



June 28, 2016

VIA EMAIL: comment@ccmr-ocrmc.ca

Department of Finance Canada | Ministère des Finances Canada
14th floor, 90 Elgin Street
Ottawa, Ontario
K1A 0G5

Attention: Jean-François Girard,
Chief – Securities Policy | Chef – Politiques en
matière de valeurs mobilières

Re: Capital Markets Stability Act (Canada)

Dear Sirs/Mesdames:

Healthcare of Ontario Pension Plan (“**HOOPP**”) welcomes this opportunity to comment on the revised consultation draft of the *Capital Markets Stability Act (Canada)* (“**CMSA**”) dated January, 2016 and released on May 5, 2016 (the “**Revised Draft CMSA**”) and very much appreciates the consultative approach being taken by the Department of Finance Canada.

About HOOPP

HOOPP is a defined benefit pension plan dedicated to providing a secure retirement income to more than 309,000 workers in Ontario’s healthcare sector. More than 490 employers across the province offer HOOPP to their employees. With over \$63 billion in assets, HOOPP is one of the largest defined benefit pension plans in Ontario and in Canada and a significant and active capital market participant. Our proven strategy and track record of investment returns have made HOOPP a leader among its global peers.

August, 2014 Draft

We are very pleased that the Revised Draft CMSA contains significant improvements from the original August, 2014 consultation draft of the CMSA (the “**August 2014 Draft**”). Given the changes in the Revised Draft CMSA, it is clear the sponsors of the CMSA have been very responsive to the concerns of stakeholders.

HOOPP is particularly pleased that the concept of designating certain entities as “systemically important” has been removed from the Revised Draft CMSA.

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None of the changes in the Revised Draft CMSA affects the objective of the legislation to empower the proposed new regulatory authority (the “Authority”) to analyze and respond to systemic risk related to capital markets. HOOPP supports this objective and is interested in working with the Authority to help maintain capital market stability. However, we continue to have concerns with respect to certain elements of the Revised Draft CMSA.

Our comments below are divided between broad and specific points of concern on the Revised Draft CMSA.

1. Broad Comments on the Revised Draft CMSA

Purposes of the Act; the Authority’s Power and Responsibilities

From a broader perspective and commenting on the Revised Draft CMSA overall, we are concerned that the creation of the Authority and its new legislative and regulatory powers could (i) quickly grow beyond what is necessary, (ii) create duplication of regulatory requirements and uncertainty with respect to overlapping mandates, and (iii) be too interventionist for the good of Canadian capital markets.

We understand the stated purposes of the CMSA flow directly from the cooperative capital markets regulatory framework (the “**Cooperative Framework**”) which is based on an agreement by participating provinces and territories to delegate portions of their respective constitutional jurisdictions to a federal authority, the Capital Markets Regulatory Authority (the “**Authority**”). To carry out the stated purposes, the Revised Draft CMSA provides the Authority with certain powers and responsibilities, including authority to:

- a) collect data to identify potential risks;
- b) regulate systemically important products and benchmarks and systemically risky practices;
- c) make urgent orders to address serious and immediate threats; and
- d) administer and enforce the CMSA, including the criminal offences described therein.

Were it not for the Cooperative Framework, we believe that the stated purposes of the CMSA, and these powers and responsibilities of the Authority to fulfill them, would be largely duplicative of the mandates, powers and responsibilities of existing governmental institutions at both the federal and provincial level, including the federal government represented by the Minister of Finance, the Office of the Superintendent of Financial Institutions, the Bank of Canada, the provincial governments represented by the provincial finance ministers and the provincial securities commissions. Though the implementation of the Cooperative Framework on the one hand justifies the need to revisit these existing institutional mandates, powers and responsibilities, on the other hand, there are still significant risks the CMSA and the work of the Authority will create duplication, uncertainty, inefficiency and possibly jurisdictional conflict, in spite of what we recognize are attempts to mitigate it through provisions like sections 6(2), 9(2)(a), 18(2)(g), 20(2)(h) and 22(2)(f) of the Revised Draft CMSA. None of these risks would be desirable outcomes in the context of promoting stable capital markets in the face of adverse market events.

