IIACACCVM
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Capital Markets Act Consultation
Capital Markets and Agency Transformation Branch
Ministry of Finance
Frost Building North
95 Grosvenor Street, 4th Floor
Toronto, ON M7A 1Z1
CMA.Consultation@ontario.ca.

Dear Ministry:

**Re: Capital Markets Act *(CMA)***

The Investment Industry Association of Canada (IIAC) is the leading national association representing investment firms that provide products and services to Canadian retail and institutional investors. Our members manufacture and distribute a variety of securities such as mutual funds and other managed equity and fixed income funds and provide a diverse array of portfolio management, advisory and non- advisory services. Our members also trade in debt and equity on all Canadian marketplaces, provide carrying broker services and underwrite issuers in public and private markets. They operate in Canadian and global capital markets.

The IIAC appreciates this opportunity to comment on the CMA. Our comments on several of the questions posed are set out below in chronological order of questions.

**Independent Review Committee**

Q. 2: What would be the impact of including the independent review committee (established under the terms and conditions of exemptive relief received by the fund) of a non-reporting issuer investment fund to the definition of "market participant"?

The addition of the independent review committee (IRC) of a non-reporting issuer investment fund to the definition of "market participant" could result in candidates for membership on an IRC becoming concerned about potential additional liability.

If potential IRC members are concerned about liability and such concerns cannot be alleviated through indemnities and insurance (which could increase in cost as a result of the inclusion), it could become more difficult for private funds to fill these positions. If an IRC cannot be constituted, then the fund would not satisfy the conditions for the specified exemptive relief, and

the fund could not engage in activities which have been determined by the fund's advisers to be desirable (including inter fund trades).

Under Section 6.1 of National Instrument 81-107 *Investment Funds* (NI 81-107), the commentary notes that the instrument sets out the expectations regarding the records the investment fund must keep of any inter-fund trades made in reliance on the exemption in the instrument, which must comply with certain recordkeeping requirements applicable to registered firms set out in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. In addition, as the investment fund manager of the fund would be a registrant (and thus a "market participant"), we believe that the OSC would already have alternative avenues to obtain copies of books and records of the IRC if that is one of the goals of the proposed changes to the CMA. If necessary, the scope of the records provisions elsewhere in NI 81-107 can also be explicitly extended to IRCs of non-reporting issuer investment funds as an alternative to including them in the definition of "market participant".

**OTC Derivatives**

Q3: Is it appropriate to have an OTC derivatives-specific registration rule to address the regulatory gap that exists for derivatives firms that are not able to rely on a registration exemption for certain specified financial institutions in the CMA?

The IIAC believes that including an OTC derivatives-specific registration rule is necessary and critical to supporting efficient functioning in our OTC derivatives markets.

Given the global nature of OTC derivatives markets, many of our members' counterparties to these transactions are foreign market participants. These foreign participants provide important price discovery, liquidity and trade execution to our members and their clients. We are concerned that imposing registration requirements on foreign market participants, such as foreign derivatives dealers, can make transacting with Canadian market participants too costly or burdensome for these foreign firms. This could curtail their participation with Canadian market participants to the detriment of Canadian investors and markets.

The CSA has undertaken prior consultation and work in this area. Notably, the CSA's *Derivatives Registration Rule* ("NI 93-102") allows for several registration exemptions including for certain derivatives dealers that have their head office or principal place of business outside of Canada. We believe the CMA should align with NI 93-102 and provide a statutory exemption from registration for foreign derivatives dealers.

Further comments are as follows:

- additional regard should be given to differentiating between exchange-traded and OTC derivatives and as to whether a provision of the Act applies to a particular class of derivatives

- the applicability of Section 61 of the CMA pertaining to the completion and filing of a prescribed disclosure document for a "designated derivative" should be restricted to exchange- traded derivatives, with details of disclosure requirements set out in the applicable rule. These disclosures may not be appropriate for all derivative transactions,

particularly OTC derivatives transactions. Such disclosures are not warranted, would represent a departure from international practices and risk market disruption

- Part XIII of the CMA has various portions to be carried forward in OSC rules. Various aspects of derivatives trading have now been addressed through national instrument, with which OSC rules should align

**Obstruction**

Q4: Do the changes to narrow the scope of the obstruction offence address concerns about creating positive obligations to provide information to the OSC? (See section 110)

The IIAC is pleased that the obstruction offence has been modified from the 2015 CMA Draft (developed as part of the Cooperative Capital Markets Regulatory System initiative) to remove the prohibition against withholding any information, record, or thing.

