DAVIES

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BY EMAIL

Ministry of Finance (Ontario)
Email: CMA.Consultation@ontario.ca

Dear Sirs/Mesdames:

Re: Consultation – *Capital Markets Act*

I. Introduction and Executive Summary

We are writing in response to the request for comment by the Ministry of Finance (Ontario) (the "**Ministry**") with respect to the consultation draft of the *Capital Markets Act* (Ontario) (the "**Draft CMA**") and the accompanying consultation commentary (the "**Commentary**"). Our submissions are set out below, beginning with comments on the Draft CMA and followed by responses to certain of the consultation questions set out in the Commentary.

As a preliminary matter, we object to the adoption of the Draft CMA in its entirety. The recommendation to replace the *Securities Act* (Ontario) (the "**Ontario Act**") and the *Commodity Futures Act* (Ontario) (the "**CFA**") with the Draft CMA appeared for the first time in the final report of the Capital Markets Modernization Taskforce (the "**Taskforce**") published in January 2021 (the "**Taskforce Report**").[1] Among other things, the Taskforce Report stated that implementing the Taskforce's recommendations would require new, modernized legislation that reflects significant policy changes and that is flexible enough to respond to future capital markets issues in a timely manner. With all due respect to the Taskforce, we disagree with the premise that new legislation is necessary to implement its recommendations and with the notion that additional regulatory flexibility is required.

The Ontario Act has been amended over decades to respond to the ever-shifting realities of our capital markets. There is no reason that the recommendations in the Taskforce Report that warrant adoption could not similarly be incorporated into the Ontario Act. The only circumstance in which the adoption of an entirely new piece of securities legislation would be warranted is in connection with the introduction of the Cooperative Capital Markets Regulatory System (the "**CCMR**"), given that new provincial and territorial legislation would be a necessary compromise with other participating jurisdictions. With the

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1 Given the significance of such a recommendation, we were surprised that the Taskforce chose not to include the adoption of the Draft CMA among the 47 proposals on which it sought comment in its consultation report published in July 2020 (the "**Consultation Report**").

CCMR no longer a realistic possibility in the near term, we do not believe that there is a benefit that would justify the time, expense and uncertainty that the adoption of the Draft CMA would necessarily involve. In this regard, the adoption of the Draft CMA would be antithetical to the Ministry's stated goal of reducing unnecessary regulatory burden in Ontario's capital markets. In our view, it is difficult to envision anything more unduly burdensome than for market participants to have to spend time and money familiarizing themselves and complying with a brand new piece of legislation where there is nothing wrong with the existing legislation.

We have serious concerns with the assertion that the adoption of the Draft CMA is necessary in the interests of increased regulatory flexibility. In our view, the platform approach taken in the Draft CMA affords the Ontario Securities Commission (the "**Commission**") – and particularly the Chief Regulator – nearly unfettered discretion and facilitates legislation by regulatory fiat with limited political accountability. It also undermines one of the key features of a sound capital market, namely stability and predictability in the legal and regulatory regime that allows for transaction planning. With several key sections of the law proposed to be left to rules (some of which, we note, do not yet exist), there is significant risk of instability with the potential for substantive changes to be effected through a process subject to no more discipline than a 60-day request for comment.

The introduction of the Draft CMA should not be used as an opportunity to introduce major substantive changes to securities law unless the adoption of such changes is preceded by a thorough public consultation and study of the changes. The long established process of the Commission and the Canadian Securities Administrators (the "**CSA**") in this regard ought to be followed here. Were that process followed, each change would be identified in a request for comment, its implications explained and its necessity justified. Comment would be sought from the broad community in a process that is often iterative and that sometimes, justifiably, extends for months or years.

Several of the concerns identified in our comments below flow from the fact that the Draft CMA is modeled on the *Securities Act* (British Columbia) (the "**BC Act**") rather than the Ontario Act. The Ontario Act governs the largest portion by far of Canada's capital markets, and Ontario has a vigorous and involved securities bar and investment banking community, both of which have contributed over the years to a robust dialogue on the evolution of securities legislation. The choice to model the Draft CMA on the legislation of British Columbia, where the capital market is comprised of smaller issuers and which has historically faced very different securities regulatory issues than Ontario, is difficult to defend on a principled basis. While this approach may have been defensible to some extent in the context of the CCMR, there is no longer any compelling justification to use the BC Act as the precedent for Ontario legislation.

Moreover, we are not aware of any thorough public consultation process having been undertaken in British Columbia prior to the adoption of significant amendments to the BC Act in early 2020. Given the circumstances, the reasons for and impact of the changes made to the BC Act should be carefully studied and understood before they are incorporated into Ontario law.

By proceeding on the wrong foot from the outset, the drafters of the Draft CMA will impose on Canada's key financial and capital markets legislation that will be disruptive to well-established transaction

mechanics and compliance practices, and will force market participants to incur significant and unnecessary costs associated with adapting to a new regime.

II. Comments on the Draft CMA

A. Part I – Interpretation

(i) Section 1 – Purposes of Act

Section 1.1 of the Ontario Act was recently amended to include fostering capital formation among its purposes.[2] In our view, this amendment was neither necessary nor desirable. Accordingly, we propose that it be removed from section 1 of the Draft CMA.

For years, the twin purposes of the Ontario Act were to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.[3] In addition to these purposes, section 2.1 of the Ontario Act identifies seven "fundamental principles" that the Commission must consider in fulfilling its mandate. Those principles, which have been incorporated into section 2 of the Draft CMA, include that business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized, and that innovation in Ontario's capital markets should be facilitated. Accordingly, when viewed through the lens of the fundamental principles elucidated in section 2 of the Draft CMA, the Commission's mandate is sufficiently broad to provide it with the appropriate degree of authority to implement rules and policies that foster capital formation in Ontario's capital markets without the need to include it as a standalone purpose of the Draft CMA.

Although there are circumstances in which fostering fair and efficient capital markets and protecting investors can be furthered simultaneously, these goals can (and often do) pull in opposite directions. Some initiatives that enhance investor protection necessarily come at the expense of efficiency in the capital markets. Conversely, some initiatives that enhance market efficiency may be offset by a slight reduction in investor protection. However, the fact that these goals sometimes oppose one another is positive rather than negative, as this helps to prevent the Commission from straying too far in either direction when crafting rules and policies. Including fostering capital formation among the purposes of the Draft CMA could have the unintended effect of upsetting this delicate balance and making it more difficult to assess whether, on balance, rules and policies are in the public interest. Worse still, doing so could result in the Commission being compelled to prioritize quantifiable benefits associated with capital markets growth at the expense of unquantifiable, but extremely important, rules and policies that are necessary to protect Ontario's capital markets.

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[2] We commend the Ministry for its decision not to expand the Commission's mandate to include fostering competition in the markets, as was recommended in the Taskforce Report.

[3] In 2017, the Ontario Act was amended to add a third purpose, namely to contribute to the stability of the financial system and the reduction of systemic risk.

(ii) Section 3 – Definition of "related financial instrument"

The definition of "related financial instrument" compresses the two definitions in the Ontario Act of "related derivative" and "related financial instrument" into a single definition. We do not object to such a change. However, we note that the concept of materiality has been removed from clause (a) of the definition. No explanation for this change is included in the Commentary. We would propose that clause (a) be revised as follows: "another security or a derivative or other contract or instrument whose market price, value, delivery obligations, payment obligations or settlement obligations are, *in a material way,* derived from, referenced to, or based on the market price, value, delivery obligations, payment obligations or settlement obligations of the security…".

