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VIA E-MAIL

December 8, 2014

Cooperative Capital Markets Regulatory System

Dear Sir/Madam:

Re: Comments on the Consultation Draft of the Provincial Capital Markets Act ("PCMA")

The Walton Group of Companies ("**Walton**") welcomes the opportunity to comment on the consultation draft of PCMA. Walton is an issuer/promoter of exempt market investment products and Walton Capital Management Inc. ("**WCMI**"), an affiliate of Walton, is an exempt market dealer ("**EMD**") that is registered in all Canadian provinces. The Walton Group is headquartered in Alberta, but because it operates across Canada, the implementation of the PCMA and the Capital Markets Stability Act ("**CMSA**") will have a significant impact on the Walton Group's business.

We have organized our comments in two letters. This letter provides comments on the PCMA. A separate letter will provide comments on the CMSA. Given that the CMSA and PCMA will operate together to create a new capital markets/securities regulatory system in Canada, we ask that you please review both letters together to reflect our comments.

The Walton Group is not opposed to the concept of a "national regulator" for capital markets in Canada. The proposed Cooperative Capital Markets Regulatory System ("**CCMR**") could potentially have a positive benefit to Canada and its economy as a whole if it were to be operated properly and fairly in acknowledging regional differences and protecting the fundamental legal rights of market participants. The proposed CCMR creates an opportunity to organize the capital markets in a manner that could significantly boost the Canadian economy in a sustained manner and maintain appropriate protections for the participants in those markets, including investors. We do not see these two goals as inconsistent or difficult to achieve.

However, we are also not opposed to the current system of Canadian capital markets regulation. We believe the current system has done, and currently does, a very good job in regulating capital markets in Canada, in particular in recognizing and respecting the fundamental differences in the capital markets that are present in different areas of Canada. We believe that the current proponents of the CCMR have not given enough credit to the achievements of the provincial securities regulators, through the Canadian Securities Administrators ("**CSA**"), in facilitating cooperation among the various jurisdictions and creating a system that is substantially harmonized, yet recognizes and enhances regional capital market differences. In our view, the concerns that have been raised with the current system could be handled easily through other initiatives and systems of cooperation that do not require the historically significant, and potentially unsettling, changes that are currently being proposed by the CCMR.

Our concerns in this regard primarily relate to the potential that the CCMR has to materially and negatively impact and possibly eliminate the diversity of the Canadian capital markets across the country. Canada's strength arises from the diversity of its people, industry and culture. Similarly, Canadian capital markets are not uniform in that certain segments of capital markets in one region play a much more important part than they do in other regions. It is not by accident that there have arisen substantive differences in how those segments are regulated in different areas of the country. If the practical result of the implementation of the CCMR is to remove, in one or more regions, the benefits resulting from those differences, the Canadian economy as a whole could be substantially and negatively impacted. We fear that the legislation currently proposed by the CCMR could have this result.

PCMA – Substantive Comments

1. **Sufficient time has not been provided for capital market participants to review, fully understand and properly comment on the PCMA.**

We submit that the implementation of the CCMR is the most significant change to the Canadian capital markets regulatory system since the development of the "second generation" of provincial securities acts in Canada, and is likely more significant than that. The enactment of the PCMA and the CMSA are among the most crucial steps as they set out the framework under which the CCMR will operate, including the powers to be exercised by the Authority and the rights available (or not available, as the case may be) to capital markets participants.

Having read through the draft PCMA numerous times, we still struggle to adequately understand the full impact and reach of the changes it introduces to capital markets regulation and how it interacts with the CMSA. The PCMA contains a number of significant changes to the legislation currently in place and many more subtle changes in wording, the reasons for which, in a number of instances, are not readily apparent. However, many of those changes clearly have a broader reach, and place more limits on the rights of capital market participants than provisions in the current legislation.

In addition, while the PCMA and CMSA provide the framework for the proposed CCMR, a very significant portion of the substantive rules will be contained in the regulations to be issued under the PCMA and CMSA. Those regulations, which we expect to be more significant in size and at least as significant in practical impact than the PCMA and CMSA themselves, are not proposed to be published in draft form for comment until December 19, 2014.

Given the crucial interaction between the PCMA and the CMSA and their respective regulations, we submit that complete and effective comments cannot be provided on the PCMA and CMSA until the draft regulations have been published and market participants have been given sufficient time to consider them. In this regard, we have more comments and questions with respect to the PCMA than are set out in this letter, but in order to provide meaningful comments, we need to assess how they are impacted by the regulations. We anticipate that we will provide further comments on the PMCA itself once we have reviewed the draft regulations.