**Compelled Evidence**

Q8: Is the scope of the OSC's ability to disclose compelled evidence without a Tribunal order or a Chief Regulator order (following notice and an opportunity to be heard) in subsections 148(2) and (3) too broad or too narrow?

> For example, should the OSC be permitted to disclose compelled evidence without a Tribunal order or a Chief Regulator order "in connection with an investigation under section 146" instead of "in connection with the examination of a witness under the CMA"?" (See section 148(2) Disclosure in investigation or proceeding and section 148(3))

The scope of the OSC's ability to disclose compelled evidence pursuant to subsections 148(2) and 148(3) should be limited to circumstances where it determines the disclosure is in the public interest which should include considerations of procedural fairness. Any disclosure made pursuant to these sections should, in turn, be subject to statutory obligations of confidentiality.

In addition, in light of the proposed scope of the OSC's ability to disclose compelled evidence without an order, the role and use to be made of subsection 148(4) is unclear.

**Periodic Reviews**

Q9: Is the scope of periodic reviews appropriate? Should the proposed draft legislation include further details about how the review would be conducted? (See section 276)

The scope of periodic reviews should include a review of the operations of the Capital Markets Tribunal, Chief Regulator, the Commission and its staff and their effectiveness in fostering globally competitive, efficient, and compliant capital markets in Ontario. Transparency in the process for review would instill public confidence and is in the public interest.

**Consultation Periods**

Q.10: Are there circumstances where a minimum consultation period of 60 days would be inappropriate? If so, please explain. Are there particular factors the OSC should consider in determining when a consultation period should be longer than 60 days?

Reasoned and constructive feedback to draft legislative and regulatory proposals help to achieve informed, proportionate, and effective legislation and regulation. A minimum consultation period of 60 days may provide insufficient time to meaningfully consider a proposal.

**Non-Compliance Orders**

Q11: Will these new tools allow the OSC to effectively encourage compliance without unduly burdening market participants**?** (See section 125)

We have some concern with the breadth and ambiguity of section 125(1) of the CMA. As currently drafted, the Chief Regulator has, in essence, broad, unfettered discretion, to make multiple orders, including cease trade orders, without prior notice, if satisfied that an issuer has "not complied with capital markets law".

No materiality threshold has been stipulated for non-compliance. In addition, it is not stipulated that any order made under this provision must be in relation to and proportionate to the non-compliance. Accordingly, a failure to strictly comply with a more nominal procedural aspect of capital markets law, including one that has no bearing on whether an issuer's securities should be permitted to be traded during the period of that non-compliance, could result in a cease trade or denial of exemption where unwarranted.

We recommend that the CMA codify the parameters under which the Chief Regulator may exercise the discretion afforded by this section. Those parameters should in turn state that any order made must be proportionate to the non-compliance**.**

Similarly broad, unfettered discretion is granted to the Chief Regulator pursuant to s. 53 of the CMA, which states:

> Before issuing a receipt for a preliminary prospectus, a prospectus or, if a receipt is required by the rules, a prescribed offering document, the Chief Regulator may impose additional restrictions, conditions and filing requirements if the Chief Regulator considers that it is in the public interest.

In contrast, s. 55 of the Securities Act, R.S.O. 1990 Chapter S5 ("OSA") states:

> The Director shall issue a receipt for a preliminary prospectus forthwith upon the filing thereof.

Similarly, s. 61(1) of the OSA states the Director shall issue a receipt for a final prospectus unless it appears to the Director that it is not in the public interest to do so. Section 61(2) of the OSA sets out instances where a Director shall not issue a receipt for a prospectus or an amendment to a prospectus. Sections 63(4) of the OSA states that where a summary statement is

filed with a prospectus, the Director shall not issue a receipt for the prospectus if it appears that the statement does not comply with applicable regulation.

It is therefore recommended that s. 53 of the CMA be removed, or alternatively, amended to reflect analogous provisions of the OSA.

Similar concerns as stated above arise with respect to s. 56 of the CMA which states:

> 56(1) If the Chief Regulator considers that a preliminary prospectus does not comply with the requirements under capital markets law with respect to its form and content, the Chief Regulator may, without giving an opportunity to be heard, order that the trading activities permitted under section 55 cease.
>
> (2) The order remains in force until a revised preliminary prospectus satisfactory to the Chief Regulator is filed and sent to each person who is shown, on the record that is maintained in accordance with the rules, to have received the defective preliminary prospectus.

Section 56(1) of the CMA is inconsistent with both s. 50(1) of the CMA and s. 54(1) of the OSA which refer to a preliminary prospectus being in 'substantial compliance' with capital markets law or Ontario securities law respectively.