(iii) Section 3 – Definition of "reporting issuer"

The definition of "reporting issuer" does not address all circumstances in which an issuer may have become a reporting issuer. For example, under the Ontario Act, an issuer may have become a reporting issuer by virtue of the listing and posting for trading of its securities on a recognized exchange. Accordingly, the definition of "reporting issuer" in the Draft CMA should be amended to preserve the reporting issuer status of any issuer who is, at the effective time of the Draft CMA, a reporting issuer under prior legislation and would not otherwise be deemed a reporting issuer under the Draft CMA.

In addition, the definition of "reporting issuer" includes a clause that is designed to capture successors to an existing issuer's reporting obligations. Generally speaking, this "successor issuer" clause covers an exchange of an issuer's securities for the outstanding securities of a second issuer (that was a reporting issuer at the time of the exchange) in connection with a restructuring transaction in which it is the first issuer, not the second issuer, whose existence continues as the publicly held company. We note that the Draft CMA proposes the broadest formulation for this clause under current securities legislation. While preferable to the successor issuer clause of the Ontario Act (which may be too narrow in some circumstances), we are concerned that the proposed formulation is overly-broad in certain circumstances. It may technically deem a wholly-owned subsidiary within a corporate group to be a reporting issuer as a consequence of security exchanges made for internal reorganizational purposes *in connection with* a business combination. Clearly, it is not the intent of securities legislation that an issuer become a reporting issuer merely by virtue of an internal exchange of securities that does not involve the distribution of securities to public security holders or otherwise result in that issuer having public security holders. Accordingly, we submit that clause (c) should be drafted to exclude an exchange that is temporary in nature or that is made merely to effect an internal reorganization. In circumstances in which the Chief Regulator determines it in the public interest to do so, they have the authority (on their own initiative or an application) to order a given issuer to be a reporting issuer pursuant to section 127(2) of the Draft CMA.

(iv) Section 3 – Definition of "rule"

The definition of "rule" is a rule made by the Commission "unless the context requires otherwise". Given the import of this term in shaping capital markets law, we think that it is necessary for "rules" to

be limited to those made by the Commission pursuant its express rule-making authority in all circumstances.

B. Part V – Distribution of Securities

As noted elsewhere in this letter, we are concerned with the extent of the Chief Regulator's discretion under the Draft CMA. This is particularly true with respect to the proposed legislation governing distributions, where the Chief Regulator's discretion has the potential to be exercised in a manner that could unduly burden market participants, inappropriately delay capital raising or otherwise unnecessarily impair deal certainty. Our concern is, in part, a result of the Draft CMA providing the Chief Regulator responsibility for key policy decisions that were previously reserved for the Commission's board of directors. However, we are also concerned with the discretion provided to the Chief Regulator to impose additional conditions, restrictions or obligations on market participants that would more appropriately be mandated through new legislation or rule-making and associated consultation. Notably, this discretion is not currently afforded to the Director under the Ontario Act.

We understand and agree that regulatory flexibility is important to respond to market developments in a timely manner. However, where flexibility is used to impose additional requirements or restrictions on market participants (as opposed to relieving them of obligations), a transparent rule-making process that is responsive to the input of market participants is critical to balancing the need for both effective and efficient regulation that contributes to confidence in, and the competitiveness of, Ontario's capital markets. In granting any discretion to the Chief Regulator, it is crucial that the trade-offs between regulatory expediency and due process be carefully examined. Moreover, we do not think it is justified or acceptable to expand the Chief Regulator's discretion merely on the basis that it is consistent with the approach taken by other Canadian jurisdictions in their securities legislation. This will simply compound the issues caused by the errors in the legislation in those other jurisdictions. Notably, the number of issuers subject to this discretion will be expanded significantly if this is to apply in Ontario given the number of reporting issuers for which the Commission is the principal regulator.

(i) Section 44 – Activities of Purchasers

The Draft CMA proposes to provide the ability for conditions, restrictions and requirements to be prescribed governing the purchase of securities offered in a distribution. We are not aware of any such requirements currently in the Ontario Act. As noted above, we do not believe that the Draft CMA should be used to introduce major substantive changes to securities law, so we are unaware as to the necessity of such a provision. Given the novelty of regulation of persons that purchase securities in a distribution in Ontario securities law, and the discretion that is left to the Commission to prescribe conditions, restrictions and requirements it believes appropriate, we believe that such an inclusion warrants specific public consultation beyond a mere 60-day comment period. If considered necessary, expansion of securities regulation to purchasers should be done through an amendment process, and be accompanied by the political accountability that process entails.

(ii) Subsection 45(1) – Requirement to file prospectus, etc.

We note that, through section 45 and the other relevant provisions, the Draft CMA allows for an alternative offering model through the use of a "prescribed offering document" that (we assume – it is not clear from the Draft CMA) would allow for the sale of freely-tradeable securities without qualification by a prospectus. It is, of course, impossible to comment on the merits of any alternative offering model in the absence of any details as to the applicable terms and conditions. However, we caution against implementing an alternative offering model that erodes the integrity of our capital markets that is derived from imposing a prospectus-based public offering model. For the many reasons noted in our firm's comment letter dated September 7, 2020 in response to the Taskforce's Consultation Report, and more recently in our firm's comment letter dated October 26, 2021 in response to the CSA's request for comment on a proposed listed issuer financing prospectus exemption, we believe it is critical to market confidence and investor protection that a prospectus be required for capital raising where participating investors acquire freely-tradeable securities. In order to publicly sell freely-tradeable securities, it should always be necessary for a registered investment dealer to be involved in the offering (except in the case of direct sales that do not require an underwriter), and that the offering be subject to the type of process and disclosure fundamental to a prospectus offering. That is not to suggest that a single prospectus model should apply in all circumstances. Developing variations to the prospectus model is important for making our capital markets more efficient. Examples of beneficial variations are the new and improved rules for at-the-market offerings and, if and when implemented, the well-known seasoned issuer ("**WKSI**") model that allows for an 'automatic' shelf prospectus (the recently-adopted WKSI model does not feature an 'automatic' receipt). Accordingly, instead of marginalizing the prospectus regime, we recommend that securities regulators continue pursuing burden reduction and modernization initiatives that (a) streamline the prospectus process, including through alternative prospectus offering models, and (b) improve the existing exempt market regime.

On a more technical note, the word "distribute" is not a defined term in the Draft CMA, although "distribution" is defined. As such, we suggest revising subsection 45(1) by replacing the words "distribute a security" with "make a distribution of". Alternatively, the definition of "distribution" could be revised to reflect derivatives of the word, similar to the definition in the Ontario Act.

(iii) Subsection 45(3) – Automatic Receipts

We are supportive of a provision that explicitly grants rule-making authority for the automatic issuance of receipts for prospectuses. Currently, the CSA has implemented a version of the U.S. WKSI regime on a trial basis through the adoption of blanket orders by each CSA member. Given the uncertainty as to whether or when the Draft CMA will be adopted, we recommend that the Ontario Act be amended as soon as practicable in order to provide the Commission with such rule-making authority.

Consideration should also be given to providing authority to prescribe circumstances in which a distribution is permitted (notwithstanding subsection 45(1)) without the filing of a preliminary prospectus and a preliminary receipt. Removing the concept of a preliminary receipt may be appropriate to eliminate undue regulatory burden in certain circumstances. For example, for an efficient and effective WKSI model that is equivalent to the 'automatic' shelf registration procedure available under U.S. securities legislation, only a final prospectus and receipt should be necessary.

