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The Government of British Columbia, represented by its Minister of Finance
The Government of Ontario, represented by its Minister of Finance
The Government of Saskatchewan, represented by its Minister of Justice and Attorney General
The Government of New Brunswick, represented by its Minister of Justice
The Government of Prince Edward Island, represented by its Minister of the Environment, Labour and Justice and Attorney General
The Government of Yukon, represented by its Premier, Minister responsible for the Executive Council Office and Minister of Finance
The Government of Canada, represented by the Minister of Finance of Canada

(collectively, the "Participating Jurisdictions")

VIA EMAIL: comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Cooperative Capital Markets Regulatory System
Revised Consultation Draft of *Capital Markets Stability Act*

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regards to the revised draft *Capital Markets Stability Act* ("CMSA" or "Act") in furtherance of the cooperative capital markets regulatory system (the "Cooperative System").

About Advocis

Advocis is the largest and oldest professional membership association of financial advisors and planners in Canada. Through its predecessor associations, Advocis proudly continues over a century of uninterrupted history serving Canadian financial advisors and their clients. Our 11,000 members, organized in 40 chapters across the country, are licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada. Advocis members provide comprehensive financial planning and investment advice, retirement and estate planning, risk management, employee benefit plans, disability coverage, long-term care and critical illness insurance to millions of Canadian households and businesses.

As a voluntary organization, Advocis is committed to professionalism among financial advisors. Advocis members adhere to our published Code of Professional Conduct, uphold standards of best practice, participate in ongoing continuing education programs, maintain professional liability insurance, and put their clients' interests first. Across Canada, no organization's members spend more time working one-on-one with individual Canadians on financial matters than do ours. Advocis advisors are committed to educating clients about financial issues that are directly relevant to them, their families and their future.

General Comments

We continue to support the general objectives of the Cooperative System and the CMSA. The national management of systemic risk will be a tangible benefit brought about by the Cooperative System and will protect investors across Canada, regardless of whether their home province is a Participating Jurisdiction. But we do have concerns about the overarching power granted by the CMSA to the Capital Markets Regulatory Authority (the "Authority") – these powers are very broad in nature, both in terms of what the powers can be, and to whom or what they can be applied.

We are cognizant that, in the Participating Jurisdictions' view, this approach is deliberate and necessary based on the idea that the products or practices that will pose the next material risk to financial stability are typically not known in advance – if they were, they could be addressed before they ever escalate to the level of posing a systemic risk. Consequently, the CMSA provides the Authority with great flexibility to respond rapidly to unforeseen challenges.

But at the same time, these broad powers give rise to our (and other stakeholders') overarching concern that they could be used to impose undue regulatory burdens on market participants. Many of the CMSA's details are to be expressed in regulations that will not exist upon the Cooperative System's launch. Our approach to reviewing the CMSA is further guarded because, unlike the companion uniform *Capital Markets Act*, there is no direct comparative Canadian legislation upon which to base our review – the regulation of systemic risk as envisioned in the CMSA is largely uncharted territory.

In the latest draft, the definition of systemic risk has been tweaked somewhat to add a materiality threshold – but despite the use of this somewhat more familiar term, the CMSA still has little specific guidance on what it means for a product, benchmark or practice to be "systemically" risky. This remains largely unknowable until the Cooperative System is operative and precedent is established on how the Authority intends to use its powers.

But once a product, benchmark or practice is designated as posing a material risk, it becomes subject to all relevant CMSA powers. And there is little to restrict the type or scope of regulations that can be made by the Authority so long as the regulations can be characterized as addressing systemic risk. It is this tremendous scope of power, combined with the lack of precedent that informs how this power will be applied, that is at the core of our general 'unease' with the CMSA.

Our overall view, then, is that the powers granted by the CMSA must be used judiciously, in a manner that reflects coordination with existing regulators and restraint by the Authority to minimize market distortion. A robust system of checks and balances is a necessity. The new five-

year review afforded by section 98 is a definite improvement, but we believe that the CMSA could go further. It is this theme of regulatory coordination, restraint and checks and balances that forms the basis of our more specific comments in the sections that follow.

Segregated Funds

In the revised CMSA, "security" is defined as follows:

> "security" includes any contract, instrument or unit commonly known as a security *but does not include a contract, instrument or unit that is within a prescribed class*.
>
> (emphasis added)

Given that there will be no product- or practice-based regulations upon the launch of the Cooperative System, there will be no initial prescribed class of products excluded from the definition. Therefore, it is conceivable that segregated funds could be brought under the auspices of the Authority, following the application of the proposed notice and comment mechanism.

As you are aware, segregated funds are already subject to an extensive regulatory framework, under three different regulatory regimes that are administered by two different levels of government for different purposes: by federal regulation as it pertains to solvency and corporate governance of life insurance companies; by provincial securities regulation as it pertains to the underlying fund; and by provincial insurance regulation as it applies to market distribution, consumer protection and generally-applicable elements of all life insurance contracts.

We understand that the financial services landscape is constantly shifting and there may eventually be a need to fundamentally change the regulation of segregated funds – but such an event would impact a very large number of stakeholders and likely result in confusion due to regulatory overlap and increased compliance costs that would eventually be borne by the consumer. Given the stakes involved, a change to the regulation of segregated funds should be based on a fulsome stakeholder review, followed by any necessary amendments through the *legislative* process.

That is, for fundamental changes to products or practices that are already subject to a robust regulatory regime (including segregated funds), we believe a more deliberative process should be required than what the CMSA proposes, in that the Authority would be able to promulgate its own regulations that could bring about disruptive change.

