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Comments on the Cooperative Capital Markets Regulatory System

The following comments on the proposed *Provincial Capital Markets Act* ("PCMA") and federal Capital Markets Stability Act ("CMSA") address the allocation of various types of authority under the draft legislation, the structure of the proposed Capital Markets Regulatory Authority (the "Authority") and issues relating to its accountability. A few drafting issues are addressed in an appendix.

Introduction: The Authority

The Authority will be composed of two divisions, a regulatory division and an adjudicative tribunal (the "Tribunal"), both subject to supervision by a board of directors (the "Board"), which in turn will be accountable to a Council of Ministers ("COM") from participating provinces and territories and the federal government. The regulatory division will be headed by a chief executive officer, identified as the Chief Regulator ("CR"), and the Tribunal by a Chief Adjudicator. The Authority's divided structure is intended to address criticism of the current multi-functional securities commissions, which are ultimately responsible for all aspects of the regulatory process, including operational, regulatory decisionmaking, enforcement, adjudication, policy formulation and rulemaking.

The PCMA and CMSA allocate decisionmaking authority to the CR, the Tribunal and the Authority, itself, generally following the allocation of decisionmaking authority under existing provincial acts to the commission and their senior staff, the Executive Director in BC and a "Director" in Ontario. Decisionmaking authority with respect to operational, or administrative, regulatory functions is conferred on both the Authority and the CR following similar allocations in existing securities acts; authority to make disciplinary decisions and conduct appeals from staff decisions and from decisions of self-regulatory organizations ("SROs") is allocated to the Tribunal.

In implementing the Authority's divided structure, the PCMA and the CMSA reflect some of the difficulties inherent in such bifurcation.[1] Because of the Authority's bifurcated structure and separate, independent Board, the powers given to a commission and to its staff under existing provincial securities acts cannot simply be accorded to the Authority, CR and Tribunal on a one-for-one basis, as the PCMA and CMSA generally do. In some cases, the allocation would deprive affected persons of rights of appeal that they would have under existing legislation from a commission decision. In others, it is overlapping, sometimes confusing, and appears inconsistent with the Authority's likely operational activities.

[1] See, e.g., Anisman, "The Ontario Securities Commission as Regualtor: Adjudication, Fairness and Accountability", in *Conflicts of Interest in Capital Market Structures: Queen's Annual Business Law Symposium, 2003* (A. Anand and W.F. Flanagan, eds. 2003) 101.

CR vs. Authority

The Authority's Board is based on a corporate model. Its responsibilities, as specified in the *Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System* (the "MOA") among the participating provinces and federal government are largely supervisory (s. 7.2). Its only operational function identified in the MOA is to exercise the Authority's power to make regulations under the PCMA and CMSA (s. 7.2(d)). This mandate is consistent with the usual responsibilities of a board of directors, which does not engage in day-to-day management of a corporation's business and, except in circumstances involving a conflict of interest, largely relies on corporate management for information on which to base its decisionmaking.

The CR, as the CEO of the Authority's regulatory division, will head management, much as the chair of a provincial commission currently does, but will not be a member of the Board, whose members will be independent. Thus the structure suggested by the MOA is one under which the CR is responsible for the Authority's operational administration, including enforcement of the legislation, the Tribunal is responsible for adjudication, and the Board is responsible for supervision of the CR's activities, the Tribunal's non-adjudicative-related operations, and the determination of policy, primarily through making regulations.

The PCMA and CMSA, however, assign operational decisions to both the CR and the Authority. For example, the CR, like the Director in Ontario, is responsible for registration of dealers, advisers and investment fund managers. He or she determines whether to grant or deny registration, to impose terms and conditions on a registration and to suspend a registration. Similar decisions, currently made by a commission, concerning recognition and designation of entities under the PCMA (ss. 9 and 17) and designation of trade repositories, trading facilities, clearing houses, credit agencies and capital markets intermediaries as systemically important under the CMSA are to be made by the Authority (ss. 18, 20, 23 and 27), but only after "consultation" with the CR. Once they have been recognized or designated, the CR may order such entities to alter their organization or conduct of business (PCMA, ss. 12, 20 and 21).

It seems odd to specify in the statutes that the Authority must consult with the CR before making regulatory decisions. The CR is the CEO of the Authority's regulatory division. As the CEO, the CR will initially be responsible for all activities preceding such decisions on applications by the entities under the PCMA and for initiating the designation process under the CMSA. Operational decisions of this nature need not be made by the Board. Although it appears inconsistent with the Board's mandate under the MOA, the legislation may be interpreted to require Board approval for every decision allocated to the Authority. In any event, such decisions will undoubtedly be based on the CR's recommendations and the Board may delegate some decisions to the CR, for example, a determination to impose conditions on a registrant or a recognized or designated entity, which may request "an opportunity to make representations" (PCMA, ss. 9(2) and 17(2); CMSA, ss. 18(3), 20(3), 23(3) and 27(3)). (A delegation of this nature would complement the CR's power to make any decision concerning the bylaws and other rules of such organizations and the manner in which they carry on their business, without a statutory right to "make representations", although one would be expected to be provided.)