(iv) Section 46 – Exemption for debt securities of governments in Canada
Section 47 – Exemptions for securities of certain financial institutions
Section 48 – Exemption for government incentive securities

While sections 46, 47 and 48 set out certain specific exemptions from the prospectus requirement, the Draft CMA fails to include a clear, general provision (like those in sections 73.6 and 73.7 of the Ontario Act) to allow for the regulations or rules to prescribe additional exemptions from the prospectus requirement (e.g., the exemptions set out in National Instrument 45-106 *Prospectus Exemptions* and OSC Rule 72-503 *Distributions Outside Canada*) or deem first trades to be a distribution (as is currently done via National Instrument 45-102 *Resale of Securities*). While this authority may technically be covered elsewhere in the Draft CMA, for clarity, it would be best placed with these exemptions.

(v) Section 49 – Restriction on distribution of records

In order to properly limit the conduct that might be prohibited by the rules, language should be added to the effect of the following italicized language: "must not, *in furtherance of that distribution,*…". This limitation is consistent with existing prohibitions on marketing materials that are a function of the prospectus requirement, which is premised on a "trade".

(vi) Section 50 – Preliminary prospectus requirements

Notably, subsection 50(1) requires that a preliminary prospectus "comply with the prescribed requirements", in addition to requiring (consistent with subsection 54(1) of the Ontario Act) that it "substantially comply" with requirements under capital markets law governing "the form and content" of a prospectus. It is unclear what additional requirements will be prescribed for a preliminary prospectus beyond those governing their form and content. This is concerning. Market participants should be consulted (with further information as to what is contemplated) in order to assess whether these additional prescribed requirements for a preliminary prospectus are appropriate. Ultimately, if compliance with such other prescribed requirements is to be legislated, the threshold for compliance should, at a minimum, align with the compliance standard for the form and content of the prospectus (i.e., "substantially comply"). Requiring strict compliance with any prescribed requirement for a preliminary prospectus is over-reaching and unnecessary given the purpose served by a preliminary prospectus.

Also, in keeping with the platform nature of the Draft CMA, subsection 50(1) should be modified to clarify that other exceptions to these requirements may be prescribed (in addition to those specifically set out in subsection 50(2), which merely carry forward exceptions already addressed in the Ontario Act).

(vii) Section 53 – Requirement to provide further information, etc.

Section 53 is one of several provisions in the Draft CMA that grants discretion to the Chief Regulator that is unnecessary and inappropriate. It allows the Chief Regulator to "impose additional restrictions, conditions and filing requirements" prior to issuing a receipt for a preliminary prospectus or a prospectus. Notably, under the Ontario Act, a receipt for a preliminary prospectus is to be issued

forthwith upon its filing without any conditions. Likewise, a receipt for a final prospectus is to be issued except in the specific circumstances contemplated by subsection 61(2) of the Ontario Act, or pursuant to subsection 61(1) where the Director determines that it would not be in the public interest to issue a receipt (thereby setting a very high standard). The current receipt structure under the Ontario Act is important from a deal certainty perspective. Windows to raise capital can be very limited and issuers and underwriters need an appropriate level of certainty that they will be issued a receipt for a prospectus during those limited windows in order to confirm sales[4] and, if applicable, start marketing[5]. This certainty is achieved through advance planning by an issuer to be in a position to address the published prospectus requirements. So, whether it is connection with a preliminary or final receipt, giving the Chief Regulator practically unfettered discretion to demand additional information or impose conditions or new filing requirements beyond those required by the statute, regulations or rules, and without ample prior notice, is problematic as it unnecessarily and adversely impairs deal certainty. We therefore recommend this section be removed.

(viii) Section 55 – Permitted activities under preliminary prospectus

Currently, section 55 of the Draft CMA only provides an exception for permitted marketing activity during the waiting period. It fails to account for permitted marketing activities prior to the issuance of the preliminary receipt (e.g., bought deal, testing the waters).

In addition, we propose that section 55 be revised to expressly include the activities that are currently permissible pursuant to subsection 65(2) of the Ontario Act, modified to further permit any activity (not merely “trading activities”, which term is not defined) that is permitted by the rules. We believe that the basic marketing rights provided in subsection 65(2) of the Ontario Act should be enshrined in the Draft CMA rather than by way of rules.

(ix) Section 56 – Exception; defective preliminary prospectus

We have significant concerns with the Chief Regulator’s discretion to order that marketing activities in support of a public offering permitted during the “waiting period” (i.e., following the issuance of a receipt for the associated preliminary prospectus) cease, without providing the issuer an opportunity to be heard, if the preliminary prospectus does not strictly comply with the requirements under capital markets law with respect to form and content. Given the drastic consequences that would result from such a cease trade order (both to the issuer and to the market price of its outstanding securities), we submit that the standard for the exercise of the Chief Regulator’s discretion should be much higher (e.g., a “material change” that is adverse, such that it is in alignment with the obligation to amend a preliminary prospectus). Notably, the standard proposed for this subsection 56(1) discretion is even lower than is actually required for a preliminary prospectus – under each of the Ontario Act (subsection

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4 This is particularly important in the case of a bought deal by way of a short form (non-shelf) prospectus where clearing that prospectus within commercially reasonable deadlines set out in the bought deal agreement is critical. While this deal certainty can also be achieved through the prior clearance of a shelf prospectus, using a shelf prospectus may not be an appropriate (or, for some issuers, an available) option.

5 While a preliminary receipt is not necessary in order to start marketing for a Canadian public offering pursuant to the bought deal exemption, it is necessary for a cross-border bought deal due to requirements under U.S. securities law.

54(1)) and the Draft CMA (subsection 50(1)), a preliminary prospectus must only “substantially” comply with the prospectus form and content requirements under Ontario securities law or capital markets law, respectively.

Generally, our view is that there is no need for a “cease marketing” order during the waiting period, as the receipt issuance process for a final prospectus can be used to ensure compliance with the form and content rules of a prospectus. Because of the negative consequences that such an order would have on an offering, the Chief Regulator should be obligated to provide the issuer details of the alleged non-compliance prior to the order’s effectiveness. The issuer should also have an opportunity to be heard prior to the order coming into force and/or file an amended preliminary prospectus that addresses the Chief Regulator’s material concerns.

In addition, subsection 56(2) should be amended to provided that the cease trade order will lapse upon the issuer remedying the issue that allowed for the order (e.g., if the re-filed preliminary prospectus remedies the issue identified by the Chief Regulator or, more generally, meets the standard that was required to obtain a preliminary receipt by substantially complying with the requirements of capital markets law with respect to form and content). It is too uncertain (from an issuer perspective) and too far-reaching (from a policy perspective) to require that the revised preliminary prospectus be “satisfactory to the Chief Regulator”. This yet again introduces unnecessary and unacceptable discretion in the hands of the Chief Regulator. Further, it is unclear from the Draft CMA what will be required for the revised prospectus to be “sent” for this purpose. We trust the CMA (or at least the rules or regulations thereunder) will provide for ‘access equals delivery’. Accordingly, consideration should be given to amending this provision to require only that it be sent to the extent and in the manner that is required by the rules and regulations for an amended preliminary prospectus.

(x) Section 58 – Obligation to send prospectus, etc.

The Draft CMA imposes an obligation on any person who trades in securities and who receives a purchase order for a security offered in a distribution to deliver a prospectus. This is currently the obligation of a dealer under the Ontario Act. Section 58 appears to broaden the delivery obligation to others that may be involved in the offering. Specifically, on a technical reading of this provision, the issuer “trades in securities” when involved in a distribution of its securities and therefore is responsible to deliver a prospectus. We trust that this is simply an error. If not, it would represent a departure from Ontario law that is untenable and unnecessary by imposing an obligation on an issuer that, in most cases, an issuer is not capable of satisfying. For example, in the context of an underwritten or bought deal public offering of securities, it is the underwriters that sell the securities to the participating investors, not the issuer. Generally speaking, the issuer is not even aware of the identities of all of the participating investors and certainly would not know where to deliver a prospectus to those investors (or their brokers). As a result, underwriters are best positioned to deliver (and do deliver) the prospectus to those investors. Requiring that the issuer be responsible if an underwriter fails to deliver a prospectus would be an untenable situation for issuers and an unnecessary ‘doubling up’ of responsibility.