A more deliberative driven process would better reflect the significance of the change being proposed. The rulemaking powers vested in the CMSA should not be used to profoundly alter the financial services landscape – instead, this type of action is best suited for elected and accountable representatives through the political process.

Administrative Monetary Penalties

In regards to administrative monetary penalties discussed beginning in section 33, we are pleased to see that the revised CMSA brings about a significant improvement from the previous draft: the

Chief Regulator's orders are contested before the Tribunal, rather than the Chief Regulator itself. This adds a legitimacy to the proceedings that was noticeably absent in the previous iteration.

But there is still room for improvement here. The route to the Tribunal is only granted to persons who make representations; if the person chooses not to make any representations, which can be a legitimate strategy in some circumstances, the CMSA deems the person culpable of committing the violation and grants the Chief Regulator the power to impose the respective penalty.

We believe this is the wrong approach. Even if the person chooses not to respond, the Chief Regulator should still have to prove to the Tribunal that the violation occurred, and it should still be the Tribunal that ultimately determines culpability and imposes penalties. The person's failure to make representations should be a factor for the Tribunal to consider in judging culpability, in context with the other facts of the case.

We understand that the Participating Jurisdictions see a failure to respond as opening up the person to default judgment – but even in the case of a default judgment, it is the court and not the prosecutor that renders the decision. Additionally, in the interests of procedural fairness, the CMSA should contain a clear right of appeal of Tribunal decisions to a court of competent jurisdiction.

Temporary Orders

In regards to subsection 39(2), we recognize there are circumstances that warrant the making of a temporary order – namely, when an immediate risk to the public interest outweighs the time required to hold a hearing. But in our view, it is overbroad to permit all of the orders in subsection (1) to be levied on a temporary basis.

In particular, subsection 39(1)(a) permits "an order that a person comply, or that a person's directors and officers cause the person to comply, with [the CMSA]". An order to comply necessarily implies that the person actually breached the CMSA – this implication is significant and is not directly implied by the other temporary powers. Further, this subsection is so broad that the steps to rectify the alleged "breach" could require the person to take steps that could irreversibly harm the person and his or her business going forward.

For these reasons, we believe that subsection (1)(a) should not be an eligible order under subsection (2) powers.

Extensions of Temporary Orders

Currently, subsection 39(3) allows the Tribunal to extend a temporary order if deemed necessary but it does not contain any requirement for the Tribunal to expedite a hearing to consider the subject matter of the underlying temporary order. This could effectively render "temporary" orders as not so temporary in practice. This ability to extend temporary orders for an indefinite length undercuts the compromise between responding immediately for the sake of public interest and procedural fairness for the person subject to the order.

The Cooperative System should take steps to ensure an expedited hearing whenever a temporary order is issued, to demonstrate a commitment that the orders made under this power are indeed temporary. We suggest the inclusion of language similar to section 127(7) of the Ontario *Securities Act* (the "OSA"), which states "[t]he Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period."

The inclusion of an objective timeframe in the CMSA by which a hearing must be commenced adds accountability to the Cooperative System and ensures market participants that the temporary order power will not be abused by the Authority as a means of exercising power notwithstanding the lack of sufficient evidence to substantiate the use of that power.

Requirement to Provide Records or Things

Subsection 27(2) requires, for the purpose of verifying compliance with the Act, a person to provide any "records or other things in their possession or control, including, except where prohibited by law, any filings, reports or other information provided to any other regulatory agency whether within or outside Canada".

In our view, this section is overly broad and does not give sufficient clarity on the Authority's expectations regarding recordkeeping. Lack of clarity in this regard burdens market participants with additional compliance risk and costs. We believe this section could be improved by mirroring the language in section 19 of the OSA which deals with record-keeping. We suggest language requiring persons to provide "books, records and other documents that are required to be maintained under securities laws".

Right to Apply for Review

Section 91 deals with the right to apply to the Tribunal for a review of the Chief Regulator's orders. Subsection (5) states that the "Tribunal may substitute its own determination of whether something could pose a systemic risk related to capital markets for that of the Chief Regulator only if the Chief Regulator's determination is unreasonable".

We do not understand why such a deferential standard of review is being prescribed. We view the Tribunal as effectively fulfilling the role of a securities commission vis-à-vis staff decision-making at the Chief Regulator's level. Consequently, the Tribunal should have the authority to review the Chief Regulator's decisions on a 'correctness' basis.

Directing Policy

Section 82 provides that the Council of Ministers may request that the Authority consult on a matter specified by Council and consider making regulations thereto; the Authority is required to report with its response to the Council within one year. This is a helpful mechanism that promotes political accountability by ensuring that policy initiatives are not solely within the ambit of the Authority's bureaucracy.

We wish to ensure that there is an expansive role for other stakeholders to bring policy issues to the attention of the Authority. Often, self-anointed "consumer advocates" gain traction with regulatory bodies – even being selected to join the sanctioned investor advisory panels that have the ear of the regulator. But to ensure that regulators receive a balanced perspective, including from those that actually serve consumers on a day-to-day basis, the Authority must provide an opportunity for industry stakeholders to raise policy issues in a format that will garner serious consideration.

We appreciate that the Participating Jurisdictions envision an annual solicitation of stakeholder feedback – essentially, a statement of priorities for the Authority. While this is a good start, something more analogous to section 82 for stakeholders would be preferable, particularly as there will be so much uncertainty at the launch of the Cooperative System.

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We look forward to working with the Participating Jurisdictions as they take the next steps towards the establishment of the Cooperative System. Should you have any questions, please do not hesitate to contact the undersigned, or Ed Skwarek, Vice President, Regulatory Affairs and Public Affairs at 416-342-9837 or eskwarek@advocis.ca.

Sincerely,

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