

Toronto

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Montréal

**SENT BY E-MAIL** (commentonlegislation@ccmr-ocrmc.ca)

Ottawa

**To: The applicable legislative working groups of the Governments of Canada, Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon**

Calgary

New York

Dear Sirs/Mesdames:

### **Comments on the *Capital Markets Stability Act***

Osler, Hoskin & Harcourt LLP welcomes the opportunity to comment on the consultation drafts of the federal *Capital Markets Stability Act* (“CMSA”) and the Capital Markets Regulatory Regime (the “Regime”), more generally.

Osler continues to support the objectives of fostering efficient and competitive markets through capital market regulation on a national basis. We applaud the efforts of all jurisdictions participating in this initiative.

### **General Comments**

At the outset, we repeat our view that this legislation would be best considered and assessed simultaneously with the companion provincial legislation and all relevant legislative and regulatory proposals intending to form the totality of the Cooperative Capital Markets Regulatory Regime. As we have indicated in previous comments, until the full Regime – including the lines of accountability, the composition of the Board (which we understand will be responsible for making regulations) and the decision making process proposed for the Board and the council of Ministers – is fully articulated in legal instruments, we are not able to fully comment on the substance of the legal framework and its requirements. We therefore hope to have the opportunity to comment on *all* aspects of the Regime, including the CMSA, once the entire Regime has been proposed.

Similarly, we reserve comment on the structure and composition of the Tribunal. As will be seen in the substantive comments below, the Tribunal needs to play an important role in this Regime, to ensure fairness for affected parties, and to ensure the Act is being applied in a consistent and appropriate manner. We understand that the Tribunal members will have appropriate expertise to fulfill that mandate and will be selected through a merit-based selection process overseen by a nominating committee. We support this approach. It is critical to ensure that the Tribunal and its members are independent and that panels are appointed for each case to ensure the necessary expertise.

We will also welcome the opportunity to review and comment on the proposed regulations under the CMSA. We understand that, at this stage, none are being proposed but the regulations will eventually address issues that are central to the CMSA such as data collection. We will need to know what is contemplated in this regard.

## **Specific Comments on the CMSA**

Notwithstanding our concern that some of the proposed changes in the CMSA cannot be fully assessed in the absence of the important transitional provisions and other guidance, we have the following comments:

- **Defined terms should be used consistently in the provincial Capital Markets Act and the CMSA to reflect similar concepts.** As noted in our 2014 comment letter, the CMA and CMSA define key terms such as “security” and “trade” differently. Other definitions such as “derivative” in the CMSA rely on prescribed exceptions that have not been provided. The two statutes also use different terms that seem to relate to the same concept – for example, “clearing house” versus “clearing agency.” Absent a specific policy reason to use different terms or definitions – and an explanation of that policy reason – consistent terms and definitions should be used among the various statutes and regulations.
- **One of the most significant concerns is whether the current CMSA provisions are sufficient to maintain the confidentiality of information shared with foreign regulators and law enforcement agencies.** The CMSA essentially asks Canadian market participants to take it on faith that foreign agencies will maintain confidentiality. These provisions would be strengthened if the CMSA required the Authority to consider the confidentiality obligations of the foreign regulator and satisfy itself that the confidentiality will be maintained before sharing the information. Market participants require greater clarification of what is intended by these information sharing provisions and how they will be applied in practice, including what factors the Authority will consider.
- **Another major concern is that the CMSA, like the CMA, weakens the protections for compelled evidence in Part VI of the Ontario *Securities Act*.** It is not clear to us, for example, why the CMSA permits the authority to compel evidence relating to compliance with foreign capital markets legislation and, despite section 17, appears to permit the disclosure of that evidence to foreign agencies in some circumstances. It could significantly prejudice Canadians if they are compelled to answer questions under this Act (by virtue of the Evidence Acts or otherwise) that they would not be required to answer in the United States – and then be at risk that the answers could be shared with the United States Securities and Exchange Commission and/or Department of Justice. We are concerned that

there are insufficient safeguards in both the CMSA and the CMA to protect against the disclosure and subsequent use of the information.