Accordingly, it would be appropriate for the comment period for the PCMA and CMSA to be open until the end of the comment period for their respective regulations.

2. **Defined terms that appear in both the PCMA and CMSA sometimes have different definitions. These differences may cause problems in how the definitions are ultimately interpreted by capital market participants and the courts.**

Defined terms that are in both of the PCMA and CMSA sometimes have different definitions. Sometimes the differences are small and subtle, while, in other circumstances, the differences are significant. We note differences between the PCMA and the CMSA in at least the following definitions: clearing agency, investment fund, investment fund manager, security, trade and underwriter.

Having two different (even subtly different) definitions for the same term in two pieces of legislation that are intended to operate in the same "space", can create interpretation issues. Where different wording is used in these circumstances, statutory interpretation rules generally assume that there must be a reason for the distinctions and the courts must determine the reason if they can. How they do so may not necessarily result in an endorsement of the interpretation that was initially intended.

To pick a specific example, we note that the definition of "security" in the CMSA is much narrower than in the PCMA, which contains the more standard definition under securities legislation. We are puzzled as to why this is the case. As referred to above, having these two significantly different definitions for the same term in the PCMA and the CMSA is hazardous and undesirable, particularly where the PCMA definition has a well developed meaning established through case law. We submit the definitions should be identical.

The drafters of the PCMA and the CMSA should carefully review definitions of common terms to make sure any inconsistencies are intentional.

3. We note that a number of important definitions or phrases used in the PCMA have been worded slightly differently than in current securities legislation in some of the Participating Provinces. These subtle changes are (i) confusing, and/or (ii) may result in significant changes to their interpretation.

A number of important definitions or phrases used in the current draft of the PCMA have been worded differently than in current securities legislation in some of the provinces that have accepted and signed on to the CCMR through the applicable Memorandum of Understanding (the "**MOU**") (the "**Participating Provinces**"). Some of these changes are significant and/or clear and, as a result, it is easier to understand what the drafters intended with such changes.

However, some of the changes are more subtle and it is not clear what was intended. For example:

- "misrepresentation" is a very important definition under Canadian securities laws. The current definition in most of the legislation across Canada indicates, in the first part of the definition that it is an "<u>untrue</u> statement of a material fact" (emphasis is ours). This portion of the definition has been in place for a significant period of time and we are unaware of any concerns with the definition. However the first part of the definition contained in the PCMA now states that it is a "<u>false or misleading</u> statement of a material fact" (emphasis is ours).

- In a number of spots in the PCMA, the Authority or Chief Regulator is given the power to act <u>if it considers that</u> it is in the best interests of the public. In a number of spots in current legislation, such concepts are worded that the Authority or Chief Regulator can undertake an action <u>if in its opinion</u> it is in the best interests of the public.

Some may argue (as was argued in a comment published in the Financial Post by Philip Anisman on November 28, 2014) that there is no difference or no substantial difference in meaning between the wording in the above examples. We do not agree:

- In the second example above, the use of the word "considers" as opposed to "opinion" indicates a significant difference. A much higher standard of diligence, thought and reasoning is required by the use of the word "opinion" than the low standard of diligence for the word "considers". This is a significant difference. We suggest that if a regulator is going to determine whether a particular order is to be issued based on the interests of the public, especially when such order may result in a person's rights, property or otherwise, to be negatively impacted or limited, the decision should be based on the regulator's well formulated "opinion" that it is the right thing to do, not just because the regulator "considers" it appropriate.

- If the drafters truly did not believe there is any real difference between the two expressions, why did they make the change? Statutory interpretation rules generally suggest that if there is a change in wording, there must be a substantive reason for it. Common sense suggests that as well. A court looking at the new wording generally will be driven to find a substantive difference. If the drafters did not intend there to be any difference or any significant difference, they may be surprised by how the courts interpret the altered wording. In our view, given the significant importance of some of these definitions or phrases and the drafters' desire to ensure certainty for capital markets participants, if the drafters:

    - do intend a significant difference in the interpretation of the wording or concepts, they should explain what they intend by the difference rather than letting market participants or the courts guess at their intention; and

    - do not intend a significant difference in the interpretation of the wording or concepts, they should employ the wording in use in the current legislation.