Separately, there should be an exception if the required documents were previously sent. This exception is currently provided in section 71 of the Ontario Act.

Finally, as noted in an earlier comment, provision should be included here and in all other cases in the Draft CMA where a prospectus delivery obligation is imposed to account for an 'access equals delivery' model.

C. Part VI – Trades of Derivatives

We are concerned that Part VI of the Draft CMA, which regulates trades in derivatives, is overly-broad in certain respects. The Commentary notes that "market participants who previously relied on exemptions under the CFA for trading in exchange contracts would be subject to the dealer registration requirement under the [Draft] CMA only if they are in the business of trading"; however, it is not clear what constitutes the "business of trading". Many end users of commodity derivatives use those transactions as a fundamental part of managing the economic risk inherent in their primary commodity business, whether it is an agricultural commodity or another type of commodity such as fuels, oil, gas or precious metals. These parties are unlikely to consider themselves as being in the "business of trading", but there is no guidance on this and, as each such person is a "counterparty to a trade of a derivative", it must comply with the provisions of Part VI of the Draft CMA and the corresponding regulations and rules.

In addition, while the Draft CMA may appropriately address broadly-traded (including exchange-traded) derivatives, particularly those that are based on an underlying equity security or securities, it inappropriately captures over-the-counter ("**OTC**") derivatives that are used to mitigate business risks, and not as speculative investments. We submit that the Draft CMA should distinguish between OTC derivatives and exchange-traded derivatives, both for purposes of registration requirements and disclosure of prescribed information. While financial institutions that routinely deal in financial derivatives such as currency, interest rate and credit risk derivatives in the OTC market are exempt from registration, their counterparties are not similarly exempt. Entities who trade in OTC derivative products solely as ancillary to their business should also be exempt.

(i) Section 62 – Duty to provide information

Section 62 of the Draft CMA regarding providing "prescribed information" relating to derivatives transactions should restrict the type of information that can be required to be disclosed with respect to OTC derivative transactions, and specifically should exclude commercially sensitive information that is typically set out in the confirmation of the particular OTC transaction.

D. Part VII – Reporting Issuers and Prescribed Others – Disclosure and Governance Obligations

Our primary concern with the disclosure and governance provisions set out in Part VII of the Draft CMA is their potential application to non-reporting issuers. The CSA increasingly has become involved in regulating what many market participants would consider to be, at their core, corporate law matters. This can be justified to some extent with respect to reporting issuers for which corporate law and securities law necessarily intersect and in circumstances where corporate law may not adequately protect investors or foster fair and efficient capital markets. However, we are not aware of any

compelling justification for securities regulators to impose inherently corporate law requirements on non-reporting issuers, and no such justification has been provided in the Commentary.

(i) Section 65 – Disclosure requirements, reporting issuers and others

The words "or any other issuer within a prescribed class" in section 65 should be deleted. In our view, it is not appropriate for the Draft CMA to allow for the possibility that the rules or regulations will require issuers other than reporting issuers to provide periodic and timely disclosure. To the extent that there is a specific class of issuers on which the Ministry or the Commission believe that disclosure requirements should be imposed, that class should be identified in the Draft CMA and the rationale for subjecting that class to such disclosure requirements should be provided.

(ii) Section 67 – Information from Directors, etc.

Section 67 of the Draft CMA is problematic for several reasons. First, no justification is provided for why directors, officers, promoters and control persons of non-reporting issuers should have to comply with an information request from the Chief Regulator. Second, section 67 neither provides for any procedural safeguards with respect to the use of the Chief Regulator's power nor references any regulations or rules that might impose such safeguards. Third, unlike section 142 of the Draft CMA (which is itself problematic), there is no requirement for the Chief Regulator to make an order requiring that the information or record in question be provided to the Chief Regulator, nor is there any standard that must be met in order for the Chief Regulator to make such a demand (e.g., that it is necessary for the administration or enforcement of capital markets law or the regulation of the capital markets). In our view, these issues should either be addressed or section 67 should be deleted in its entirety.

(iii) Section 69 – Governance of reporting issuers, etc.

The words "and any other issuer within a prescribed class" should be deleted from section 69 of the Draft CMA. In our view, the inclusion of issuers other than reporting issuers is even more objectionable in section 69 than it is in section 65. Although section 65 would require disclosure where it may not be necessary or appropriate, section 69 would require compliance with actual governance requirements where it may not be necessary or appropriate. While neither is desirable, the latter is considerably more onerous and is arguably even less within the purview of securities regulators.

(iv) Subsection 70(1) – Governance and oversight of investment funds
Section 71 – Business conduct of investment funds

For the reasons noted in our comments on section 69 above, the words "and such other persons as may be prescribed" in subsection 70(1) and section 71 should be deleted.

(v) Section 72 – Duties re financial accounting, etc.

For the reasons noted in our comments on sections 67 and 69 above, section 72 should only apply to a reporting issuer and the auditor of a reporting issuer.

(vi) Subsection 73(1) – Decisions requiring approval, input

For the reasons noted in our comments on section 69 above, subsection 73(1) should only apply to the board of directors of a reporting issuer as opposed to any issuer.

(vii) Subsection 73(3) – Decision requiring prior approval of Chief Regulator

Subsection 73(3) of the Draft CMA contemplates the possibility that the regulations or the rules will require the board of directors of an issuer or an investment fund manager to obtain the approval or solicit the input of the Chief Regulator before proceeding with a "prescribed transaction". In our view, any regulations or rules that would grant the Chief Regulator a potential veto over a transaction would have a significant and adverse impact on deal certainty. Such authority is entirely unnecessary given the various other powers that the Chief Regulator has at their disposal. For example, the Chief Regulator can apply to the Tribunal for various orders under subsection 85(1) if a transaction does not comply with Part VIII and its associated rules, or if the transaction is otherwise contrary to the public interest. Any prescribed rules or regulations under subsection 73(3) would inappropriately lower the bar for regulatory intervention in connection with a transaction. Although we believe that the entire provision should be deleted, at a minimum, the words "obtain the approval or" should be removed. In addition, we reiterate that subsection 73(3) should only apply to the board of directors of a reporting issuer as opposed to any issuer.

(viii) Section 74 – Issuer's meetings with security holders

For the reasons noted in our comments on sections 67 and 69 above, section 74 should only apply to a reporting issuer, not any issuer. While we do not otherwise object to the provision's inclusion in the Draft CMA, we note that the Commentary suggests that its purpose is, in part, to provide rule-making authority for annual advisory shareholders' votes on a board's approach to executive compensation (i.e., 'say-on-pay'). Although we support mandatory say-on-pay, we believe that the appropriate forum for its implementation is through amendments to the *Business Corporations Act* (Ontario) and the other provincial and territorial corporate statutes, on a consistent and harmonized basis. If say-on-pay is mandated by the Commission, we do not believe that it should be required to be held annually as suggested in the Commentary. Yearly say-on-pay votes may unduly increase focus on the short-term and lead to greater costs and complexity for reporting issuers. The frequency of say-on-pay votes (like many governance and disclosure practices more generally) should be a contextualized decision made by a reporting issuer's board that depends on company-specific factors, such as the size of the company, its financial performance, the presence of recent problematic executive pay practices and the level of shareholder support for the say-on-pay votes at past meetings.