Notwithstanding the changes from the August 2014 Draft, the Revised Draft CMSA continues to be extraordinary legislation, intended to deal with extraordinary events and circumstances affecting capital markets. The Revised Draft CMSA:

- is binding on the Her Majesty in right of Canada or a province;
- provides the federal government with authority, on the Finance Minister's recommendation, to order the assignment to the Authority of the administration of any provision of the *Bank Act* or its regulations;
- gives the Authority broad powers to collect information, including non-public information, and to disclose the information collected to other governmental and regulatory authorities and other capital markets institutions if the disclosure is for the purposes listed in section 15(1)(a), and (b) and with others, if the Authority considers that exceptional circumstances exist for such purposes;
- gives the Authority the power to make an urgent order if, in its opinion, it is necessary to address a serious and immediate systemic risk related to capital markets; and
- gives the Authority the power to make regulations for carrying out the purposes and provisions of the CMSA.

In many cases, the Revised Draft CMSA contains exceptions or additional requirements that impose limits on the Authority's powers and discretion, such as the requirement to provide those who would be directly affected by an action or order an opportunity to be heard, and a requirement to publish notices of its proposed regulations and obtain the approval of proposed regulations from the Council of Ministers. However, in a number of cases even such limits have been carved back when the Authority considers that extraordinary circumstances exist, leaving the Authority with significant net powers and discretion.

We would encourage the drafters to consider including additional provisions in the legislation that:

- incorporate principles that clearly and appropriately circumscribe the powers granted to the Authority under the Act;
- confirm the Authority's responsibility to ensure there is appropriate coordination of its activities with other governmental and regulatory agencies responsible for capital markets participants and financial markets more generally; and
- ensure the responsibilities of the Authority include undertaking scenario analyses (including historical scenarios) so that the implications of any capital market intervention which the Authority may contemplate are thoroughly understood.

2. Specific Comments on the Revised Draft CMSA

Our comments on specific provisions of the Revised Draft CMSA are as follows:

- The goal of any regulation made under section 9 should be to ensure consistency with existing requirements relating to the keeping of records and information and the provision of records and information to any other regulatory authority. Differing requirements of this nature would likely impose onerous administrative and compliance costs, and it is important for the Authority to recognize that existing requirements may apply (not just legal requirements but for example, accounting standards also).
- We would prefer it if subsection 10(2) was made to explicitly require the Chief Regulator to obtain the records and information from the other source, if the Chief Regulator considers it practicable to do so.
- There should be a relieving provision in the event that a person, after making good faith reasonable efforts, is unable to comply with a request for records or information under section 10 or subsection 27(2). If requested information is simply not available because, for example, it was destroyed in accordance with an entity's records retention policy (and applicable law), the entity should not be subject to a penalty or offence. Similarly, some data may simply be irretrievable or be very difficult to retrieve and produce (i.e. excessively costly, time consuming, and complicated for technological reasons).
- In our view, the due diligence relief provided in section 51 should also apply to administrative monetary penalties.
- The Authority's powers to request information are broad, and we are concerned that the Revised Draft CMSA continues to make it too easy for the Authority to disclose information that constitutes confidential or proprietary information, including "trade secrets".
- It is important to note that an urgent order making power, if not exercised in an appropriate way and in appropriate circumstances, may have unintended consequences and perhaps achieve the opposite effect from the stated purpose of the CMSA of enhancing market stability. For example:
 - the power itself may be de-stabilizing (it is an unknown and parties will likely find it difficult to order their affairs so as to account for the possible exercise of the power);
 - how market participants react to an order may be unpredictable and be de-stabilizing;
 - an announcement of a possible order may have a de-stabilizing effect given how market participants respond;
 - further, even the mere suspicion or rumour of an order may have a de-stabilizing effect given how market participants may respond; and
 - the imposition of an order may cause domestic entities to default under one or more of their investment contract(s), which could be de-stabilizing.

The biggest concern with the exercise of the Authority's powers may be the creation of funding and liquidity crises for certain market participants.

- Section 83 permits the Authority to issue policy statements and guidelines on the exercise of its powers and the interpretation of the CMSA through a process involving the publication of draft

materials for public review and comment. We strongly support this consultative approach to financial regulation to avoid lack of certainty and clarity

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We appreciate the Department of Finance's consultative approach on this project to date, and the opportunity to comment on the Revised Draft CMSA. We hope that the comments in this letter are helpful to you.

Yours truly,

HEALTHCARE OF ONTARIO PENSION PLAN

A handwritten signature in blue ink, appearing to read 'DL', is written over the printed name and title.

David Long

CIO & SVP, Asset Liability Management, Derivatives & Fixed Income