DAVIES

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BY E-MAIL: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Thank you for the opportunity to comment on the Revised Consultation Draft *Capital Markets Stability Act* (Canada) (the "**CMSA**" or the "**Draft Act**") published on May 5, 2016, and thank you as well for meeting with us on June 16, 2016 to discuss our comments in advance of our sending this letter. Our June 16 meeting was very helpful and has assisted us in refining and focusing our comments.

Our detailed comments are set out below and range from high-level policy-oriented comments to drafting points. References herein to the "Commentary" are to the "Commentary on the Revised Consultation Draft of the CMSA", also published on May 5, 2016.

The members of the Davies working group who participated in the comment process are listed at the end of this letter.

GENERAL COMMENTS

1. We appreciate that in the revised CMSA you made a significant effort to respond constructively to comments received during the initial consultation in 2014, and in your recent meetings with stakeholders, you created an opportunity for meaningful consultation and discussion.

2. Given that the CMSA is a new component of Canada's capital markets regulatory framework, it requires a measured approach to managing systemic risk that ensures accountability of the Authority and the Chief Regulator as well as certainty, predictability and procedural fairness for capital markets participants. The revised CMSA goes some way to achieving this goal, but nonetheless still falls short on several fronts, as discussed below.

3. We note that the revised CMSA removes systemically important entities from the purview of the legislation, narrows the definition of systemic risk by removing references to integrity and adds a materiality threshold, all of which are changes that we support. However, we continue to be concerned about a number of other new substantive measures and regulatory requirements.

4. We continue to be concerned about the broad discretion and significant powers afforded the Authority and the Chief Regulator and, in certain instances, the lack of adequate procedural protections. As a result, we continue to be of the view that the Authority should be subject to stronger accountability mechanisms.

5. We are pleased to see new section 98(1), which provides for a mandatory five-year review of the CMSA, addressing the concern we raised in our last comment letter that the 2014 draft legislation did not include a statutorily mandated legislative review, similar to what is provided in the *Bank Act*. This new provision will assist in ensuring that the legislation, its administration and its operation are living up to its mandate and that there is a process that allows for changes to the CMSA in light of changes in Canadian capital markets, financial systems and systemic risk factors threatening the Canadian economy. That said, the new section should clarify that a review is required *every* five years, not only five years after the section comes into force.

6. While we support the changes in the revised CMSA, we believe that further changes are required. In addition, it is difficult to provide meaningful comments on sections of the proposed legislation that are subject to regulations without having the benefit of reviewing those regulations.

7. To the extent that our comments to the 2014 draft CMSA were not incorporated into the revised CMSA and were not addressed in the Commentary, many of them are repeated in this letter. It would be helpful if the Commentary would specifically discuss the reasons for not addressing our concerns. We think that it is important that the rationale for not accepting any comments that have been considered in this consultation process be specifically set out in commentary, consistent with the consultation model devised by the Canadian Securities Administrators.

SPECIFIC COMMENTS

No Intention to Abrogate Solicitor–Client Privilege

In our original comment letter, we raised concerns about a number of provisions of the draft CMSA that do not address solicitor–client privilege at all, including broad disclosure requirements that do not provide express exceptions for communications between a solicitor and a client. These concerns were not addressed in the Commentary.

Given the broad disclosure obligations and powers created by the CMSA and its extraordinary nature and purpose, we continue to believe that it is preferable that the CMSA expressly affirm solicitor–client privilege to remove any doubt that the benefits of privilege continue, and to protect documents or things maintained by a lawyer in respect of his or her client's affairs, as well as other correspondence held by the person that are subject to solicitor–client privilege. Given the significance of the concern raised, we believe that the CMSA should include express language to confirm what we understand is the intention of the CMSA, similar to the language included in the *Proceeds of Crime (Money Laundering) and Terrorist Financing* Act, s. 11, the *Canada Business Corporations Act*, s. 236, or the Ontario *Securities Act*, s. 13(3). In the alternative, we do think it important for further commentary to be issued confirming that the Draft Act is not intended to abrogate solicitor–client privilege.