Allocating such decisionmaking to the Authority also has the effect of denying an entity that is refused recognition or designation, or an entity that is designated against its wishes or on

whose operations conditions are imposed, the right of appeal to a court that exists under current securities laws from a commission decision, as well as an appeal to the Tribunal that is available from a decision of the CR under the proposed legislation.

Similar issues arise with respect to the granting of exemptions. The PCMA authorizes the CR to vary time periods in a particular case in connection with a takeover bid (s. 51), while in other contexts extensions of time periods must be ordered by the Authority (s. 97). Other exemptions and designation orders in specific cases must also be made by the Authority (ss. 94-96). This is also the case under the CMSA (s. 96). Such orders are commonly made by securities commissions in the ordinary course of the administration of their legislation. Requiring the Board to meet to make them would make its function operational, rather than supervisory, and is unnecessary. It is reasonable to expect the Board to delegate most such decisions to the CR, whose authorized conduct is conduct of the Authority.

The statutory allocation of these powers to the Authority would in either case deny an appeal to the Tribunal by a person whose exemption application is effectively refused by the Authority's staff. Under existing legislation, an applicant who seeks an exemption is entitled to a hearing before the commission if staff refuses to recommend that the exemption be granted. The availability of such a hearing may serve to constrain an otherwise arbitrary rejection. This form of discipline on staff may not be available to an applicant under the PCMA, as the legislation does not provide for an opportunity to make representations in such circumstances.

On occasion, the allocation of authority between the CR and the Authority under the PCMA is effectively duplicative. The treatment of confidential information is an example. Section 193 provides that information obtained by the Authority is confidential and can be disclosed only in specified circumstances. Disclosure is permitted if the CR "considers that exceptional circumstances exist for doing so and that it is necessary for the purposes of the Act" (s. 193(2)(d)); it is also permitted if the Authority "considers that the public interest in disclosure outweighs any private interest in keeping the information confidential" (s. 193(3)(c)). In view of the Authority's structure, this differentiation is unnecessary for such operational determinations.

Practically, the CR will have responsibility for the day-to-day administration of the PCMA and CMSA. Both acts should be revised to give the CR decisionmaking authority over all operations of the regulatory division. This will result in a clearer division of authority, will clarify the expected supervisory functioning of the Board (MOA, s. 7.2) and will provide all persons directly affected by a decision of the CR with a right of appeal to the Tribunal. Such appeals to the Tribunal may provide an additional means of ensuring the accountability of the regulatory division's operational decisionmaking.

If there are specific decisions that should not be subject to an appeal to the Tribunal, they can be expressly identified, for example, a decision relating to urgent systemic issues. Such issues are addressed in PCMA, s. 86 and CMSA, s. 34; both authorize the Authority, after consultation with the CR, to make a temporary cease trade order. The Authority must notify the COM as soon as feasible after it concludes that such an order is necessary; it must also provide the COM with a copy of the order and an explanation of the circumstances requiring it as soon as feasible after the order is made. It might be argued that the CR should be granted this authority, subject to specific Board approval. If the CR is given such authority, the Act could provide that no appeal lies from such a decision.

CR vs. Tribunal

The primary decisionmaking authority of the Authority and CR relates to the regulatory division's administration of the PCMA and CMSA. The Tribunal has authority to make disciplinary decisions; it also has appellate authority to review the CR's decisions, equivalent to that currently exercised by commissions with respect to decisions of their Directors. The bifurcation of the operational and adjudicative functions of the Authority complicates the allocation of authority, which follows existing legislation with respect to operational matters. As suggested above, the proposed legislation should be revised to allocate all operational regulatory decisionmaking to the CR, disciplinary and review decisionmaking to the Tribunal and supervisory and rulemaking authority to the Board, as indicated in the MOA.

The allocation of disciplinary decisionmaking is especially significant in view of the different standards in the proposed legislation relating to hearing requirements. When such a requirement is imposed, the CR and the Authority must provide an affected person with an "opportunity to make representations" before making a decision; in most cases the Tribunal may make its decisions "after a hearing". The difference in terminology suggests that a hearing provided by the CR will be less formal and may involve a lesser standard of due process for affected persons than one before the Tribunal. Although the legislation follows existing language in some securities acts, a hearing should be required in all cases, leaving appropriate procedures to be determined in light of the issues in specific proceedings. For example, the Ontario Securities Commission ("OSC") currently conducts both oral and written hearings in disciplinary proceedings, depending on the issues and circumstances of each case. The proposed legislation should follow this example with respect to hearings before the CR and the Tribunal, and a hearing should be required for all adjudicative decisions.

Whether or not these suggestions are accepted, some reallocation of decisionmaking authority under the proposed legislation is advisable. For example, applications relating to takeover bids under the PCMA may be made to the CR, the Tribunal and the courts. The CR and Tribunal are given overlapping discretion to vary time periods required with respect to takeover bids (PCMA, ss. 51-52). Such variations, unless necessary for a compliance order, are largely operational and should be made in the first instance by the CR. Similarly, exemption orders from the takeover bid requirements should, like other types of exemptions, be made primarily by the CR rather than the Tribunal, with overlapping authority to allow the Tribunal to tailor compliance orders in appropriate circumstances (PCMA, s. 52(1)(f)).