Given the drastic consequences to both investors and issuers that would result from such a cease trade order, we recommend that the bar for the Chief Regulator's exercise of this discretion be much higher such as a failure to comply that results in the preliminary prospectus containing a "misrepresentation" as defined under the OSA.

**Crypto Assets**

Q. 14: Is the definition of crypto asset appropriate? Is the scope of the broader designation powers and rule-making powers appropriately defined? Will these powers negatively impact innovative business models? Are investor protection considerations appropriately addressed?

While we recognize that drafting a regulatory framework around crypto assets is challenging, we do not believe the proposed definition of crypto asset is appropriate for use at this time. We understand the platform nature of the legislation and the need for flexibility in a rapidly evolving market, as well as the fact that crypto assets can be securities, derivatives, or both. However, we note that there are already definitions widely in use by Canadian securities regulators that have been acceptable to market participants.

For example, Joint CSA/IIROC Staff Notice 21-329 *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements* (**Staff Notice 21-329)** uses the term "Crypto Contract" to mean an instrument or contract involving crypto assets. The term "Crypto Contract" is also used in recent exemptive relief granted to crypto platforms, the most recent being *Bitbuy Technologies Inc.* (2021), 44 OSCB 9730. In the decision, the term "Crypto Contract" refers to instruments or contracts involving crypto assets where a user's contractual right to the crypto asset may itself constitute a security and/or a derivative. Interim exemptive relief was granted to the platform based on a number of representations and conditions, including that the Crypto Contracts to purchase, sell and hold crypto assets to be entered into with clients would involve crypto assets such as bitcoin, ether and anything commonly considered a crypto

asset, digital or virtual currency, or digital or virtual tokens, that are not themselves securities or derivatives (emphasis added). The foregoing was referred to in the decision as a "Crypto Asset". The definition of "crypto asset" used in the draft CMA is not used in the decision.

It may already be difficult for market participants to comply with the existing complex crypto assets rules and regulations across the country. It could thus be disruptive if new or alternative definitions or designations were intended to be introduced in only one province at this time. The IIAC believes that regulatory harmonization of these rules, including baseline definitions for crypto assets across the country, is desirable for both domestic and international participants in the crypto space.

We believe investor protection considerations will continue to be addressed through the OSC's enforcement proceedings against non-compliant crypto platforms.

**Promotional Activities**

Q.17: Is the scope of the definition of promotional activity appropriate? Do the elements outlined in the prohibition against making false or misleading statements about public companies capture the problematic behaviour seen in "short and distort" and "pump and dump" schemes? What types of activities should be exempt from this prohibition? (See section 94(1) False or misleading statements, information about reporting issuers, etc.)

The CSA has recognized an increase in promotional activity viewed as non-compliant with securities law requirements (CSA Staff Notice 51-356 Problematic promotional activities by issuers, CSA Notice, (2018) 41 OSCB 9357).

The problematic behaviour may stem from those who are not employed by a registrant and/or are otherwise unregistered but are in the business of providing, or choose to provide, some form of view or analysis of securities in various forms (e.g., newsletters) and through various means (e.g., social media). Investor protection may be enhanced if certain basic disclosures in these reports provided by these authors were mandated by statute including:

1. Disclosure of any conflicts of interest including disclosure of whether the author:
    - Directly or indirectly holds a short or long position in the security.
    - Is compensated, directly or indirectly, by other parties, including by subscribers or advertisers, for this research.
2. Disclosure of all supporting facts, research and sources or a declaration that none are available.
3. A declaration that the information provided is true, to the best of the author's knowledge.
4. Contact information of the author(s).

Beyond a review of regulations regarding short selling, "short and distort" schemes require dedicated regulatory intervention, enforcement action and statutory remedies requiring perpetrators to compensate investors harmed by their abusive conduct.

**Orders: Production Orders (section 157-162, 166), Order Prohibiting Disclosure (section 164), Self-Incrimination (Section 169), Assistance Order (Section 170), Offences and Penalties (Section 171)**

Q19: Is the scope of entities subject to these orders appropriate? Are there additional entities that would be able to produce information that would assist in an OSC investigation? Are the circumstances in which the OSC can apply to court for these orders appropriate?

Subsection 163(1) should be amended so that all preservation and production orders must (as opposed to may) exclude privileged communication between a lawyer and their client.

Subsection 163(2) should be amended so that a peace officer or person investigating an offence must make an application to vary an order when advised that the person or entity ordered to preserve or produce the records require additional time to identify, locate or produce the records.