4. Material orders or decisions should be made by the Tribunal, not the Chief Regulator

We note that, generally, throughout the PCMA, more powers have been provided directly to the Chief Regulator than are currently provided to executive directors (or similar positions) in provincial securities regulation. In current provincial securities legislation, many of those powers sit with the commission itself. Theoretically, the exercise of those powers by a commission, as opposed to an executive director, means that more independence is brought to the decision-making process. It also generally means that more persons are involved in the making of the decision, typically including industry participants, which we view as more beneficial to capital markets in general.

We understand the desire for "efficiency" in decision making; however, given the nature of many of the decisions that are to be made, the significant impact that those decisions will have on the rights of persons in Canada and the requirements of the principles of natural justice and procedural fairness, we believe that the PCMA should promote decision-making in the Authority that is independent, contains appropriate levels of oversight and is free of potential bias. We recommend that the drafters of the PCMA review those decisions and powers that are currently in the hands of the Chief Regulator in the draft PCMA and consider whether they should be placed in the hands of the Tribunal, with, in appropriate circumstances, a process whereby the decision is not made by the Tribunal until the Chief Regulator and the persons that may be materially impacted have had the opportunity to make representation to the Tribunal.

5. The term "publicly traded" as used in the PCMA should be defined.

In a few spots in the PCMA, the concept of "publicly traded" securities is used, including in connection with the prohibition on insider trading in Section 66. Typically, under current provincial securities legislation, the concept of a "reporting issuer", which has a specific and clear definition, is the concept that is used in the context of insider trading and other provisions. Since it would have been easy to use the definition of "reporting issuer" in the PCMA, the drafters of the PCMA must have intended to encompass a wider group of issuers with their use of the words "publicly traded".

The problem is that the term "publicly traded" is somewhat uncertain. For example, that term was adopted into the Canadian Income Tax Act a number of years ago in relation to what is referred to as the "SIFT rules". There has been significant concern among tax practitioners as to the meaning of this term and it has led to a significant amount of uncertainty in the interpretation of the "SIFT rules".

We believe it is important for there to be certainty around what is meant by "publicly traded". We recommend that a sufficiently certain definition for "publicly traded" be included in the PCMA, or alternatively, the use of "reporting issuer" be maintained.

6. The offence of Market Manipulation under Section 62 should require an element of intent or recklessness.

Section 62 provides that a person must not engage in, or participate in, any act, practice or course of conduct that results in or contributes to (i) a false or misleading appearance of trading activity in a security, or (ii) an artificial price or value for a security. Given the nature of the offence and the onerous penalty that can be placed on a person who violates it, we recommend that an element of intent or recklessness should be added to the definition of the offence to avoid punishment for innocent activity. We suggest the insertion of the words "that the person knows or out reasonably to know will result…".

7. The due diligence defences provided in Sections 83 and 114 may not be effective.

Sections 83 and 114 provide that, if an employee or agent of a person, within the scope of their employment or authority, contravenes capital markets laws or commits an offence under capital markets laws, that person also can then be found to have committed the offence unless (i) the offence was committed without the person's knowledge, and (ii) the person exercised due diligence to prevent its commission.

We do not understand what is required in order for a person to be able to say (under (ii) above) that it has exercised due diligence to prevent its commission. Our concern is that there may be circumstances in which an offence is surreptitiously committed in a novel and unanticipated manner. The person is not aware that the offence is being committed, and was not in a position to exercise appropriate due diligence to prevent its commission. We believe these sections require revisions to properly address the requirements to establish the due diligence defence.

8. Sections 86, 87 and 88 should be revised to include the ability to make representation to the Tribunal

Sections 86, 87 and 88 permit either the Authority or the Tribunal to, on an ex parte basis, make orders requiring parties to cease trading in a security or derivative in certain (generally urgent) circumstances. In our view:

- Section 86 should be revised to provide that the Tribunal is required to issue the order rather than the Authority so that proper oversight and objectivity is inserted into that process; and

- Sections 86, 87 and 88 should be revised to provide the entity against which the order is granted the ability, for a period of time after the order is granted, to make representation to the Tribunal as to why the cease trade should be lifted.

9. The power of the Chief Regulator under Section 88 to issue a cease trade order against a person for failure to file a required record or for filing an improperly completed record is too broad.

Section 88 provides that the Chief Regulator may, without giving an opportunity to make representations, order that a class of person or all persons cease trading in or acquiring a security or class of securities if the issuer or the person in respect of whom the order is made (i) fails to file a record required to be filed under capital markets law, or (ii) files a record that is not completed as required under capital markets law.