There is also overlapping authority with respect to disciplinary action against a registrant. Both the CR and the Tribunal may suspend or impose conditions on a registrant's registration (PCMA, ss. 23(2), 25(2) and 89(1)(d)). In circumstances where a suspension is based on a need for immediate action, the CR should retain authority to make a temporary order. Otherwise, as a suspension is primarily disciplinary, the matter should be brought before the Tribunal as a disciplinary proceeding. This is also the case with respect to the imposition of conditions or other terms on a continuing registration. Although this recommendation would modify existing practice, it would ensure that the CR's activities are directed at ongoing compliance issues, and that the CR does not perform disciplinary functions.

It is worth reiterating in this respect that the PCMA provides that the Authority must designate a designated entity and authorizes it to impose conditions on a designation at any time, but gives practical supervisory jurisdiction over such entities to the CR, who may require an

entity to provide information to the Authority and may make any decision that the CR considers in the public interest concerning an entity's bylaws, rules and policies and the manner in which it carries on business (ss. 17-20). Suspensions and disciplinary conditions, however, can only be imposed by the Tribunal (s. 89(1)(d)). And under the CMSA, the Tribunal has parallel authority to order changes to the practices and procedures of a designated, systemically important entity (s. 49(1)(e).

These comments are also applicable to the CMSA, which would authorize the CR to impose administrative monetary penalties (ss. 43-45). It differs from the PCMA, which authorizes the Tribunal to impose such penalties (s. 90). Monetary penalties are disciplinary. The primary jurisdiction to impose them should be with the Tribunal. The CMSA should be amended to bring it into line with the PCMA.

Adjustments should also be made to the provisions authorizing searches of the business premises of persons who are not market participants. The PCMA authorizes a search of a market participant's premises in connection with a compliance review by a person designated by the CR (s. 103(4)). It also empowers the CR to authorize a search of anyone else's premises in connection with a formal investigation that the CR initiates (s. 104(8)). (Entry to search a dwelling house would require a warrant; ss. 106-107.) Market participants should anticipate compliance reviews, but others do not. The CR should be required to obtain an order from the Tribunal authorizing a search of the premises of a non-market participant, possibly on an *ex parte* basis.

The PCMA and CMSA require additional harmonization with respect to the Tribunal's authority. The PCMA would authorize the Tribunal to prohibit a person from acting as a director or officer of an issuer, registrant or recognized or designated entity (ss. 89(1)(g)-(h)). Under the CMSA such an order must be made by a court (ss. 51(2)(f)-(g)). Disgorgement of amounts obtained by a person as a result of a violation of the legislation is treated similarly; under the PCMA, s. 90(1), the Tribunal may require payment of such funds to the Authority, while the CMSA authorizes a court to make such an order (s. 51(2)(b)). In addition, under the CMSA, only a court may order a person to pay costs of a review or proceeding to the Authority (s. 51(2)(c)), while the PCMA does not authorize payment of costs to the Authority in any proceeding. All such orders should be available from the Tribunal under both acts, and their enforcement provisions should otherwise be harmonized.

Like the PCMA, s. 99, the CMSA authorizes an appeal of a decision of the CR to the Tribunal, which may confirm the CR's decision or make another decision it considers appropriate (CMSA, s. 103).[2] The CMSA, however, specifies a deferential standard of review of a determination by the CR that something could pose a systemic risk (s. 103(5)).[3] The need for this limitation is questionable. The Tribunal is required to apply a standard based on systemic risk with respect all of its orders; section 49 authorizes the Tribunal to make orders only when it considers it "necessary to protect the stability or integrity of Canada's capital markets or

[2] Interestingly, the CMSA expressly excludes decisions under section 34 from the appeal provision, even though section 34 provides that such decisions must be made by the Authority. The express exclusion demonstrates the confusion between the Authority and CR as decisionmakers, and implicitly reflects the analysis above with respect to the likely locus of decisionmaking within the Authority in such circumstances.

[3] CMSA, s. 103(5) permits the Tribunal to substitute its own determination of whether something could pose a systemic risk only if the CR's determination is unreasonable. Again, the CMSA authorizes the Authority to make such determinations; see ss. 18-35; and see note 2, above.

financial system" after a hearing. As the Tribunal is intended to fulfill the role that securities commissions now play with respect to staff decisionmaking, this deferential standard of review should not be imposed.

The PCMA would alter the existing practice in Ontario with respect to settlements of disciplinary proceedings. A settlement agreed to by OSC staff must be approved by the Commission. Formal commission approval is not required in all other provinces; the British Columbia Securities Commission, for example, has adopted a procedure involving commission review of a proposed settlement before its Executive Director enters into it; see BCN 2007/27 and BCN 2007/34. Under the PCMA, the CR would be entitled to settle a disciplinary matter by making a sanction order with the consent of the respondent, but without having to bring the settlement before the Tribunal for approval (ss. 89(2) and 90(4)). This would give the CR relatively unfettered authority with respect to specific settlements. Under the proposed scheme, approval of settlements by the Tribunal should be required, but the process should be transparent.