- **Guidance should be provided on all aspects of the Authority’s discretion under the CMSA, including the discretion to designate products and practices as systemically important or risky.** We feel that the removal of the ability to designate entities as “systemically important” will give comfort to affected market participants. Emphasis on products and practices will likely reduce the perception that the power could have an adverse impact unfairly on one business in favour of another. However, most of the powers contemplated under the “systemic risk” aspect of the CMSA are new and untested. In particular, guidance should be provided on how the Authority will exercise its discretion.
- **The CMSA should ensure that requests for documents and information do not impose additional burdens.** We agree with the commentary accompanying the CMSA, which states that the Authority must consider whether information can be obtained through existing sources before requesting it directly from market participants. But this does not appear to track through the entire Act. For example, section 27 specifically permits a person designated by the Authority to require a person to provide information that has already been provided to another regulatory agency. Section 6(2) requires the Authority to coordinate its regulatory activities with other authorities to avoid imposing an undue burden. We think this section would be stronger if it explicitly requires the Authority to consider whether information can be obtained through existing sources before requesting it from a market participant.
- **It would be helpful to have clarification on what factors will constitute due diligence in Part 4 of the CMSA.**
- **The duty to assist, obstruction and preservation obligations are overbroad and unclear.** At a minimum, these obligations should be *explicitly* subject to the right of an affected party to mount a legitimate defence and rely on protected rights, including the right to assert solicitor-client privilege. These sections obviously cannot impose an obligation to assist the prosecution in a criminal case. And as we explained in our previous comment letter, the obstruction offence should not include vague circumstances in which a person “ought to know” that an investigation “is likely to be” conducted. The concept of “withholding” may – inadvertently or otherwise – impose positive obligations on persons whether or not they are potentially affected by the hearing, review or investigation. And these obligations may impose significant document preservation burdens given the CMSA’s six year limitation period. It is difficult to assess the potential consequences without understanding how the Authority intends to apply these

provisions. The breadth of these requirements is particularly concerning given the potential for severe consequences, including criminal liability for directors and officers under sections 48 and 49.

- **The CMSA includes few explicit rights of appeal.** Our understanding is that, unless otherwise stated, decisions of the Authority and Tribunal will be subject to judicial review in the Federal Court of Canada and based on a standard of review commensurate with other federal bodies exercising a power of decision. Please confirm this.
- **A person who pays an administrative penalty should not automatically be deemed to have committed a violation.** In our view, section 35(1) is undesirable and will frustrate the efficient administration of justice. We suggest that the payment of a fine voluntarily should be neither an admission nor denial of the allegation of wrongdoing that led to the delivery of the relevant Notice. It would be preferable to maintain the flexibility to allow market participants to settle alleged violations without admitting guilt. Given the breadth of some of the provisions, such as the duty to assist, it is difficult to know what may ultimately be alleged to be a violation. Moreover, given that a contravention of the Act could have administrative consequences for some (section 33) and criminal consequences for others (section 48), some market participants may be unable to settle out of concern that the deemed violation will prejudice others, such as their directors and officers (e.g., through section 49).
- **Director and Officer liability for contraventions.** Section 37 should specifically state that individuals receive the appropriate notice, and have a right to be heard by the Tribunal prior to being held liable for the contravention of a company they serve.
- **A person affected by a freeze order should be given notice and the opportunity to be heard before that order is extended.** We understand that the requirement for a hearing in section 40(6) means that affected persons will be given notice and the right to be heard at the hearing. In light of section 40(4), it would be helpful to include an explicit provision requiring that each affected party be given notice of a hearing contemplated in section 40(6).
- **The Court should have unfettered jurisdiction to revoke or vary a production order made on an *ex parte* basis.** Section 45(4) seems to limit the grounds on which the Court could do so. There may be other grounds such as material non-disclosure that would justify revoking the *ex parte* order.

- **We support the proposed five-year review of the CMSA.** We think this requirement will increase market participants' confidence in the CMSA.
- **Insider Trading, Tipping and Recommending.** As we have said in previous letters, it is crucial that concepts, approaches and specified prohibitions be consistent as between the CMSA and the provincial legislation. While we appreciate the distinction between provincial prohibitions and the criminal law mandate of the CMSA, we are concerned that wording that may be the result of drafting protocols (eg. "it is necessary in the course of their business" vs. the more considered provincial formula "in the necessary course of business") may result in undesirable inconsistencies in judicial interpretations. We also believe that the "recommending" offence in section 57(6) should be subject to the "necessary course of business" exception that is included in the "tipping" offences in sections 57(4) and 57(5). This would be consistent with the approach that Ontario adopted recently when it amended the Ontario Securities Act to include a "recommending" prohibition, and would address scenarios where issuers or security holders have a business need to recommend or encourage private trades in securities while in possession of material undisclosed information (e.g. in the private placement context).