We believe that some concept of materiality should be included for the failures referred to in (i) or (ii) above before the Chief Regulator may issue a cease trading order. The cease trade order must be justified based on the seriousness of the failure referred to in (i) or (ii) above.

10. The power of the Tribunal under Section 91 to order persons to retain the property of another or to refrain from withdrawing its property from another person or to maintain or refrain from

disposing of securities, if the Tribunal considers that it is "expedient" to assist in the administration or enforcement of securities laws or the regulation of a foreign jurisdiction's capital markets, does not contain sufficient standards of proof.

Under Section 91, the Tribunal may, if it considers it expedient to assist in the administration or enforcement of the PCMA or the regulation of a foreign jurisdiction's capital markets, order that a person (i) retain the funds, securities or other property of another person that the first person has under its control, (ii) refrain from withdrawing funds, securities or other property from another person that has this under its control, or (iii) maintain and refrain from the sale of securities or other property.

This effectively may mean that the Tribunal, if it finds it expedient to do so, could issue orders preventing persons in Canada from having access to their property (be it cash, securities or otherwise):

(a) in the context of the administration or enforcement of the CMSA, or

(b) because the Tribunal wishes to assist merely in the administration (ie, not enforcement) of a foreign jurisdiction's capital markets legislation.

The decision-making standard of "expedient" for the triggering of the Tribunal's jurisdiction under this section is shockingly low and is potentially significantly prejudicial to property rights of persons in Canada. This is even more troublesome when viewed in the context of (b) above, where mere expediency is required to permit the Tribunal to withhold property from Canadians to assist a foreign government.

Rather than "expedient", we submit that Section 91 should include some further element, for example, such as is referred to in the third paragraph of 11 below.

In addition, Section 91 should be revised to provide the person against which the order is granted, for a period of time after the order is granted, the right to make representations to the Tribunal to have the restrictions lifted.

11. The powers of a court under Section 93 to appoint a receiver, trustee or liquidator over all or a part of the property of a person, if the court is satisfied that the appointment is (i) in the best interests of the person's creditors or securityholders, or (ii) expedient for the administration or enforcement of capital markets laws or for assisting in the administration or enforcement of a foreign jurisdiction's capital markets, does not contain sufficient standards of proof.

Under Section 93, a court may, on application by the Chief Regulator, make an order appointing a receiver, trustee or liquidator over all or a part of the property of a person if the court is satisfied that the appointment is (i) in the best interests of the person's creditors or securityholders, or (ii) expedient for the administration or enforcement of capital markets laws or for assisting in the administration or enforcement of a foreign jurisdiction's capital markets.

Our view is that the jurisdiction to appoint a receiver/trustee/liquidator over the property of a person, especially in the context of (ii) above, incorporates an unreasonably low standard (expediency).

The current securities laws in BC do not provide for the granting of an order similar to that referred to in (ii) above and the current securities laws in Saskatchewan only permit it in defined circumstances, for example (a) when the commission (i) has or is about to make an order investigating the person, (ii) has or is about to issue a cease trade or against the person, or (iii) has or is about to suspend the registration of the person, or (b) when certain prosecutions or other proceedings are about to be commenced against the person.

Given the impact on the property rights of the person, we recommend that Section 93 be revised to include provisions similar to those contained in current securities legislation in Saskatchewan referenced above.

12. The issuance of an "according status" order under Section 95(2) should, when being made on the initiative of the Authority, be (i) required to be issued by the Tribunal, and (ii) made only after the person against whom the order is being granted has been permitted to provide representation to the Tribunal

Under Section 95(2), the Authority, if it considers it to be in the public interest to do so, may, on application or its own initiative, make an order that "accords status" to certain persons or things, for example, (a) declaring a person to be a reporting issuer, a mutual fund, a non-redeemable investment fund, an insider, a market participant or a market, (b) declaring a trade to be a distribution, or (c) declaring a security to be a derivative or a derivative to be a security.

Because of the significant obligations that may arise against persons as a result of the granting of such an order, we are of the view that, when the order is proposing to be granted on the initiative of the Authority, such an order should be granted by the Tribunal to ensure proper oversight and objectivity in the process and that no such order should be granted by the Tribunal unless the person(s) effected by such order first has the right to make representation to the Tribunal.

13. The commencement of reviews and investigations under Part 11 "Administration and Enforcement" should be commenced only upon the approval of the Tribunal.