Section 2 – Definitions

The definition of "trade" in section 2 of the CMSA continues to refer to "any transaction involving a derivative". As we stated in our previous comment letter, it is not clear how the termination or settlement of a derivative contract can constitute a trade. We believe that the implication of this definition is that anything that a person must do to enter into or sell a derivative contract (e.g., file and deliver an offering document or make filings with the Chief Regulator) the person would also be required to do in order to terminate or make payments pursuant to this derivatives contract.

Section 3 – Systemic Risk Related to Capital Markets

In our previous comment letter, we expressed concern that the CMSA defines systemic risk very broadly and that there does not appear to be a lower boundary for what qualifies as a systemic risk. We welcome the addition of a materiality threshold to the definition and the removal of "integrity" from the definition. We believe that both these changes are sound.

Section 4 – Purposes of Act

We appreciate your confirmation at our meeting on June 16, 2016 that, as a jurisdictional matter, the intention is to regulate only when there is a real and substantial connection to Canadian capital markets. In light of this, we suggest that you might reconsider the language of section 4. More specifically, we note that although section 4(a) refers to "Canada's" financial system, the reference to "capital markets" in section 4(b) is not similarly qualified by specifying "Canadian capital markets". We suggest that "Canadian" be inserted before "capital markets" in section 4(b) to eliminate the inconsistency of jurisdictional reach between subsections (a) and (b).

Section 7 – Reference to this Act

This section provides that any powers conferred under the *Bank Act* may be assigned to the Authority. We appreciate that the section has been revised so that the Governor in Council (rather than the Minister) has the authority to make such an order, presumably to provide for greater accountability. While we support the effort to reduce duplicative regulatory structures, we continue to have concerns that such an approach would further blur the separation between financial system regulation and securities regulation, thereby reducing the healthy balance of regulatory competition that otherwise exists between these two pillars. To the extent that regulatory authority is vested in the Authority, there is a risk that the expertise present within Canadian prudential banking regulatory bodies may be sacrificed and the constructive relationship that exists between financial institutions and these agencies may be diminished. Although our concerns are not addressed in the Commentary to the CMSA, we understand that the Authority intends to only regulate "gaps" in other legislation, not to substitute or replace such legislation. We think it would be beneficial for this to be made clear either in the CMSA itself or in the Commentary.

PART 1 – INFORMATION COLLECTION AND DISCLOSURE

Section 9 – Duty to Keep and Provide Information

The CMSA regulations may prescribe requirements relating to the provision of records and information to the Authority for the purposes of monitoring market activity and detecting, identifying or mitigating systemic risks. We appreciate that this section now expressly requires the Authority, in making a regulation, to consider whether it can obtain the records and information from other sources or is already required under law.

However, we continue to have a general concern that given the multiple mandates (systemic risk data collection, administrative enforcement and criminal enforcement) of the Authority, clearer limits should be set out in the Draft Act to ensure that information gathered for one purpose is not disclosed or used for other purposes. We understand from our discussion that you rely on the operation of *Jarvis* principles to make this evident. That said, we believe that this might be made clearer both in commentary and in the structuring of the Draft Act. For example, although Part 1 of the Draft Act appears to focus principally on information gathered in connection with systematic risk and policy analysis, it contains some provisions (e.g., sections 13, 15, 16, 17) applicable to all information obtained under the Draft Act (without distinction made on the basis of either the purpose for its collection or its method of collection). Further, the distinction between compelled information in support of an administrative inquiry/review and information obtained by way of court order in support of criminal prosecution is arguably not as clear as it could be, given that both are found in Part 3.

Section 12 – Disclosure of Personal Information to Authority

This section provides that any person is "permitted" to disclose personal information to the Authority for the purpose of the administration of the CMSA or assisting in the administration of capital markets or financial legislation in Canada or elsewhere.