### **Proposed Enforcement and Adjudication Protocols Need to Be Clarified**

The proposed Regime includes significant changes in the enforcement area, such as creating a common database of information obtained from surveillance, complaints, compliance reviews and administrative investigations for use across the country.

Some of these changes are understandable to enhance and improve the Authority's enforcement capabilities but, as we explained in our initial comment letter, market participants need clarity to better understand how the Authority will collect, store and share information in practice. We are concerned that important rights of affected persons are at risk of being diminished by some of these changes. We are therefore reiterating our request for greater guidance on how these powers will be used, and an opportunity to engage with appropriate persons to exchange views and consider ways that concerns can be addressed.

### **Selecting the Right Leaders and their Timely Appointments**

Osler repeats that in our view, the proposed design of the Regime, including the structure of the Regulatory Divisions and a separate Tribunal, all supervised by an expert Board is a sound foundation for this regime. We support the use of the "Policy Forum" as a means to enable disparate parts of the Authority to have face-to-face interactions, provided that the Policy Forum in no way compromises the independence or integrity of the Tribunal.

These and other creative mechanisms will be necessary to ensure consistency among those exercising a “public interest” jurisdiction on behalf of the Authority. We recognize that the legal framework for the organizational governance protocols is not currently available as it is intended to be contained in a separate instrument (or series of instruments).

We repeat that it will be essential to select and appoint appropriate persons to key governance and leadership positions within the Regulatory and Tribunal divisions, including the Board members, the Chief Regulator, Chief Adjudicator and Deputy Regulators. Having the right people managing, administering and performing these important functions is crucial. Many in the legal community and market participants remain confused about whether the CMRA will simply be a merger of existing regulators, or whether the articulated vision of a fresh regulatory authority with a new, harmonized approach to regulation of the Canadian capital markets can be realized. We continue to urge the participating jurisdictions to engage in a rigorous exercise to identify the strongest, most effective leaders of the Authority, including the Regulatory Division and the Tribunal, at the earliest opportunity. The sooner those key individuals are identified and given an opportunity to meaningfully contribute to this project at the integration stage, the sooner and more effectively a sustainable, positive culture can be cultivated and enhanced within the new organization.

### **The Participating Jurisdictions Should Ensure that Investors, Market Participants and their Legal Advisors have Engagement and Ongoing Input**

We thank Finance Canada for meeting with us to discuss the changes to the CMSA. It was an informative meeting and gave us a different perspective and clarity on many of our questions and concerns.

We note that a number of industry groups, such as The Canadian Bankers Association and The Investment Industry Association of Canada, have commented on the CMSA and the proposed Regime as a whole. We urge the promoters of this legislation and the companion legislation to give thorough and fair consideration of their comments and concerns, since market participants will be the ones who will bear the cost and other burden of complying with the legislative and regulatory requirements proposed.

It is critical that meaningful dialogue, including in-person meetings and consultations, be encouraged and facilitated before the legal framework establishing the Regime is settled. As this process evolves, we hope that there will be greater opportunity for more direct dialogue and consultation with market participants, investors and legal professionals on the proposed approach. Osler suggests the establishment of an advisory body made up of knowledgeable legal experts to assist with the development and implementation of the legal framework.

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We thank you again for the opportunity to provide comments. We look forward to providing our further comments on all aspects of the Regime once the entire Regime has been proposed.

We would be pleased to meet with you or your staff to discuss any of our comments, and would also be pleased to contribute in any way we can to the ongoing debates and discussions as you work to implement the Regime. If you would like to discuss this matter further, please contact one of J. Mark DesLauriers at 416.862.6709 or [mdeslauriers@osler.com](mailto:mdeslauriers@osler.com); Lawrence Ritchie at 416.862.6608 or [lritchie@osler.com](mailto:lritchie@osler.com); Kashif Zaman at 416.862.6804 or [kzaman@osler.com](mailto:kzaman@osler.com); Blair Wiley at 416.862.5989 or [bwiley@osler.com](mailto:bwiley@osler.com); or Robert Carson at 416.862.4235 or [rcarson@osler.com](mailto:rcarson@osler.com).

Yours very truly,

***“Osler, Hoskin & Harcourt LLP”***

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