

(f) relaxing the confidentiality protections over information obtained using the Authority's investigative powers.

Many of these changes are understandable to enhance and improve the Authority's enforcement capabilities, which objectives are applauded. Clarity would be desirable, however, as to how the Authority will collect, store and share information in practice. We note that there are also broadened information-sharing protocols among agencies and internationally, including the ability to share compelled testimony without the consent required under the current Ontario regime. We are concerned that the rights of affected persons will be diminished by some of these changes. We therefore ask for greater guidance on how these powers will be used, and an opportunity for a committee or task force of practitioners to engage with appropriate persons to exchange views and consider ways that concerns can be addressed.

Selecting the Right Leaders and their Timely Appointments

Osler welcomes the proposed design of the Regime, including the structure of the Regulatory Divisions and a separate Adjudication Tribunal, all supervised by an expert Board. We support the use of the "Policy Forum" as a means to enable disparate parts of the Authority to have face-to-face interactions, provided that the Policy Forum in no way compromises the independence or integrity of the Adjudication Tribunal. This, and other creative mechanisms, will be necessary to ensure consistency among those exercising a "public interest" jurisdiction on behalf of the Authority (which will include the Tribunal and Chief Regulator, depending on the circumstances). We recognize that the legal

framework for the organizational governance protocols is not currently available as they are intended to be contained in a separate instrument (or series of instruments).

It will be essential to select and appoint appropriate persons to key governance and leadership positions within the Regulatory and Tribunal divisions, including the Board members, the Chief Regulator, Chief Adjudicator and Deputy Regulators. Having the right people managing, administering and performing these important functions is crucial. Many in the legal community and market participants remain confused about whether the CMRA will simply be a merger of existing regulators, or whether the articulated vision of a fresh regulatory authority with a new, harmonized approach to regulation of the Canadian capital markets can be realized. We urge the participating jurisdictions to engage in a rigorous exercise to identify the strongest, most effective leaders of the Authority, including the Regulatory Division and the Tribunal, at the earliest opportunity. The sooner those key individuals are identified and given an opportunity to meaningfully contribute to this project at the integration stage, the sooner and more effectively a sustainable, positive culture can be cultivated and enhanced within the new organization.

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We thank you again for the opportunity to provide comments on the proposals. We look forward to providing our comments on all aspects of the Regime, including the PCMA and CMSA, once the detailed regulations are released for comment and the entire Regime has been proposed.

We would be pleased to meet with you or your staff to discuss any of our comments, and would also be pleased to contribute in any way we can to the ongoing debates and discussions as you work to implement the Regime. If you would like to discuss this matter further, please contact Jeremy Fraiberg at 416.862.6505 or jfraiberg@osler.com.

Yours very truly,

"*Osler, Hoskin & Harcourt LLP*"

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