Rulemaking and Blanket Orders

Regulations

The PCMA and CMSA both give the Authority very broad rulemaking authority. Under both acts, it may make regulations "for carrying out the purposes of" the legislation. Its authority to make regulations is thus substantially unconfined. The potential breadth of regulations under the cooperative legislation is evident from the many provisions of the PCMA and CMSA under which it may adopt regulations extending defined terms and prescribing the substance of a substantial number of the act's provisions. In some cases the effect of the proposed legislation cannot be discerned without seeing the regulations that are contemplated, for example, the regulations that will have the effect of requiring designation of "designated entities", referred to on page 5 of the Commentary that accompanied the legislation.[4] This is also the case with respect to appeals from decisions of the Tribunal under the PCMA, as subsection 100(2) leaves the determination of the provincial appeal court with jurisdiction in specific cases to the regulations; and section 138 leaves the substance of a right of rescission in a distribution to regulations. The PCMA also follows the example of the BC *Securities Act* ("BCSA") in providing a bare authorization to specify in regulations the requirements for takeover bids, continuing disclosure and proxy solicitation.

Rather than delegating blanket rulemaking authority to the OSC, the Ontario Legislature has enacted the principles governing these areas in the Ontario *Securities Act* ("OSA"). The Ontario approach is preferable. The unconfined rulemaking authority in the BCSA and in the "Henry VIII" provisions of the proposed legislation is, in principle, inconsistent with the democratic premise that the legislature should formulate the basic policies that inform a system of regulation. Rulemaking authority should be limited to fleshing out principles in the statute with respect to subject matter that is also specified in the statute. If it becomes evident that additional rulemaking authority is required, the statute should be amended.

The breadth of the rulemaking authority in the proposed legislation may be viewed as necessary in light of the fact that the PCMA is to be adopted by each participating province. As

[4] Department of Finance Canada, *Commentary: The Cooperative Capital Markets Regulatory System – Governance and Legislative Framework*, September 8, 2014, page 5 ("Commentary").

a result, amendment of the PCMA will be more difficult than amendment of the individual provincial acts currently is, as every participating province would have to amend the PCMA with respect to each legislative change. Nevertheless, as the MOA contemplates amendments to the PCMA, this issue must be addressed.

Consideration should be given to developing a mechanism that would permit amendments to the PCMA without the legislature of each participating province having to enact each amendment, possibly through the enabling legislation referred to in the Commentary to be adopted by each participating province. This may be possible by adopting the PCMA and expressly delegating to the Authority its administration as amended from time following the process in section 5.5 of the MOA.[5] If valid amended legislation is required to justify adoption of such an amendment on constitutional principles, consideration might also be given to adding a provision to the PCMA to the effect that an amendment of the Act in any province, made after completion of the amendment process in the MOA, is deemed to be an amendment to the PCMA in each participating jurisdiction so that an amendment would apply in each participating jurisdiction after any one of them enacts it.[6] A provision reflecting this approach with respect to orders and regulations made under the CMSA in any jurisdiction is contained in PCMA, s. 178; see also *Bill 5 - Securities Amendment Act, 2014*, Alberta Legislative Assembly, 28th Legis., 3rd Sess., s. 34 (new s. 198.1). As amendment of the legislation is inevitable, an approach of this nature is desirable even without regard to the breadth of the rulemaking power granted to the Authority.

Notice and Comment Procedure

In view of the scope of rulemaking powers conferred on the Authority, the procedure for the adoption of regulations requires careful attention. It should be designed to ensure that affected persons have as full an opportunity to participate as possible. Although the PCMA and CMSA generally adopt the rulemaking process now contained in provincial legislation, they do not follow it exactly and the provisions in each are not identical.

Both require a notice and comment procedure; a proposed regulation must be published and interested persons given an opportunity to comment on it and have their views considered (PCMA, s. 205; CMSA, s. 87). The content of the notice, however, is sparser than the current requirements. Under the PCMA, a notice must include the proposed regulation, a description of it, the reasons for it and a description of its anticipated costs and benefits (s. 205(2)); the CMSA requires, as well, that a proposed regulation addressing systemically important securities, derivatives or practices must also provide an analysis of the factors that the Authority is required to consider when making such regulations (s. 87(2)(d)). Presumably because of its unconfined rulemaking authority, the PCMA does not require reference to the authority under which the regulation is proposed or a discussion of alternatives to it that were considered. Both are required in Ontario (s. 143.2(2)) and should be retained.

The PCMA does not require the notice and comment procedure for regulations that grant exemptions, including regulations exempting classes of issuers, persons, trades, securities and derivatives from inclusion in a defined category (ss. 205(4)(a)-(b)). The CMSA, however, requires regulations that grant an exemption or remove a restriction to follow the notice and

[5] See, e.g., P. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., s. 14.4.
[6] See *ibid*., s. 14.4(c).

comment process, unless the Authority considers it necessary to make them "without delay" (s. 87(4)(a)). This element of urgency is not an express condition of these exceptions under the PCMA; it should be added.

