July 12, 2016

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Cooperative Capital Markets Regulatory System
c/o The Government of Canada
The Government of British Columbia
The Government of New Brunswick
The Government of Ontario
The Government of Prince Edward Island
The Government of Saskatchewan
The Government of Yukon

Dear Sirs and Mesdames:

RE: January 2016 Consultation Draft of the *Capital Markets Stability Act*

On behalf of the members of The Investment Funds Institute of Canada ("IFIC") we are writing to provide comments on the revised consultation draft of the federal *Capital Markets Stability Act* ("CMSA").

In our view the revised draft CMSA is a substantial improvement over the 2014 draft, particularly in the area of systemic risk. However, there remain some lingering concerns and issues with respect to the revised draft.

Our comments are, once again, provisional and incomplete because we can only assess the draft CMSA in the absence of the regulations on which the draft legislation relies. We will have further comments once the regulations are released, and recommend there be an additional opportunity to comment on the legislation and regulations together.

Systemic Risk

Despite the addition of procedural measures to narrow the CMRA's discretion, an entity facing a "systemically important" or "systemically risky" designation of its products or practices is not provided a right to be heard in advance of such designation, unlike a benchmark (section 18(3)) or an entity facing an urgent designation order (section 24(6)). It is not a sufficient remedy for firms impacted by a designation to "be heard" only through the regulation-making consultation process described in Part 6 of the CMSA. In addition, those firms do not have an express right of appeal of a designation by regulation, or any mechanism to pursue removal or withdrawal of a designation regulation that has been made. The CMSA should be amended to expressly include these rights and remedies.

To help firms understand the implications of designation, we also require clarity in the CMSA or its regulations as to whether a practice can be designated to be systemically risky if it occurs only once (or must there be a minimum occurrence frequency), and about the treatment of practices (such as leverage) that are contained within, or that are used by, products. If the practice were to be designated as systemically risky, would be product that uses it also be designated as systemically risky? There are many assurances provided in the Commentary which accompanied the revised draft CMSA. It would be beneficial if the participating jurisdictions would officially publish the relevant portions of the Commentary in the form of a Companion Policy to provide ongoing clarity and guidance.

Additional balance must be added to the CMSA's purposes of promoting the stability and integrity of Canada's financial system through the management of systemic risk related to capital markets and of protecting capital markets, investors and others from financial crimes (section 4). As the CMSA represents regulation of capital markets it should be administered in a way that fosters fair, efficient and competitive capital markets in which the public has confidence. We recommend that this additional purpose/objective be added to section 4 (*Purposes of the Act*) or section 6(2) (*Fulfilling mandate*) of the CMSA.

We also fully support the inclusion of the requirement for a five-year review of the CMSA to assess how it is fulfilling its purposes and to ensure the legislation remains current and effective. We have also recommended a similar five-year review requirement for the Capital Markets Act, with some form of coordination with the non-participating jurisdictions to ensure the securities legislation across Canada remains consistent.

Collection and Protection of Industry Information and Data

Section 9 of the CMSA provides authority to make regulations prescribing requirements for market participants to keep records and to provide records and information to the CMRA for its systemic risk monitoring activity and to allow it to conduct policy analysis. Section 10 provides the same authority to the Chief Regulator to order provision of records and information for the same purposes. Whether a requirement to deliver information is by regulation or by the Chief Regulator's order, the delivery of information is a burdensome and costly activity imposed on market participants. There must be a standardized process by which this activity is managed; one that addresses the industry's concerns and to which the industry has agreed. As such, we recommend consultations with the industry to develop the process for maintenance of information and its provision to the CMRA. This agreed process would coexist with the factors that are already set out in the CMSA, such as the extent to which it is practicable for the CMRA to obtain the records and information from another source.

Cyber-attacks are a major and growing risk for market participants and regulators. Given the CMRA's role to collect and analyze significant amounts of industry data we believe this places the CMRA at increased risk for cyber-attack. There is no information on measures being taken by the participating jurisdictions to ensure the CMRA's data operations are secure. As we have previously commented to the Ontario Securities Commission, to provide some measure of assurance to the U.S securities industry, the Securities and Exchange Commission ("SEC") recently agreed to conduct expert third-party testing and verification of its capabilities to ensure adherence with current service industry information standards and security protocols. The review also assessed potential risks arising from the SEC's sharing of data with other regulatory agencies. We encourage the CMRA to emulate this practice.

Investment Fund Manager Liability

The industry has significant concerns with the vicarious liability concept in section 37(2), making an investment fund manager a party to and fully liable for a violation committed by an investment fund, whether or not the investment fund is proceeded against. By contrast, a similar liability concept applicable to directors and officers in section 37(1) makes only those directors and officers who authorized, permitted or acquiesced in the contravention liable for violations committed by the company.

The language in section 37(2) is inappropriate for investment funds, and does not accurately reflect the structure of many funds and the entities that have responsibility. For some management functions many investment funds grant a sole directing and managing responsibility to the trustee or other service providers, with no legal responsibility on the investment fund manager for those functions. The apportioning of responsibilities by necessity must vary by investment fund and will be dictated by the terms of the fund's declaration of trust or other management agreement. For this reason, we recommend amending section 37(2) to include the same language as in section 37(1) such that the entity that authorized, permitted or acquiesced in the offending activity is liable for it.

The Way Forward

Although we have identified specific concerns and issues arising from the draft CMSA, our support for the overall objective continues.

We thank you for considering our comments, and look forward to continuing to work with the federal government and provincial securities regulators in the ongoing creation of the Cooperative Capital Markets Regulatory System for Canada.

We welcome the opportunity to discuss our concerns with you in more detail at your convenience. Should you have any questions or wish to discuss these comments further, please contact me directly, or my colleague Ralf Hensel, General Counsel, Corporate Secretary and Vice President, Policy at 416-309-2314 (rhensel@ific.ca).

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

Joanne De Laurentiis
President and CEO