On its face, this section is vague and unclear. Does this section permit persons, on their own initiative, to make such disclosures to the Authority, despite contractual confidentiality provisions and privacy legislation to the contrary? Or is the intention of the section that if requested or required by the Authority, such persons are then relieved of their statutory and contractual duties regarding privacy and can share personal information with the Authority? The wording of this section needs to be clarified.

We also believe that this provision goes too far in authorizing disclosure for purposes of the administration of capital markets or financial legislation "elsewhere" other than Canada.

We did not appreciate prior to meeting with you on June 16, 2016 that the "CMSA creation act" (not yet released in draft form) will likely deal with issues regarding what privacy regime will apply to disclosures of information to the Authority. We also did not appreciate that the federal

Privacy Act will have to be amended to authorize the Authority to collect personal information. That said, we still believe that the operation of section 12 requires clarification.

Section 13 – Confidential Information

The obligation to maintain the confidentiality of collected information is imposed on the Authority only. There does not appear to be a similar obligation on the part of the Chief Regulator, and this obligation should be expressly set out in the CMSA. Subsection (2) may permit sharing of information with law enforcement agencies even when that information is not obtained by way of a warrant; it should be amended to expressly exclude such possibility. We note that compelled evidence obtained under the Ontario *Securities Act* is expressly prohibited from being disclosed to law enforcement (see section 17(3)), and we believe that this should be made express in the CMSA as well.

Section 14(b) – Disclosure of Information

We had previously commented that this section was overbroad as it permitted the disclosure of confidential information without qualification or reference to the Authority's mandate, so long as the Authority is of the opinion "that the public interest in disclosure outweighs any private interest in keeping the information confidential". We had suggested that this section be qualified to ensure that the disclosure of information held by the Authority supports its mandate of addressing systemic risk so that such disclosures are not vulnerable to *ad hoc* pronouncements of what is in the public interest.

We support the revision to the section that removes the Authority's ability to engage in this balancing act. Nonetheless, and as stated in our last comment letter, disclosure of information under this section remains problematic if the personal information is disclosed to a foreign regulatory body that may, or may not, accord the information the same confidentiality or security that it would be entitled to in Canada. Our concern has not been addressed in the Commentary and is not addressed by section 16 (see our further comments below in respect of section 16).

Section 15(1)(b) – Disclosure of Information – Administration of Act and Other Legislation

This section now permits the Authority, as opposed to the Chief Regulator, to disclose information to certain persons, authorities or entities if the disclosure is for the purpose of assisting in the administration of capital markets or financial legislation in Canada or elsewhere.

We welcome the change that now gives this power to the Authority, as opposed to the Chief Regulator, potentially adding some greater measure of accountability. However, we continue to be of the opinion that the Authority's ability to disclose such information should be limited to ensure that it promotes Canadian interests. We therefore believe the language in section 15(1)(b) that extends to the administration of capital markets or financial legislation "elsewhere" other than Canada is overly broad. For the reasons expressed in respect of section 16, we also have concerns regarding the disclosure of information to foreign authorities.

Finally, section 15(2) continues to provide an even broader right to disclose information under "exceptional circumstances". As we stated in our earlier letter, we suggest that this provision be deleted.

None of our continued concerns have been addressed in the Commentary to the CMSA.

Section 16 – Disclosure Outside Canada

Before disclosing information to a person, authority, entity or agency outside Canada, the Authority is required to enter into an agreement regarding the terms of this disclosure. Although we are generally supportive of the Authority's prescribing the terms of any disclosure, given the potential consequences of such disclosure, we continue to suggest that the CMSA expressly set out the factors that the Authority must consider when establishing the terms of this disclosure and the issues that should be addressed in such an agreement. This concern is not addressed in the Commentary to the CMSA.

Section 17 – Disclosure of Compelled Evidence

We believe that the protections in section 17 should not be limited to information obtained by way of compelled testimony (paragraph 28(3)(b)), but should extend to all compelled evidence, including compelled production of records (in paragraph 28(3)(c)). This protection exists in the Ontario *Securities Act* (section 17) and there is no apparent principled reason for not offering a similar protection under the CMSA.