The exception provision in the OSA permits an exempting regulation without notice and comment only if the exemption or waived restriction "is not likely to have a substantial effect on the interests of persons who benefit under it" (s. 143.2(5)(b)). The OSA's qualification should be added as an alternative to the urgency requirement, and the provisions in the two acts should be made identical.

The remaining exceptions to the notice and comment procedure are premised on a subjective determination by the Authority. Notice and comment is not required if the Authority considers that a proposed amendment to a regulation does not change the regulation in a material way (PCMA, s. 205(4)(c); CMSA, s. 87(4)(b)). The test in the OSA is objective (s. 143.2(5)(c)). The exemption should not be based on a subjective opinion of the Authority, but on the objective materiality of the proposed change. The OSA provision should be followed.

As under OSA, s. 143.2(5)(d), the exceptions also permit the Authority to make a regulation that it considers necessary to address a substantial risk of material harm to investors or the integrity of the capital markets. Under the CMSA, the Authority must believe that there is an urgent need for the proposed regulation to address a systemic risk (s. 87(4)(c)). Although the PCMA has dropped the express requirement for urgency, it retains it implicitly, as subsection 210(4) imposes an obligation to publish, as soon as practicable after such a regulation comes into force, a statement describing the regulation that includes the reasons for it and "the nature of the urgency". The requirement for urgency should be expressly retained in this exception in the PCMA, as well as for exempting regulations, as it is in the CMSA.

Under the PCMA, a regulation adopted without notice and comment is automatically revoked 18 months after its adoption, unless the Authority decides it should be continued through adoption of a regulation following the notice and comment procedure, in which case the regulation may remain in force for three years (ss. 210(1)-(2)). Under the CMSA, such a rule is repealed after one year and cannot be extended (s. 93(1)(d)). The period for such rules under both acts should be the same.

More importantly, there is no reason to extend such a rule for a three year period. The period under the OSA, s. 143.4(6), is 275 days. If the Authority intends to adopt a regulation under the formal rulemaking process, one year is sufficient time to enable it to publish a proposed regulation in the same terms and request comment in accordance with the statutory rulemaking process.

The Authority must republish a regulation for further comment if it proposes a change that it considers material (PCMA, s. 205(5); CMSA, s. 87(5)). If the COM returns a regulation under the PCMA to the Authority for further consideration, the COM may specify what is to be considered and the process to be followed (s. 208). Under the CMSA, the subjective materiality standard applies to both types of proposed changes (s. 87(5)). All matters that are returned by the COM for reconsideration should be treated as material. In any event, the test for republication should be the objective materiality of the change. In view of the breadth of the Authority's ability to adopt regulations, an open, interactive process is necessary. The exceptions to this notice and comment process should be limited to the extent possible.

The proposed legislation authorizes the COM to specify a matter on which the Authority must consult and consider making a regulation (PCMA, s. 211; CMSA, s. 94). This is an important element of governmental oversight in that it allows the COM to require the Authority to consider rulemaking on specific issues. A similar, but non-mandatory request should also be available to any member of the public who is or may be affected by the proposed legislation. A provision should be added to both the PCMA and CMSA requiring the Authority to accept and consider proposals for regulations from members of the public.[7]

Although the PCMA requires that regulations be made by the Authority and the Board will have to approve them before they are published, the PCMA would authorize the CR to specify the content of forms required under them and to supplement content requirements contained in the regulations (s. 204). The effect of this provision is to give the CR rulemaking authority that is not subject to the notice and comment process applicable to regulations or to Board and COM approval. The contents of disclosure documents under current national instruments, which are expected to be adopted by the Authority initially, are often specified in the forms that accompany these instruments.[8] Specifying this content is rulemaking and should be subject to the same process and authorization as regulations. Accordingly, the CR should not have authority to specify the content of forms. As now, forms should form part of the regulations.

Blanket Orders

The PCMA would authorize the Authority to make class orders in a number of circumstances. For example, it may grant an exemption for a class of persons, trades, intended trades, distributions, securities or derivatives (s. 94). It may also make an order designating a class of issuers not to be reporting issuers, mutual funds, or non-redeemable investment funds, a class of persons not to be insiders, market participants or marketplaces, a class of contracts or instruments not to be derivatives, a class of securities not to be securities, a class of derivatives not to be designated derivatives, a class of derivatives to be securities or designated derivatives, and a class of securities to be derivatives. Such class orders are, in effect, rules that may be made without following the notice and comment procedure that would be required if they were characterized as regulations. They are prohibited under the OSA, s. 143.11, but are permitted under other provincial securities acts.