(ix) Subsection 76(1) – Information circular re proxy solicitation

Subsection 76(1) of the Draft CMA prohibits a person from soliciting proxies in certain circumstances. Unlike the Ontario Act, "solicit" and "solicitation" are not defined. These terms should be defined in the Draft CMA or, at a minimum, referenced in a provision similar to section 1(1.1) of the Ontario Act that provides that such terms may be defined in the regulations or rules and, if so defined, have the defined meanings for purposes of the Draft CMA.

E. Part VIII – Take-Over Bids, Issuer Bids and Certain Other Transactions

(i) Section 77 – Definition of "interested person"

Section 77 of the Draft CMA defines an "interested person" to include, among others, an "offeree issuer" and an "offeror". However, neither "offeree issuer" nor "offeror" is defined in the Draft CMA. This is also true of various other terms used throughout Part VIII, including "insider bid", "going-private transaction", "related party transaction" and "business combination". The Draft CMA should include a provision similar to subsection 1(1.1) of the Ontario Act that provides that these terms may be defined in the regulations or the rules and, if so defined, have the defined meanings for purposes of the Draft CMA.

Similarly, we note that the Draft CMA refers to an "offeree issuer" in certain sections and to "an issuer whose securities are the subject of" a bid in others. If these terms are intended to have different meanings, it is not clear why that is or what the differences are. If these terms have the same meaning, only one term should be used throughout the Draft CMA.

(ii) Section 79 – Requirement re take-over bid, issuer bid

Although we have no comments on section 79 of the Draft CMA itself, we believe that the rules governing issuer bids should be amended in the near term to create a new private agreement issuer bid exemption that allows for selective buybacks on appropriate terms consistent with the long line of exemptive relief orders addressing these transactions. Absent an available exemption, an issuer that repurchases even a single share of its own issue must comply with the formal issuer bid requirements in Part 2 of National Instrument 62-104 *Take-Over Bids and Issuer Bids*. The lack of a private agreement issuer bid exemption is the source of significant regulatory burden for many issuers, and often forces issuers to incur the costs and delays associated with applications for discretionary exemptive relief. Any concerns that the issuer may overpay or repurchase too many of its securities to the detriment of the issuer's other security holders could be addressed by imposing restrictions on the use of the exemption (e.g., that repurchases must be made at or below market price). Any concerns that may arise by virtue of a selling security holder being a related party of the issuer would be addressed by the fact that the transaction would be subject to the enhanced disclosure and, potentially, the formal valuation and minority approval requirements of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**").

(iii) Section 81 – Requirement re recommendation

Although we understand that section 81 of the Draft CMA mirrors section 91 of the Ontario Act, we do not believe that it is necessary to import this provision into the Draft CMA. We note that the Draft CMA does not include a requirement for a bidder to prepare a take-over bid circular. Accordingly, it is not clear why the legislation would require an offeree issuer to prepare a directors' circular. Given the Ministry's preferred platform approach, it would be more appropriate for such a requirement to be set out in the corresponding rules. If section 81 is retained, consideration should be given to clarifying that the board's obligation to prepare a directors' circular and an individual director's or officer's option to

make an individual recommendation only apply to a take-over bid that is subject to the formal take-over bid requirements and not to an exempt take-over bid.

(iv) Section 83 – Prohibitions on acquiring, trading

Subsection 83(1) prohibits a prescribed person from acquiring or trading in a security before, during or after certain transactions. Subsection 83(2) requires a prescribed person to comply with such restrictions, conditions and requirements as may be prescribed with respect to acquiring or trading in a security before, during or after certain transactions. Given that subsection 83(2) contemplates restrictions with respect to acquiring or trading securities, and given that restrictions would include outright prohibitions, it is not clear what purpose subsection 83(1) is intended to serve. Further, it is not clear why these provisions refer to offers to acquire, acquisitions and redemptions as opposed to take-over bids and issuer bids. If subsections 83(1) and (2) are to be retained, we would recommend replacing them with a single provision as follows: "A person shall comply with such conditions, restrictions and requirements as may be prescribed with respect to acquiring or trading in a security before, during or after a take-over bid, issuer bid, going-private transaction, related party transaction or business combination or other similar transaction."

F. Part IX – Market Conduct

(i) Section 87 – Requirement to keep records

The records required by section 87 should not be readily available to the Chief Regulator, at their request, particularly given that the Draft CMA does not specify the circumstances in which the Chief Regulator is entitled to make such a request. In addition, a market participant should not be required to disclose any requested records where it would otherwise be prohibited by law from disclosing the information. We note that this limitation is contemplated in subsection 87(4)(b) of the Draft CMA, however we believe that it should apply to subsection 87(4)(a) as well.

(ii) Section 88 – Duty of good faith

Section 88 of the Draft CMA imposes a duty of good faith and fair dealing on all dealers and advisors, including underwriters, notwithstanding the prevailing view and practice that underwriters do not owe such a duty to their issuer clients. A quasi-fiduciary duty is potentially incompatible with underwriters' statutory liability to the persons to whom their clients' securities are sold, and inconsistent with the securities commissions' articulated expectation that underwriters will stand in an adversarial role vis-a-vis their clients in respect of due diligence and disclosure. Such a significant change should not be adopted without a full understanding of the implications and a process of consultation.

Under section 88 of the Draft CMA, the Commission will also have the ability to require all registrants to meet such other standards "as may be prescribed", providing the Commission with significant rule-making power to further alter the duty of a registrant. We urge the Ministry to consider adopting any additional registrant standards as part of the Draft CMA itself, rather than through rule-making.

(iii) Section 94 – False or misleading statements, information about reporting issuers, etc.

For the reasons set out in our response to consultation question 17 below, we are strongly opposed to the adoption of section 94 of the Draft CMA and believe that it should be deleted in its entirety.

(iv) Section 95(4) – Listing on an exchange

The prohibition on listing representations in subsection 95(4) should be removed from the Draft CMA. It is an antiquated provision unique to Canadian jurisdictions that results in unnecessary cost and delay without any concomitant benefit to Canadian investors.

(v) Section 97 – Market manipulation

Section 97 of the Draft CMA should mirror the language in section 126.1 of the Ontario Act such that the person engaging in the conduct must know or ought reasonably to know that the conduct would result in market manipulation. The prohibition should incorporate an element of *mens rea* and only apply to wilful or reckless conduct given the significant consequences for a breach of section 97, which may include imprisonment.

(vi) Subsection 102(1) – Insider Trading

We are concerned by the fact that the term "publicly traded" is not defined in the Draft CMA. Although this is also true of the Ontario Act, we note that this amendment was made to the Ontario Act in 2015 without any public consultation and presumably to align the insider trading regime in Ontario with the regimes in other CSA jurisdictions.

The term "publicly traded" as it is used in the insider trading context is much more open-ended than the term as it is used in the secondary market liability context. Under section 138.1 of the Ontario Act, 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 regime in the Draft CMA. Where an issuer has a real and substantial connection to Ontario, it is defensible to regulate trading in the securities of that issuer to ensure that all investors in Ontario have access to the same information before making an investment decision. If there is no real and substantial connection to Ontario, then the Draft CMA should not apply. To continue to extend the application of the insider trading and tipping prohibitions extra-territorially is particularly problematic where the conduct may be lawful in the foreign jurisdiction, a risk which 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 stated purposes of the Draft CMA are to provide investor protection, to foster fair, efficient and competitive capital markets, to foster capital formation and to contribute to the stability and integrity of the Canadian financial system. None of these purposes is served by extending the insider trading regime to securities of all publicly traded issuers, irrespective of their connection – or lack thereof – to Ontario.

We have the same objection to the use of the term "publicly traded" in sections 94 and 157(1) of the Draft CMA.