PART 2 – SYSTEMIC RISK

Given the concerns we raised in our previous comment letter about the designation and regulation of systemically important entities, including concerns about hindering their competitiveness, we fully support the removal of the provisions designating and regulating systemically important trading facilities, clearing houses, credit rating agencies and capital markets intermediaries from the CMSA.

Sections 18–23 – Content of Regulation

We cannot provide meaningful comments on the sections of the proposed legislation for systemically important benchmarks, products and practices until the relevant regulations under the CMSA are released and we have an opportunity to review and comment on them.

Section 24 – Urgent Orders

We recognize that there are certain circumstances that necessitate the making of a temporary order in order to address a serious and immediate risk because there is not sufficient time to hold a hearing.

We welcome the express addition of subsection (6) which provides for an opportunity for persons who would be directly affected by the order to be heard. However, subsection 6 is currently too broad in that it permits the extension of the initial *ex parte* 15-day order by another 15 days without a hearing (and does not condition such extension on the existence of exceptional circumstances). We are strongly of the view that there should be a presumption that an opportunity to be heard must be provided before the original order is extended and that any *ex parte* extension of the original order should be permitted only in exceptional circumstances. We are also of the view that such extension should not be as long as 15 days and should, at most, not exceed 10 days. We note that even in the context of *ex parte* civil injunctions in Ontario (see Rule 40.02 of the *Ontario Rules of Civil Procedure*), there is a presumption that the order will not be extended beyond 10 days without a hearing on notice to the affected parties, and only in exceptional circumstances may an order be extended without notice, for a further period not exceeding 10 days.

PART 3 – ADMINISTRATION AND ENFORCEMENT

Section 27(2) – Requirement to Provide Records or Things

In our view, and as we have previously stated, the requirement that a person provide a person designated with verifying compliance with the CMSA with "any records or other things in their possession or control" is an overly broad and unwarranted requirement. We continue to suggest instead that such records be limited to the "books, records and other documents that are required to be maintained under securities laws". In this regard, the CMSA should adopt language similar to sections 19 and 20 of the Ontario *Securities Act*. The Commentary does not address our concerns.

In addition, we question why "or other things" is included in section 27(2). Given the purpose of the CMSA, it is difficult to conceive of any "things" other than "records" that might be required to be provided, especially given that "record" is defined in section 2 to include "anything containing information, regardless of its form or characteristics".

Section 28(1) – Inquiry – Order Authorizing Exercise of Powers

Section 28(1) is overly broad in that it allows inquiry by the Authority into compliance with a foreign jurisdiction's capital markets legislation. We question whether this is a power that is appropriately granted to the Authority and whether any benefit associated with such inquiry will outweigh the cost. While we may see a rationale for providing the Authority with the ability to exercise its powers when requested by a foreign jurisdiction, we are not convinced that the Authority will have the proper expertise to conduct such an inquiry on its own.

Sections 28(3)(b) and 28(3)(c) – Summons and Production

See our comments above regarding confidentiality and disclosure issues raised by sections 13–17. We continue to have concerns about the lack of sufficient protections for compelled evidence. The Commentary does not address our concerns.

Further, we continue to be of the opinion that the Chief Regulator's power to compel a person to give evidence under oath and produce records or other information is particularly troublesome because it uses Canadian investigative powers to potentially subject a party to foreign prosecution in which the party may not be entitled to the same protections available in Canada. Nothing in the Commentary to the CMSA addresses our concerns.