The PCMA adopts a hybrid compromise and treats class orders in a manner similar to regulations for which notice and comment are not required. In fact, the PCMA authorizes regulations that cover much the same ground as permitted class orders; compare PCMA, ss. 94-96 with s. 205(4)(a)-(b). Like an excepted regulation, class orders can have no effect eighteen months after the day on which they come into force, unless the Authority makes a regulation under subsection 205(4) extending the order for a further eighteen month period (s. 96(1)). If it does so, however, it cannot further extend the regulation (ss. 210(2)-(3)).

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[7] See, e.g., P. Anisman *et al.*, *Proposals for a Securities Market Law for Canada* (1979), Vol. 1, Draft Act, p. 115, s. 15.15(6); Commentary, Vol. 2, p. 358. Such a provision would also allow an alternative to multiple applications for "blanket rulings"; see note 9 below.

[8] See, e.g., *National Instrument 41-101 – General Prospectus Requirements*, s. 3.1 ("form of prospectus") and *National Instrument 51-102 – Continuous Disclosure Obligations*, s. 1.1 "AIF", "information circular" and "MD&A".

The Authority must submit a regulation made without notice and comment to the COM and the regulation comes into force only after the MOC approves, or fails to reject or return it within thirty days. A class order, however, does not have to be approved by the COM and comes into force immediately upon its adoption. It is therefore not subject to the statutory accountability process required for regulations.

The OSC has long sought to obtain authority to make blanket orders, like other provincial commissions. Its requests have consistently been rejected by the Ontario Legislature, despite the recommendation of the Five Year Review Committee in 2003.[9] The Commission's reasons for seeking this authority have been the perceived need to grant general exemptions from new rules containing an error, the delay involved in the notice and comment procedure and the inefficiency of processing multiple exemption applications.[10] In view of the fact that equivalent authority to make regulations is contained in the PCMA, there is no need for blanket orders that are neither urgent nor subject to approval by the COM. As a matter of principle and clarity, the authority to make class rulings should be limited to regulations.

Policy Statements

The PCMA would authorize the CR to issue policy statements to provide guidance on the CR's interpretation of the PCMA and the regulations and on the exercise of the CR's powers (s. 212). As under the OSA, the CR would be required to publish a proposed policy statement and invite written comments on it for a specified period.

This authority highlights a number of difficulties with the Authority's structure. As much operational decisionmaking under the PCMA is conferred nominally on the Authority, the authorization of CR guidance arguably does not apply to the exercise by the Authority of its statutory powers.

A more important question is who should issue policy statements, that is, how the issuance of policy statements should be determined and authorized. A policy statement is merely guidance and is not binding on the Authority or persons whose conduct may be affected by it. As a result, a policy statement issued by the CR would not be binding on the Tribunal in a proceeding before it and need not be adhered to. Indeed, one of the difficulties envisaged with a bifurcated tribunal is the possibility the Tribunal may differ from the CR in its interpretation of a legislative provision. It would be more difficult for the Tribunal to differ if a policy statement were considered or issued by the Board.

In view of the importance of policy statements, their issuance should have to be approved by the Board. The equivalent provision in the CMSA (s. 95) authorizes the Authority, but not the CR, to issue policy statements in otherwise identical terms. Both acts should provide that the

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[9] For a summary of the history of the treatment of blanket orders in Ontario, see Anisman, *Comments on Proposed OSC Policy 11-602*: *Guidelines on the Application of the Prohibition against Orders of General Application to Exemption Applications* (Submission to OSC, July 15, 2013).

[10] See, e.g., *CSA Notice and Request for Comment: Proposed Amendments to Certain National and Multilateral Instruments and Policies Related to the Recognition of Aequitas Neo Exchange Inc*., December 11, 2014, p. 4 (Interim Measures: CSA jurisdictions other than Ontario to issue blanket orders relieving issuers listed on Aequitas Neo Exchange Inc. from requirements pertaining to venture issuers; in Ontario "issuers will gain such relief by application").

Authority may issue policy statements, and if the CR is permitted to issue policies, they should require Board approval.

Accountability

The breadth of the Authority's rulemaking and other regulatory powers highlights the need for it to be held accountable for its administration of the PCMA and CMSA. The proposed cooperative regulatory regime contains a number of accountability mechanisms. The activities of the CR will be subject to supervision by the Authority's Board, although it is not clear how deferential a board of directors will be to staff decisionmaking and the CR's participation as the CEO. Under the PCMA, s. 100, but not the CMSA, decisions of the CR are subject to appeal to the Tribunal, whose decisions are in turn subject to appeal to "appeal courts". Decisions of the Authority, however, and particularly its operational decisions, are subject only to judicial review (PCMA, s. 176(1)) and would receive much greater deference than would be expected from the Tribunal, assuming that the Tribunal would apply review standards similar to those currently applied by securities commissions on appeals from decisions of their staff and SROs. A general right of appeal to the Tribunal from operational decisions of the Authority (whether made by the CR or the Board) would enhance the Authority's accountability for operational decisions aimed at specific persons.

The Board will also have authority to supervise all of the activities of the Tribunal, except those related to its adjudicative decisionmaking. Nevertheless, the Board will be in a position to control the Tribunal's budget and administration, which may have an impact on the Tribunal's adjudication. The manner and effect of such supervision remain to be seen. Some indication may be obtained when the "CMRA Charter Documentation" ("CCD") is published; see MOA, s. 3(a)(iii); Commentary, p. 2.