In addition, subsection 102(1) of the Draft CMA prohibits purchases or sales of securities by any person in a special relationship with knowledge of material non-public information that has not been generally disclosed, which would include grants to insiders of options and other securities tied to the market price of the issuer's securities, subject to certain exceptions set out in the regulations.[6] In several cases, the corresponding restrictions in the Ontario Act have prevented issuers from making annual grant awards to directors, officers and employees, sometimes for prolonged periods of time and sometimes in circumstances beyond the issuer's control (e.g., because of a potential M&A transaction or the existence of a material confidential investigation or proceedings). This has the potential to compromise an issuer's ability to retain key employees. Even worse, a failure to grant these annual incentive awards could signal to non-management employees that do not have access to material non-public information that a material event may be pending or in progress. In our view, consideration should be given to exempting award grants from the insider trading provisions. Alternatively, the defence for automatic plans in subsection 104(3) of the Draft CMA should be broadened to permit issuers to price options and other incentive awards while in possession of material non-public information if all grant details, including the dates and formula for pricing, were established prior to acquiring knowledge of such material non-public information.

(vii) Section 102(2) – Tipping

Subsection 102(2) provides an exemption from the tipping prohibition where informing a person of a material fact or a material change is "necessary in the course of business". Under the Ontario Act, the phrase employed in the tipping provisions is "in the necessary course of business". This phrase has been interpreted by courts and regulators (see section 3.3 of National Policy 51-201 *Disclosure Standards* ("**NP 51-201**")). Changing the phrase to "necessary in the course of business" suggests a change in the meaning of the subsection under Ontario law, which we assume is not the intention. We would recommend reverting to "in the necessary course of business" in this subsection of the Draft CMA or otherwise confirming that the change in wording is not intended to alter the meaning of the provision in any way. We have the same comment with respect to subsections 102(3) and 103(3) of the Draft CMA.

(viii) Subsection 102(4) – Recommending

Subsection 102(4) prohibits a person with knowledge of a material fact or change from recommending or encouraging a person to enter into a transaction involving a security of an issuer. This change is a good one as it clarifies an ambiguity under the existing statute and because it makes sense that a person in a special relationship be prohibited from "recommending", not just disclosing the material fact

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[6] We also note that Toronto Stock Exchange rules and guidelines restrict boards from setting option (or other award) exercise prices, or prices at which securities may otherwise be issued, on the basis of market prices which do not reflect material information of which management is aware but which has not been disclosed to the public, even if the recipient of the award is not aware of the material non-public information or the award is being granted in the context of an "annual" or regular grant, subject to certain exceptions.

or material change. However, we note one possible anomalous effect in the private placement area. In the course of marketing a private placement, an issuer or agent may need to disclose material non-public information to a potential investor, which it does under the "necessary course of business" exception. This has been a practice that has been accepted by the Canadian securities regulators as reflected in subsection 3.3(4) of NP 51-201. 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. Consideration must also be given to whether other ordinary course business activities that involve recommending an issuer's securities (such as investor relations activities, non-deal road shows, etc.) should be excepted.

(ix) Subsection 104(6) – Defence to tipping

An equivalent defence should be afforded for recommending in contravention of subsection 102(4).

(x) Section 105 – Unfair practice

Section 105 is very broad and far-reaching. The concept of unfair practice is already captured in the IIROC rules. Including provisions in the Draft CMA that are duplicative of other provisions will result in confusion and an uncertainty in respect of the interpretation of such provisions.

G. Part X – Orders, Reviews and Appeals

(i) Subsection 116(6) – Order without delay

We recognize that there are certain circumstances which necessitate the making of a temporary order in the public interest where there is not sufficient time to hold a hearing. In our view, however, the scope of the types of temporary orders currently authorized in subsection 116(6) is overly-broad. Given the almost unfettered discretion granted to the Chief Regulator to make orders that imply a finding of breach (e.g., subsections 116(1)1 and 13 – an order that a person comply with capital markets law or submit to an audit, respectively); or have potentially significant ramifications to a person's livelihood (e.g., subsections 116(1)8, 9, 10, 11 and 12); we believe that it would be appropriate to carve subsections 116(1)1, 8, 9, 10, 11, 12 and 13 out of subsection 116(6).

We also note that subsection 116(9) of the Draft CMA refers to an order under subsection (4). We believe that the intention is to refer to an order under subsection (6).

(ii) Section 124 – Cease-trade order – failure to file, to complete filing

In order to properly balance the discretion afforded in subsections 124(1) and (2) with the wrongdoing they are intended to address, the following italicized language should be added to the first line: "The Chief Regulator may, *if it considers that it is in the public interest to do so,* without giving…".

(iii) Subsection 127(2) – Same

We have significant concerns with the fact that subsection 127(2) of the Draft CMA would empower the Chief Regulator to impose additional conditions, restrictions and obligations on anyone, at any time and on the Chief Regulator's own volition (which authority is not granted to the Director under the Ontario Act). While it is appropriate for the Chief Regulator to have discretion to relieve market participants from certain requirements, the inverse is not also true. For example, clauses (d) and (h) allow the Chief Regulator to designate a person to be an insider or a trade to be a distribution. It is unclear to us when such discretion would be necessary or the circumstances in which it would be used. To the extent possible, market participants should be entitled to structure their affairs without fear of becoming subject to additional requirements. Where there is a concern that market participants are behaving abusively such that designation orders of the sort contemplated by subsection 127(2) may be appropriate, those designation orders should be made by the Tribunal and not by the Chief Regulator. In this regard, we are particularly troubled by the fact that the Chief Regulator's decisions under subsection 127(2) cannot even be the subject of a hearing and review before the Tribunal by virtue of subsection 137(2). Accordingly, a party that wishes to challenge such a decision would have to incur the costs and delays associated with an application for judicial review. In our view, this is untenable.

(iv) Subsection 127(3) – Restriction

Subsections 127(1) and (2) allow the Chief Regulator to make an order designating any derivative or class of derivatives to be or not be a "designated derivative". Although subsection 127(3) provides that the Chief Regulator must not make an order under subsection (1) or (2) without giving the persons directly affected by the order an opportunity to be heard, we are concerned that while persons whose primary business is trading in derivatives, notice giving the opportunity to be heard will not reach non-dealer type counterparties (i.e., the corporations who enter into derivative transactions to hedge their business risk) who will be affected by such a designation.

H. Part XI – Administration and Enforcement

(i) Section 142 – Order to provide information, etc., to Chief Regulator

Section 142 introduces a sweeping new open-ended power for the Chief Regulator to require various categories of persons to provide the Chief Regulator with any information, record or thing in the person's possession or under the person's control for the administration or enforcement of capital markets law or the regulation of the capital markets or to assist in the administration or enforcement of the securities or derivatives laws or the regulation of the capital markets of another jurisdiction. There are several troubling aspects to this provision. First, the obligation is not limited to the disclosure of information. The power is drafted broadly enough to authorize the Chief Regulator to effectively confiscate property, even property that does not belong to the person but is in the person's control. Second, the Draft CMA does not impose any procedural safeguards with respect to this power and references no rules or regulations that would impose any restrictions or protocols around such demands. Third, although the information, records or things demanded by the Chief Regulator must be for the administration or enforcement of capital markets law or the regulation of the capital markets or to assist in the administration or enforcement of the securities or derivatives laws or the regulation of the

capital markets of another jurisdiction, the obligation extends to directors, officers, promoters or control persons of non-reporting issuers. No explanation is given for why the provision should apply to such persons. Finally, section 142 is both broader and more vague than similar provisions, such as section 87 of the Draft CMA. Accordingly, we suggest deleting section 142 the Draft CMA.