Section 28(7) – Powers – Entry

We remain concerned that the powers of entry in section 28(7), first, are not subject to any court order or search warrant and, second, are not limited to particular locations or business premises. Further, the scope of review is not limited to particular records. In this regard, we favour the model contained in the Ontario *Securities Act* (see section 13 and, in particular, sections 13(3)–(7)). We strongly believe that section 28 should require an authorized person to apply to a court for an order authorizing a search in circumstances beyond those specified in section 13(3) of the Ontario *Securities Act.*

Section 29 – Duty to Assist

This provision, to our knowledge, is without parallel in Ontario securities law. It imposes a vague and indefinite obligation to "give all assistance that is reasonably required" and is subject to the General Offences provisions of Part 4. In our view, the vagueness and breadth of this provision impose obligations that may be virtually impossible to meet, and therefore the provision should be removed from the CMSA. The Commentary does not address our concerns.

While it was helpful to learn at our meeting on June 16, 2016 that similar obligations are contained in other federal legislation, we continue to believe that it would be preferable to frame the obligation as an obligation not to obstruct, as in section 72(2) of the CMSA, rather than as an open-ended and ill-defined obligation "to assist".

Sections 34 and 35 – Notice of Violation

In our previous comment letter, we raised the issue that the Chief Regulator, who issues a notice of violation, should not be the person to whom representations are made by a respondent served with the notice. We recommended that, for due process to be assured, respondents who contest a notice of violation should be entitled to have the matter referred for decision in the first instance to an independent decision-making body such as the Tribunal. We therefore welcome the change in section 34, which addresses the bulk of our concern.

In both the previous Draft Act and the current CMSA, the Chief Regulator does not have to establish a violation before the Tribunal if the respondent does not "seek to appear or make representations" (section 35(4)). Any contravention of the CMSA other than Part 5 criminal offences constitutes a "violation" and penalties can be as high as $15 million plus amounts obtained or payments or losses avoided. Given the significance of a violation and the potential heavy fines, we continue to believe that the Chief Regulator should, nevertheless, be required to establish before the Tribunal that there has been a violation because the Tribunal (and not the Chief Regulator) is the appropriate entity to make such a determination and impose any penalty. Our comment has not been addressed in the Commentary to the CMSA.

Section 37 – Contravention by Directors or Officers

We continue to recommend that this provision be amended to make it clear that the individuals referred to in this provision be found liable only in circumstances in which they were served with notice and given an opportunity to make representations to the Tribunal. Such a notice requirement would seem obvious on fairness grounds.

We understand from our meeting with you that there is no intention to hold directors or officers liable for a violation by a corporation without such directors being given personal notice of the alleged violation and a hearing. We suggest that this could be clarified in the CMSA because, in the current form, the Draft Act suggests that directors and officers may be a party to the violation and not the proceedings leading up to a finding of violation.

Section 39(2) – Temporary Order

We recognize that there are certain circumstances that necessitate the making of a temporary order in the public interest because there is not sufficient time to hold a hearing. However, we continue be of the view that the range of temporary orders authorized in section 39(1) is overbroad. For example, it would be appropriate to carve out paragraph (a) from the temporary order provision since paragraph (a) implies a finding of a breach of the CMSA and may require the person to take positive (irreversible) steps that have serious ramifications for the person's livelihood or operation of the business for the future. The Commentary to the CMSA does not address our concerns.

Section 39(3) – Extension of Temporary Order

Section 39(3) fails to require the Tribunal to take steps to expedite a hearing and, at least theoretically, permits the Tribunal to extend a temporary order for a significant period of time. In this regard, we continue to strongly recommend the inclusion of a provision similar to section 127(7) of the Ontario *Securities Act*. We strongly believe that fairness dictates that the legislation should mandate an expedited hearing in circumstances in which a temporary order is issued and that the requirement to hold an expedited hearing not be left to the Tribunal's discretion or scheduling convenience. The Commentary does not address our concerns.

Section 40 – Freeze Order

Given the intrusiveness of a freeze order, the apparently low standards (when compared to the test for a *Mareva* injunction) for issuing such an order under section 40 of the CMSA and the fact that it is issued prior to any hearing that finds a breach of securities laws, we continue to believe that there should be a requirement to have such an order reviewed by a court and any extension of such order made subject to court approval, as in section 126(5) of the Ontario *Securities Act*. The Commentary does not address our concerns. Furthermore, the deletion of section 40(4) in the revised draft CMSA compounds the issues we identified.