A condition prohibiting the disclosure of the existence or contents of a preservation demand in subsection 154(5) increases the risk that records, or data will inadvertently not be preserved. As currently drafted, it is unclear as to whether any condition prohibiting the disclosure of the existence or contents of a preservation demand or order requires an application pursuant to section 164, which should be the case.

Applications for review of production orders pursuant to section 166(1) should be made orally or in writing, at the election of the applicant.

All preservation and production orders should be subject to the principle of proportionality.

**Limitation Periods**

Q20: Are there potential circumstances where the above-mentioned limitation periods would not apply to OSC collections actions or would be inadequate? (See sections 263(2) Extension by agreement and 148(2) and (3) Disclosure in investigation or proceeding)

The IIAC supports proposed subsection 263(2) that allows the OSC and respondents to mutually agree to extend the limitation period.

Please see prior comments regarding subsections 148(2) and 148(3).

**Summons**

Q21: Does this provide sufficient clarity that compliance with a summons would not be the basis of contractual liability? (See section 248(2))

We note that subsection 248(2) of the CMA is substantially similar to section 154 of the *Securities Act*. There is a great deal of overlap between subsections 248(1) and (2) and it is unclear as to what subsection 248(1) intends to address over and above the current section 154 that is now reflected to subsection 248(2).

We recommend that subsection 248(1) be removed and subsection 248(2) should simply expand disclosure made to the "Commission or a trade repository" to also include the "Chief Regulator or to anyone acting under the authorization of the Chief Regulator".

**Aiding, Abetting and Counselling**

Q22: Do these new prohibitions raise concerns for market participants? Are there additional prohibitions that should be included in the CMA? (See sections 114 and 115)

The IIAC supports the inclusion of proposed sections 114 and 115 with respect to prohibitions from doing anything for the purpose of aiding, abetting, or counselling a contravention of capital markets law and from conspiring with others to contravene capital markets law.

**Frontrunning (s. 103 and 104(7)**

Q23: Are the defences to front-running described in 104 appropriate? Is there any other legitimate activity that appears to be inadvertently restricted in the front-running offence? (See sections 103 Front-running and 104 Defences)

Sections 103 and 104 do not reflect front-running or its defences. Rather, sections 103 and 104 conflate front running with concepts of insider trading including by mutual fund insiders.

Front-running and its defences are set out in UMIR 4.1 (1) and (2). In addition, UMIR Policy 4.1 Part 2 states:

> In order to constitute frontrunning contrary to Rule 4.1, the person must have specific knowledge concerning the client order that, on entry, could reasonably be expected to affect the market price of a security. A person with knowledge of such a client order must ensure that the client order has been entered on a marketplace before that person can:
>
> - enter a principal order or non-client order for the security or any related security.
> - solicit an order for the security or any related security; or
> - inform any other person about the client order, other than in the necessary of course of business.
>
> Trading based on non-specific pieces of market information, including rumours, does not constitute frontrunning.

**Confidentiality**

Q24: Are there additional persons that the Chief Regulator should not be able to order a person to not communicate with about an investigation that need to be included in the legislation? Should the Chief Regulator be able to prohibit disclosure to an insurer or insurance broker when the

disclosure may compromise the investigation? (See section 147 Order prohibiting disclosure of investigation)

We suggest that that the confidentiality exceptions be expanded beyond lawyers and insurers to also include:

a) "a prudential financial regulatory authority"

This addition is required in order to clarify that disclosure of investigation orders to Office of the Superintendent of Financial Institutions and equivalent regulators (in Canada or elsewhere) is permitted.

b) "Any other person where the disclosure is necessary to comply with Part XI", or for "sound corporate governance"

This addition is required in order to facilitate disclosure to internal compliance and governance officers and/or to the extent that disclosure is otherwise required to comply with investigation requests/orders.

c) the company's board of directors and senior management

The IIAC supports this confidentiality exception (but note that it may not be necessary if the addition proposed in b) above is adopted in its entirety).

We suggest that the reference to 10 days' notice in paragraph 1 of subsection 147(4) be shortened to two business days. While we recognize that the authorized investigator may waive the notice period, if that does not occur, 10 days is unduly long.

We also suggest that paragraph 3 of subsection 147(4) be revised to remove the requirement to obtain written acknowledgement from the insurer. This could be unduly burdensome and at times, challenging to obtain on a timely basis.