(ii) Section 145 – Review of market participants and others
Section 146 Investigation – order authorizing exercise of powers

Notwithstanding that the authority to "examine anything in the place" in subsections 145(4)(a) and 146(8)(a) are limited by the purposes set out in subsections 145(1) and 146(1), respectively, we believe the language in subsections 145(4)(a) and 146(8)(a) is overly-broad and should be narrowed to "anything in the place that reasonably relates to" the review or investigation.

Subsections 145(4)(f) and 146(8)(f) do not provide for the return of records or things removed from the place. We suggest that the language similar to that found in subsection 14(2) of the Ontario Act be added.

(iii) Subsection 171(3) – Order to pay compensation, etc.

We believe the words "directly or indirectly" found in subsection 171(3)2, and which qualify the payment to the Commission of any amount obtained or payment or loss avoided, give rise to uncertainty and that they should be deleted.

(iv) Section 174 – Increased fines for specified contraventions

As drafted, subsection 174(1) is a significant departure from the Ontario Act. We suggest that the maximum fine set out in subsection 174(1) of the Draft CMA accord with subsection 122(4) of the Ontario Act such that these fines are based on the profits made and losses avoided by the person that has contravened the insider trading provisions of the Draft CMA, rather than by "all persons".

I. Part XII – Civil Liability

(i) Section 178 – Actions relating to prospectus or prescribed offering document – after conversion, etc.

Subsection 178(2) provides for a right of action where the prospectus or prescribed disclosure document contains a misrepresentation "at the time of purchase of the first security". These words are not found in subsection 130(1) of the Ontario Act and it is not clear to us whether this change is directed at the *Danier* decision. *Danier* confirmed that the time of filing is the appropriate time to assess whether a prospectus contains a misrepresentation. As noted above, we are of the view that substantive changes should not be introduced into the Draft CMA without an appropriate explanation of the policy rationale and an opportunity to fully canvass the implications of the change.

(ii) Subsection 180(3) – Liability – purported authority of expert
Subsection 180(4) – Liability – no purported authority of expert

The wording of subsections 180(3) and (4) appears to shift the onus of proof from that set out in corresponding sections of the Ontario Act. In our view, this would represent an unwelcome and substantive change to the existing law. Any such change should be made only with extensive consultation and input from market participants.

(iii) Subsection 182(3) – Liability – purported authority of expert
Subsection 182(4) – Liability – no purported authority of expert

We have the same comment as above regarding subsections 180(3) and (4).

(iv) Section 183 – Actions relating to prescribed disclosure documents

Subsection 183(1) creates a new statutory right of action against a host of persons, including directors, promoters, other influential persons and every person that signed a prescribed disclosure document to which this section is to apply. This would represent a clearly divergent and significantly more expansive approach to civil liability than is contained in the civil liability provisions of subsection 130.1(1) of the Ontario Act, which (for an “offering memorandum” containing a “misrepresentation”) limits the statutory right of action to claims against the issuer and a selling security holder. As discussed in more detail in our response to consultation question 12 below, in our view, this is another example of a significant change in the substantive law that should not be enacted in the absence of the articulation of a persuasive policy rationale and extensive consultation with affected market participants. A discussion of the necessity and desirability of expanding the class of potential defendants should precede this change, as it would impose significant costs and may prevent issuers from accessing the exempt market using a prescribed disclosure document to which subsection 183(1) applies.

Generally speaking, the purpose of the exempt market is to provide issuers with faster and less costly access to capital provided by investors with the sophistication, knowledge and/or resources necessary to fend for themselves. Canadian regulators have worked to balance this objective with investor protection principally by limiting the class of investors entitled to participate in exempt offerings. In our view, exposing additional classes of persons to liability for an associated disclosure document only serves to undermine the utility of the exemptions in circumstances where there is no suggestion that the current framework for recourse is flawed.

That said, some version of this expansion may be appropriate for a “prescribed offering document” that is prescribed by the regulations as a substitute for a prospectus where the purpose and effect of the expanded liability is to align with the prospectus liability regimes on the basis that it serves as an appropriate ‘check and balance’ to mitigate the potential for a misrepresentation. However, this expansion must be limited to specific circumstances. We only see two sets of circumstances where such an expansion would be warranted, namely (a) where the prescribed offering document is indeed a prospectus alternative (i.e., the securities may be sold broadly to the public and will be freely-tradeable

immediately on their issuance);[7] or (b) where the exemption from the prospectus requirement is premised entirely on adequacy of disclosure, the prescribed disclosure document is mandated to provide that disclosure, and the investors participating in the exempt distribution do not have the necessary sophistication, knowledge and/or resources to fend for themselves. However, consideration must still be given to the appropriate classes of persons as, on their face, many do not serve an obvious purpose for ensuring investor protection. Moreover, imposing liability on certain experts may result in a failure to obtain their consent and make the prospectus exemption unworkable. For further discussion on these issues, see our response to consultation question 12.

In any event, the broader civil liability provisions proposed in subsection 183(1) are not appropriate for an "offering memorandum" (as currently defined in the Ontario Act) that is voluntarily provided to potential investors in a private placement exempt from the prospectus requirements. The Commentary is consistent with our position on this front, noting that that "[s]ubsection 183(2) seeks to carry forward the status quo for [offering memoranda] that are currently subject to the statutory rights of action of section 130.1 of the [Ontario Act]." Given that, subsection 183(2) should be amended to very clearly provide that an "offering memorandum" is a prescribed disclosure document to which that subsection applies, and subsection 183(1) should be amended to clearly provide that it does **not** apply to an "offering memorandum" or any other prescribed disclosure document for purposes of subsection 183(2). It should not be left to the rules or regulations to determine when and if an offering memorandum may be "prescribed" to be subject to the more expansive liability provisions of subsection 183(1).

In addition, we submit that the introductory language to subsections 183(1) and (2) be amended as follows: "If, *during the period of distribution*, a person purchases securities offered *to it* by a prescribed disclosure document…". The first edit is consistent with subsection 130.1(1) of the Ontario Act. The inclusion of "to it" is to clarify that this right is available only to purchasers to whom the offer was made.

Finally, the interpretation provided in OSC Staff Notice 45-705 *Interpretation of Section 130.1 of the Securities Act* (i.e., that an underwriter is not a "selling securityholder" for purposes of section 130.1 of the Ontario Act) should also be carried forward and codified for purposes of subsection 183(2).

(v) Section 189 – Liability of trader, offeror or issuer

Under section 133 of the Ontario Act, a purchaser of a security to whom a prospectus is not delivered has a statutory right of action against a dealer. Under section 189 of the Draft CMA, such a purchaser right of action would be against "a person who traded in a security". This change has the potential to make parties other than dealers subject to liability. We refer you to our comment on section 58 above, which, in our view, inappropriately broadens the delivery obligation.

[7] However, as noted in our earlier commentary with respect to section 45 of the Draft CMA, we do not support an alternative offering model that would, in any way, supplant a prospectus-based public offering model. We believe that it is critical to market confidence and investor protection that a prospectus be required for capital raising where participating investors acquire freely-tradeable securities.

Section 189 also introduces a statutory right against issuers that may be exercised by a purchaser of a security to whom a prescribed disclosure document was not sent. For example, if an offering memorandum were a prescribed disclosure document, an institutional investor would have a right of action for damages or rescission against an issuer where a Canadian wrapper was not delivered in connection with a private placement. This would introduce a significant change into the law, with implications for the vast institutional private placement market that exists in Canada. The rationale for this substantive change should be explained and issuers and other market participants should have an opportunity to consider the implications and provide input.

(vi) Subsection 190(1) – Action for damages – insider trading, etc.