Part 11 "Administration and Enforcement" provides that the Authority or the Chief Regulator has certain powers to launch reviews and investigations and set out the parameters that the reviews or investigations are to follow. To ensure appropriate independence and oversight in the granting of such orders and setting out the powers exercisable thereunder, we are of the view that such order and powers should be granted not by the Authority or the Chief Regulator, but by the Tribunal on application by the Chief Regulator (or his or her appropriate delegate). We note that the securities legislation of a number of the Participating Provinces specifically require that investigations can only be commenced by order of the applicable securities commission and not by the executive director of that commission.

14. The wording regarding the collection and use of information under Part 14 "General – Disclosures to and by the Authority" is, in a number of spots, too broad and/or unclear.

(a) We recommend that Section 193(2)(a) , which requires disclosure of information that "is not otherwise prohibited by law" also include wording that protects privacy of personal information. We suspect that the quoted wording above is intended to primarily relate to Canadian privacy laws and therefore we recommend that the reference should be made clear in the legislation.

(b) In some sections of Part 14, the Authority is given powers to disclose information and, in other sections of Part 14, the Chief Regulator is given power to disclose certain information. It is unclear if there is a difference in practice between action by the Authority and action by the Chief Regulator. If there is a difference, it would be helpful to have explain the respective requirements. If there is no difference, it would be helpful to use the terms consistently..

(c) The powers of the Authority and the Chief Regulator to disclose to any other party information received by it under Subsections 193(2) and (3) are very broad, especially because that information can be provided to those other parties for purposes that are beyond those for which the information was gathered by the Authority. We believe that the stipulated standard of "exceptional circumstances" as referenced in Subsection 193(2) fails to provide adequate protection, particularly given the very broad and discretionary nature of the term "exceptional".

We recommend that (i) a more defined, restrictive and objective standard be used and (ii) some independence be inserted into the process, for example, a process whereby the Tribunal must approve such release of information. Given that personal information can be released to other parties under Subsections 193(2) and (3), we believe that it is appropriate to have the independent Tribunal approve the release before the information is disclosed. It would be of little comfort to any person to only have

the Tribunal review a decision of the Authority or the Chief Regulator to release personal information after that personal information has already been released.

(d) The concept of entering into "an agreement, arrangement, commitment or understanding … regarding the conditions of that disclosure" referred to in Section 194 is unclear as to what type of agreement, arrangement, etc., or its parameters, is being referred to. The failure to define the scope of the arrangement creates ambiguity and reduces the protective effect of the section.

(e) In Section 196, the Chief Regulator must, before it discloses "compelled evidence", give notice to the person who gave the evidence and give that person an opportunity to make representations. While not specifically stated, it appears that the representations are to be made to the Chief Regulator. We find it troublesome that, Chief Regulator is the decision maker in a situation in which the Chief Regulator has already come to the conclusion that it wishes to make the disclosure. Since the person was compelled under oath (ie, involuntarily) to give such information, some independence ought to be inserted into the process, for example, a process whereby the Tribunal makes the decision as to the release of the information following representations made to it by both the Chief Regulator and the affected person.

15. All decisions of the Chief Regulator should be reviewable by the courts, whether or not they have been first reviewed by the Tribunal, and all decisions of the Tribunal should be reviewable by the courts.

We recommend that provisions should be included in Part 14 that make it clear that all decision of the Chief Regulator under the PCMA are reviewable by the courts whether or not such decisions have also been reviewed by the Tribunal and that all decisions of the Tribunal under the PCMA are reviewable by the courts. Ultimately Canadian courts have the necessary independence to ensure that appropriate oversight is maintained over the decisions of both the Chief Regulator and the Tribunal. Court review also ensures that a body of jurisprudence is created to provide certainty and consistency in the application of the PCMA. This provides important guidance to the Chief Regulator and PCMA and to capital market participants. The ability to have decisions reviewed by the courts is crucial for the proper operation of capital markets in Canada.

16. The PCMA does not contain adequate provisions to protect privileged information and communications.

Section 195 contains provisions confirming that privileged documents are not required to be disclosed under certain circumstances; however, we recommend that the PCMA should also contain a general provision that states that any records, communication or other information for which solicitor and client or other similar privilege can be claimed are not required to be delivered by any person to the Authority, the Chief Regulator, the Tribunal or other party under any terms of the PCMA requiring the delivery of any such information. Such a provision should also include a clear process by which information over which privilege is claimed can be protected until such time as there is a judicial determination of whether the claims of privilege should be upheld.

We would be happy to discuss this with you further if you wish.

Yours truly,

WALTON INTERNATIONAL GROUP INC.

(signed) "Kurtis T. Kulman"

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