Sections 42 – "Capital Markets Intermediary"

The definition of "capital markets intermediary" found in section 42 of the Draft Act is vague and could include unintended service providers. We think the definition should be clarified so that it captures persons in the business of trading or advising in securities or derivatives. The definition should also be revised so that the meaning of "provides services related to…" is clarified.

PART 5 – CRIMINAL OFFENCES

In our original comment letter, we provided a number of comments arising from the existence of parallel or similar offences in the *Criminal Code* to those proposed to be included in the CMSA. We appreciate your clarification at our meeting on June 16, 2016 that certain securities-specific offences (e.g., market manipulation, insider trading) currently contained in the *Criminal Code* will be entirely removed from the *Criminal Code* and transferred to (and modernized in) the CMSA; other offences that have broader application and are not securities-specific (e.g., fraud, forgery) will remain in the *Criminal Code*, and a securities-specific version of the offence (which is substantially the same as that remaining in the *Criminal Code*) will be included in the CMSA.

Section 55(1) – False Information – Benchmark

We continue to be concerned that criminalizing the reckless provision of information for the purpose of determining a benchmark may unduly stifle the willingness of persons to create, provide and support benchmarks. We are of the opinion that absent any intent to manipulate the benchmark, the reckless provision of information is more properly addressed under a regulatory rather than a criminal law regime.

Section 56(4) – Definition of Control

The definition of "control" in paragraph (a) does not specify an ownership threshold for the percentage of voting securities held. Because the number of votes required to elect a majority of directors may vary significantly according to the number of securities voted at a general meeting, the absence of a defined threshold creates uncertainty for investors. We continue to suggest that the definition of "controlled companies" in section 1(3) of the Ontario *Securities Act* be

incorporated to provide greater certainty for market participants. The Commentary does not address our concerns.

Section 57 – Insider Trading

The insider trading rule in section 67 of the CMSA now extends to trades of an issuer whose securities are "publicly traded". Although "publicly traded" is not defined in the CMSA, we do appreciate your confirmation at our meeting on June 16, 2016 that, as a jurisdictional matter, the intention is to regulate only when there is a real and substantial connection to Canadian capital markets on the basis of the established jurisprudence setting out the required connectors to Canada for criminal prosecution. Under section 138.1 of the Ontario *Securities Act* and similar provisions in the CMR Jurisdictions the notion of a "publicly traded" non-reporting issuer is limited to one with a real and substantial connection to Ontario. A similar limitation should be applied to the insider trading provisions in the CMSA. When an issuer has a real and substantial connection to Canadian capital markets, it is defensible to regulate through criminal sanctions trading in the securities of that issuer to ensure that all investors in that jurisdiction have access to the same information before making an investment decision. If there is no real and substantial connection to the Canadian capital markets, then the CMSA insider trading provisions should not apply. To extend the application of the insider trading and tipping prohibitions extraterritorially is particularly problematic when the conduct may be lawful in the foreign jurisdiction; this is a risk that is especially acute in the insider trading and tipping area, where Canada's laws are more stringent than those in the United States and other jurisdictions. The legitimate purposes of the CMSA are not served by extending the insider trading regime to securities of all publicly traded issuers, irrespective of the connection to Canada. In the event that you are not inclined to make the "real and substantial connection" requirement express in the CMSA, we think that, at a minimum, commentary should be issued that confirms the intention to regulate only when there is a real and substantial connection to Canadian capital markets.

Further, the insider trading prohibition has been extended well beyond the current prohibition in the Ontario *Securities Act* against the purchasing or selling of a security to prohibit a transaction involving a security that results in the termination or material amendment of a pre-existing obligation with respect to a security or any related financial instrument. Such a radical extension of the well-settled insider trading law in Ontario and other provinces should not be included in new legislation without a full airing of the purpose of the change and a full appreciation for the implications.