**Procedural Fairness**

Q25: Should the CMA include additional procedural fairness requirements for automatic reciprocal orders and settlements? How should the OSC make notice of automatic reciprocal orders and settlements accessible to the public? (See sections 117 Automatic effect of certain order of other provinces and territories and 118 Automatic effect of certain settlement agreements of other provinces and territories)

~And~

Q26: Should any further procedural fairness safeguards be added to the legislation with respect to streamlined reciprocation of orders and settlements? (See sections 116 (3) No hearing if prior conviction, etc., 116 (4) No hearing if prior order of certain regulators, and 116 (5) No hearing if prior settlement agreement with certain regulators)

In the IIAC's view, orders of foreign courts and regulators (outside of Canadian provinces) should be excluded streamlined reciprocation. A streamlined reciprocation power provides foreign courts and regulators with an improper influence over Ontario securities enforcement. The current process for reciprocation of court and foreign orders currently found under subsection 127(10) of the *Securities Act*, including a requirement that there be a finding that adopting the order is in the public interest, should continue to apply. The hearing right should also be used to address the issue of the degree of fairness provided in a foreign jurisdiction. The Commission should use the same standards courts use to decide whether to enforce a foreign judgment.

There should remain an opportunity to be heard before the Commission regarding reciprocation of orders by a capital markets regulator of another Canadian province or territory. Market participants at a minimum should have the ability to challenge the scope of the reciprocal jurisdiction and whether the content of the reciprocal order is identical to the underlying order.

**Whistleblower Protection**

Q27: Does this new provision provide adequate protection from disclosure of information related to a whistle-blower's identity? (See section 249 Whistle-blower protection*)*

We support the inclusion of subsection 249(3) outlining that a whistle-bower is a compellable witness to allow respondents to make full answer and defence.

We question the need for the inclusion of subsection 249(4) which states that "No witness in a proceeding under this Act may be examined respecting the witness's knowledge or belief about the existence or identity of a whistle-blower." If the whistle-blower can be called as a witness under subsection 249(3), thereby revealing his or her identity, this subsection is unnecessary.

**ETFs**

Q. 28 Are there any ETF statutory causes of action options that would be more appropriate for Ontario capital markets than the two identified above? If so, please identify and explain.

Q. 29 Of the two options identified above, please identify which option you think would be more appropriate for Ontario capital markets and explain why.

Q. 30 If Secondary Market Rights supplemented by Prospectus Rights would be more appropriate for Ontario capital markets, please identify the Prospectus Rights that persons or companies who purchased ETF units on an exchange should be deemed to have and explain why.

Q. 31 Should any amendments apply to at-the-market distributions (as defined in section 1.1 of National Instrument 44-102 *Shelf Distributions*)? If so, please explain.

It is important that issuers, dealers, and investors have certainty with respect to the rights that apply in the event of a misrepresentation in a prospectus. From an investor perspective, we certainly appreciate the value of fair and equal treatment amongst those who purchase ETF units

on a marketplace, regardless of whether the counterparty to the trade happens to have sold creation units or previously issued units.

We are of the view that secondary market liability is appropriate redress for purchasers of ETF units given the fact that units are purchased on an exchange, and thus investors are placed on the same footing as other investors purchasing securities of "operating companies" on the secondary market at market prices. We would be pleased to engage in further discussions and review any additional published studies or consultations examining this issuer further.

**Cost/Benefit of CMA**

**Q 32.** What are the anticipated costs and benefits to market participants, stakeholders, or the public of replacing the *Securities Act* and *CFA* with the CMA.

The IIAC is supportive of flexible regulation that permits staff to move quickly when needed to address investor protection concerns in the marketplace. We also support updating legislation such as the *Commodity Futures Act* (**CFA**) to reflect current practices and regulatory expectations. We query, however, the tangible benefits at this time of creating an entirely new piece of legislation to accomplish these purposes. We believe it is possible to update the current *Securities Act* and accompanying regulation and rules to incorporate the relevant provisions of the CFA and update other provisions without the market disruption that may be caused by new legislation.

The Consultation Commentary notes that the government's goals are to minimize the impact of transition on market participants and their businesses. In order to consider fully whether any new provision in the CMA will have the intended effect, it will be necessary to review the section together with any gap-filing or transition rules, to ensure the intentions behind the CMA can be fulfilled without unintentionally changing material rights or obligations. Any new legislation or rule requires registrants to review their internal policies and procedures and, potentially, client documentation, for references to provisions that have been amended and update them accordingly, which could be a costly exercise. Given the government's focus on burden reduction, we would encourage the Ministry to pursue many of the laudable goals of the Taskforce through alternative means, including any necessary amendments to existing legislation, before replacing the *OSA* altogether.

Thank you for your consideration. The IIAC would be pleased to respond to any questions that you may have in respect of our comments.

Sincerely,

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