Rulemaking decisions must be made by the Board and will be subject to approval, rejection or non-disapproval by the COM. It is doubtful that they will be subject to substantive review by a court.

Matters of systemic importance such as the designation of a trading facility, clearing house, credit rating organization and capital markets intermediary as systemically important require the Authority to notify the COM before a designating order is made and to give the entity an opportunity to make representations, but the legislation does not say what the COM may do in response (CMSA, ss. 18(3), 20(3), 23(3), and 27(3)). In contrast, before making an order imposing a specified obligation on a systemically important capital markets intermediary, the Authority must obtain the approval of the Minister of Finance who must notify the COM before granting the requested approval. Although, the proposed Act does not provide authority to the COM to take any action, a response from its members will likely influence the Minister in deciding whether to approve an order proposed by the Authority. Nevertheless, in both cases, the statute should express the COM's intended role when notified of an impending order.

The Authority must also advise the COM when it concludes circumstances exist requiring it to make an urgent order under the PCMA or CMSA. In addition, it must notify the COM that it has made the order by providing a copy of the order and an explanation of its purpose and the "nature of" the extraordinary circumstances or risk (PCMA, s. 86(5); CMSA, s. 34(7)) and must publish a statement of its reasons for making the order (PCMA, s. 86(5); CMSA, s. 34(8)). An order is effective for 15 days. The PCMA allows the Authority to extend an urgent order

repeatedly (s. 86(8)). The CMSA does not provide for extensions, but authorizes the Minister, after consultation with the Authority and the major-capital-market members of the COM, to require the Authority to amend or repeal an urgent order (CMSA, s. 35).

Despite these provisions, a full assessment of the Authority's accountability and the mechanisms adopted to achieve it cannot be made on the basis of the PCMA, CMSA and other published information, as the published material does not include the implementation legislation, which would create the Authority and provide for its structure, referred to in the MOA as the CCD. The CCD will presumably contain additional mechanisms to ensure accountability, for example, requirements for an annual report, statements of priorities, a process for entering international agreements and memoranda of understanding, and authorization for the Authority's internal rules. Similarly, the enabling legislation to be adopted by participating provinces has not been published. This legislation may provide additional information on the accountability of the COM to participating provincial and territorial legislatures. All of these are necessary to review the proposed system as a whole and should be published as soon as possible to enable interested persons to review and comment on the Authority's intended structure and accountability.

Respectfully,

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APPENDIX
Comments on Specific Provisions

The following comments relate to specific provisions and are identified by statute and section number.

PCMA

- s. 2 – "investor relations activities": paragraph (c) in this definition refers to newspapers and similar publications that are distributed "only to subscribers for value or purchasers". A number of newspapers distribute copies free to non-subscribers in the hope of obtaining additional subscribers and purchasers. Publications in such newspapers could be treated as "investor relations activities". "only to" should be changed to "primarily to".

- -"market participant": paragraph (m) of this definition does not include control persons of a person described in paragraph (r). Such persons are included in paragraph (d) relating to reporting issuers. They should also be included with respect to issuers distributing securities under an exemption.

- -"reporting issuer": this definition does not include an issuer whose securities are listed and traded on a stock exchange in Canada, perhaps because the inclusion may be affected by exchanges in non-participating provinces. Presumably, it is intended to include listed issuers as a class prescribed by regulation to be reporting issuers under paragraph (e) of the definition. Listed issuers should be included in the statutory definition.

- s. 66(3): this subsection prohibits tipping by a potential acquirer of a reporting issuer. The prohibition is limited to a person who "proposes" to engage in one of the actions specified in the subsection. It should be amended to refer to a person who is "considering or evaluating whether to or proposes to take" one of the specified actions. This would follow the recent amendments to OSA, s. 76(3), and would be consistent with the definition of "special relationship" in PCMA, s. 7.

- s. 66(4): the same comment applies to the prohibition against recommending in this subsection, possibly by adding in line four after "or": "a person who is considering or evaluating whether to take or who".

- s. 67(2)(f): this paragraph does not include sub-tippees. In line three, after "the investor", the following phrase should be added: "including a person described in this paragraph".

- s. 71: the unless clause does not include employees.

- s. 90(4): this provision authorizes the CR to enter settlements requiring a payment to the Authority. It should expressly state that the payment may be greater than the maximum amount provided in subsection 90(1).

- s. 92(4)(g): add "an" before officer.

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- s. 118(2): an action for rescission provided for the exercise of special warrants would merely return the special warrants, which will presumably be of little value to the purchaser. It does not correspond to the damages specified in subsection 3, which would result in the return to a purchaser of the amount paid for the special warrants. The action should be for damages and subsection 2 should be deleted.

- ss. 119(3) and (4): the imposition of the onus on experts and directors in these sections is a desirable change.