Section 57(4) – Tipping

In our last comment letter, we suggested reverting to the language "in the necessary course of business" in this and other sections of the CMSA dealing with exceptions from the tipping prohibition, given that this is the phrase that is used in the Ontario *Securities Act* and it is the phrase that has been interpreted by courts and regulators across Canada (see National Policy 51–201, section 3.3). If no change in the meaning of the section is intended, the language "unless it

is necessary in the course of their business" in the current Draft Act should be changed to the long-standing expression "in the necessary course of business".

Section 57(6) – Recommending

While we agree that it makes sense that a person in a special relationship be prohibited from "recommending", not just disclosing, the material fact or material change, we continue to note one possible anomalous effect of this provision in the private placement area. In the course of making a private placement, an issuer or agent may need to disclose material, non-public information to a potential investor, which it does pursuant to the "necessary course of business" exception. This has been a practice that has been accepted by the Canadian securities regulators, as reflected in National Policy 51–201, section 3.3(4). The marketing efforts of the issuer or agent under these circumstances could also be seen to include recommending or encouraging the investor to participate in the private placement and should be excluded from this prohibition in the same fashion that the disclosure is excluded from the tipping prohibition. However, this change was not made and the Commentary to the CMSA is silent. Consideration must also be given to whether ordinary course business activities that involve recommending an issuer's securities (such as investor relations activities and non-deal road shows) should be excepted. At a minimum, the opening language of section 57(5) should be repeated in section 57(6). The Commentary does not address our concerns.

Section 60 – Forgery

In our previous comment letter, we noted that the 2014 draft of the CMSA did not include the right to prosecute forgery as a summary offence and that, by contrast, section 367 of the *Criminal Code* permits the prosecution of forgery as a summary offence. We therefore welcome the addition of subsection 2(b) to the CMSA, which permits the Crown to proceed by way of summary offence.

Section 63 – Threats and Retaliation Against Employees

As a matter of statutory construction, we continue to be concerned by the discrepancy between the CMSA's standard of "disadvantaging" an employee and section 425.1 of the *Criminal Code*'s standard of "adversely affecting" an employee (which standard also appears in the new anti-retaliation protections in the amendments to the Ontario *Securities Act* that were recently approved. "Otherwise disadvantage" seems to be too low a bar and we favour the existing language in the *Criminal Code*. The Commentary to the CMSA does not address our concern.

Under section 63(1) employees entitled to protection against retaliation include those who intend to provide information to the Authority or a law enforcement agency "respecting an offence that the employee believes has been…committed…by the employer". This test looks entirely to the employee's subjective belief and entitles him or her to protection no matter how unreasonable that belief. We strongly recommend that the section be amended to introduce a more objective standard requiring that the employee's belief be "reasonable". We note that this is the standard

adopted in OSC Policy 15–601 – Whistleblower Program, which provides for protection from retaliation for a "whistleblower who reports information about a reasonably held belief that there has been…a violation of Ontario securities law". Similarly, section 121.5(1) of the Ontario *Securities Act* requires that the employee's belief be reasonable as a pre-condition to protection from retaliation.

Section 68 – Immunity

The immunity standard provided in section 68 of the CMSA differs from that which exists under section 83.1(2) of the *Criminal Code* in that it does not provide protection from criminal liability for persons making disclosure at the request of a peace officer or a designated person under the CMSA. Given the Authority's broad powers to compel disclosure, we continue to be of the opinion that persons called to give evidence should be protected from any criminal liability in connection with their testimony. Our concerns are not addressed in the Commentary to the CMSA.

PART 6 – GENERAL

Section 75 – Notice of Proposed Regulation

We note that the section 75 contains new subsection (d), which requires a notice to include a description of "all of the alternatives to the proposed regulation that were considered by the Authority and the reasons for not proposing their adoption". We support this provision.

In closing, we support the changes in the revised CMSA, but we believe that further changes are required and would welcome specific commentary explaining the rationale for rejecting any concerns raised in this process.

Yours very truly,

(signed) Davies Ward Phillips & Vineberg LLP

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