- ss. 130(3)-(4): is there a policy reason to base liability for frontrunning in this section on actual use of information for a person's direct benefit or advantage? The "make use of" language in the original insider trading liability provisions from the 1960s was replaced long ago because of the difficulties it created. The approach with respect to insider trading based on knowledge of non-public information should be followed with respect to frontrunning, as well.

- s. 168: the PCMA requires notice of proceedings related to an action based on secondary market misdisclosure to be given to the CR. Notice of a hearing to approve a settlement of such an action should also have to be given to the CR.

CMSA

- s. 2 - "underwriter": The definition of "underwriter" is not limited to persons who engage in distributions of securities. As a result, it includes every dealer who acts as a principal or agent in connection with any sale or purchase of securities, whether or not in connection with a distribution, and is equivalent to the definition of "dealer". The inclusion of underwriters in the definition of "dealer", therefore, is redundant. The definition of "dealer" appears to be the only provision in which "underwriter" is used in the CMSA. The definition should be deleted or amended to track the traditional definition of underwriter contained in the PCMA.

- s. 8: this provision appears intended to prevent fines imposed following a conviction from being paid to the Authority, but it does so indirectly by excluding fines "imposed as punishment for an offence". Although the CMSA states that an administrative monetary penalty is not imposed to punish and must be paid to the Authority (ss. 43(2) and 46), it would be preferable to specify in section 8 that it applies to all funds payable "other than fines imposed pursuant to Part 4 or 5" of the CMSA.

- s. 22(d): this provision requires the concurrence of the Bank of Canada before the Authority or the CR takes any of the specified actions, such as designating a clearing house as systemically important, making a regulation to address systemic risk that prescribes requirements for systemically important clearing houses, making an urgent order, and taking any action under Part 3 of the CMSA. Part 3 authorizes the CR to conduct compliance reviews and inquiries (s. 37), to order a formal investigation (s. 38), to order an administrative monetary penalty and to initiate proceedings before the Tribunal or a court in respect of such a clearing house (ss. 49-50). It also authorizes an investigator designated by the CR to apply to a court for an order requiring a clearing house to produce documents (s. 54). It is less than clear that the concurrence of the Bank of Canada should be required before the CR or a person designated by the CR conducts

any of these activities. Nor should the Bank of Canada's concurrence be a prerequisite to an order of the Tribunal or a court under Part 3.

- ss. 38(10)-(12): the procedure for confidentiality orders made by the CR appears potentially cumbersome. It appears to require the CR to identify each individual or other person who is subject to a confidentiality order. It may be appropriate in some cases for the CR to make a confidentiality order that applies to more than one person, for example, a corporation and its board of directors. If this occurs, it is unclear when the order would be effective, and against whom, as subsection (11) states that such an order is "effective once it is served on the person who is subject to" it. If it is served on only one of a number of persons identified in it, is it intended to be effective as against those who have not been served? Subsection 11 would be clearer if it provided that a person who is subject to an order is bound by it only after the person has been served with it.

  A person subject to an order may request a revocation or variation, and must give notice to "the other party" (s. 38(12)). The section does not identify who the other party is in circumstances where an order is issued by the CR. The procedure intended by this provision should be clarified.

- ss. 43-45: a monetary penalty should not be imposed by the CR. A proceeding should have to be brought before the Tribunal by the CR, or the CR's enforcement staff, to obtain such an order. The traffic-ticket-like aspects of the procedure contemplated by these provisions should either be deleted or made applicable to all proceedings before the Tribunal. It is desirable, for example, that a notice issued by the CR to initiate a proceeding before a Tribunal state the sanctions sought by the CR.

- s. 50(1): paragraph 50(1)(a) requires a person subject to a freeze order to retain funds or other property "until the Tribunal, in writing, revokes the order or consents to release a particular fund, security or property from its order", but does not include this clause in paragraph (b). The quoted words should apply to all of subsection (1).

- s. 50(6): it is not clear why a person subject to an order is only entitled to "an opportunity to make representations", rather than to a hearing, when the CR applies to the Tribunal to have a freeze order extended. (The equivalent provision in the PCMA, s. 91(7), requires a hearing.) If the opportunity to make representations is intended to provide a less formal procedure, which may diminish due process, it should not be used in a section that permits the freezing of a person's property.

- s. 66(6): this subsection defines a person who is in a special relationship with an issuer, but it varies from the wording in the equivalent definition in the PCMA. The words "considering or" should be added before the word "evaluating" in subparagraphs (6)(a)(ii) and (iii) and in paragraph (b).

  In addition, paragraph (6)(a) has separated proposed mergers with an issuer from proposed acquisitions of the assets of an issuer, which are contained in a single provision in the PCMA definition. They are here included as subparagraphs (6)(a)(iii) and (iv). This separation is not reflected in subsequent paragraphs of the definition. A reference to subparagraph (a)(iv) should be added to paragraphs (b) and (c).

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- ss. 67(5) and (6): in the first line of subsection (5), after "person" and before "proposing", the words "is considering, evaluating whether or" should be inserted. The same insertion should be made in line two of subsection 67(6) before the word "proposes".