Subsection 190(1) represents a major substantive expansion of the existing insider trading liability regime under the Ontario Act by expanding exponentially the category of plaintiffs to whom damages are payable. Under subsection 134(1) of the Ontario Act, a person who purchases or sells in contravention of the rule is liable to compensate the seller or purchaser of the securities. However, under subsection 190(1) of the Draft CMA, damages would be payable to *every person* who purchases or sells a security of the issuer during the period from the time the contravention occurred to the time when the material change or material fact is generally disclosed.

Accordingly, damages would be payable to every single person who purchased or sold during the relevant time period, not just the persons who traded with the defendant. In our view such a change warrants a clear articulation of the policy rationale and an opportunity for market participants to consider its potential implications, including those that may be unintended. We strongly recommend engaging in a robust consultation process with all potentially affected market participants prior enacting this substantive expansion to the insider trading liability regime.

(vii) Subsection 191(1) – Payment of benefit – insider trading, etc.
Subsection 191(2) – Payment of benefit – front-running

The reference to “all other persons” in subsections 191(1) and (2) should be changed to “such person” in order to ensure that the remedy (which is of a restitutionary nature) is tied to the contravention.

(viii) Section 192 – Action on behalf of issuer – insider trading, etc.
Section 193 – Action on behalf of investor – front-running
Section 194 – Action on behalf of investment fund – improper use of information

The Draft CMA does not contain a provision analogous to subsection 135(9) of the Ontario Act, which expressly provides for a right of appeal. In our view, such a provision should be added, so that an order made under any of sections 192, 193 and 194 of the Draft CMA could be appealed.

(ix) Section 206 – Intervention by Chief Regulator

We are of the view that providing the Chief Regulator with a statutory right of intervention in a proceeding to enforce a right or obligation created by Part XII constitutes an unjustified intrusion by the Chief Regulator into the private, civil liability regime created under the Draft CMA. The Chief

Regulator's purpose is deterrence while the policy objectives underlying civil liability are compensation and deterrence. To this end, we are of the view that providing an unqualified statutory right to intervene may compromise the Commission's role as an independent regulatory body.

J. Part XIII – Civil Liability for Secondary Market Disclosure

(i) Section 213 – Failure to make timely disclosure

Section 213 speaks to circumstances where a responsible issuer "fails to make timely disclosure". This phrase is not defined in the Draft CMA. We suggest that either the definition of "failure to make timely disclosure" be revised to also include the phrase "fails to make timely disclosure", or that the introductory language in section 213 be revised to use the actual defined term, "failure to make timely disclosure".

(ii) Section 226 – Liability limit

Section 226 prescribes liability limits for actions brought under any of sections 210 to 213. For responsible issuers and influential persons that are not individuals, the first value in the formula for calculating the applicable liability limit is 5% of the market capitalization of the issuer or influential person in question. "Market capitalization" is defined in section 249 of Regulation 1015 to the Ontario Act. The definition involves, among other things, performing the following calculation for each class of equity securities for which there is a published market: the average number of outstanding securities for the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred is multiplied by the trading price for the securities for the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred.

In a case involving a single misrepresentation or a single failure to make timely disclosure of a material change, calculating the applicable market capitalization is relatively straightforward in concept. However, we are concerned that in cases involving multiple misrepresentations or multiple failures to make timely disclosure of material changes, it is unclear how the applicable market capitalization is to be calculated. The Draft CMA does not specify whether, in such cases, the applicable market capitalization is: (a) based on the first misrepresentation or failure to make timely disclosure; (b) the sum of the market capitalization in respect of each of the misrepresentations or failures to make timely disclosure, divided by the number of misrepresentations or failures to make timely disclosure; or (c) to be calculated in some other manner. To our knowledge, no Canadian court has considered this issue.

In view of the importance of the liability limits to the overall scheme of the legislation and the increasing prevalence of cases involving allegations of multiple misrepresentations or failures to make timely disclosure, now is the opportunity to resolve this uncertainty. We suggest adding language to clarify that where multiple misrepresentations or instances of failure to make timely disclosure are established, the applicable market capitalization is the average of the market capitalizations in respect of each of the misrepresentations or failures to make timely disclosure.

K. Part XIV – General

(i) Section 234 – Power of the Commission re: decisions

This provision does not offer sufficient procedural protections to those directly affected by decisions of the Commission. We are concerned that a decision of the Commission made on notice to affected parties can be varied or revoked without similar notice. To address this concern, we recommend adding a new subsection 234(3) that mirrors subsection 235(3).

(ii) Subsection 247(2) – Duty to provide records, information on request

Subsection 247(2) grants to the Chief Regulator extremely broad powers to compel the disclosure of records and information for the purposes of "(a) monitoring activity in capital markets or detecting, identifying or mitigating systemic risks in relation to capital markets; or (b) conducting policy analysis related to the Commission's mandate and the purposes of [the Draft CMA]." The potential scope of information that, not only market participants, but also any "other person" may be required to disclose to the Chief Regulator without judicial (or even Tribunal) intervention is not clear based on this wording, but seems to be virtually unlimited.

The costs and burdens on capital market participants arising from the imposition of *ad hoc* information requests may be not be fully appreciated by the Ministry or the Commission. We can cite a recent experience where, in order to obtain an exemption order, the CSA required that the beneficiaries of the relief, largely global investment banks, file monthly reports of certain information. The information was not required for compliance purposes, but rather to facilitate staff's study of institutional private placements. Despite the banks' objections, staff insisted, requiring the banks to incur substantial costs to establish the systems – both computer and human – to gather the information from their worldwide operations on a monthly basis, analyze and review the information and distill it into the form of report required by staff. None of this information was required by statute, but rather was sought by the regulator for reasons similar to those contemplated by section 247.

Moreover, there do not appear to be any restrictions on the sharing of information obtained pursuant to this section with, for example, criminal and regulatory enforcement agencies. This, in our opinion, constitutes a violation of the expectation of privacy of market participants and a derogation of the due process rights of those facing criminal or quasi-criminal liability. We therefore recommend that the Draft CMA be amended to clearly segregate the multiple functions of the Chief Regulator to ensure that information shared between these functions adequately protects the procedural rights and privacy of market participants.

(iii) Section 254 – Privileged Information

Section 254 provides that "[n]othing in [the Draft CMA] is to be construed to affect the privilege that exists between a lawyer and the lawyer's client in relation to information or records that are subject to that privilege." We appreciate that this statutory language sets a crucial limit on the extent to which market participants bear a duty to disclose documents and information under various provisions of the Draft CMA, including (but not limited to) sections 16, 24, and 142(2). We are, however, concerned that

this provision may be construed as exhaustive, thereby depriving market participants and others of the right to assert and rely on other forms of privilege available at law. To that end, we recommend clarifying in section 254 that nothing in the Draft CMA shall be interpreted so as to require a person to waive any applicable privilege, and expressly expanding the scope of section 254 to include all potentially applicable categories of privilege available at law, including litigation privilege, settlement privilege and common interest privilege.

(iv) Section 256 – Publication of notices, etc., by Commission, Chief Regulator

In our view, it is important to clarify how and where any prescribed notice, rule or form must be "published" or made "accessible to the public". Market participants should not be required to make themselves aware of changes in the law that are published or are otherwise made available to the public in an inconsistent and ever-changing manner. We suggest that market participants be entitled to rely on a single source of information for informing themselves of all rules, regulations and policy statements made by the Commission and the Chief Regulator, as applicable. We suggest that this single source be the public website maintained by the Commission rather than "through an electronic medium" as suggested by section 256. The possibility that additional or contrary information may, at any time, become available through an indeterminate source will lead to market confusion. Further, any notice or statement should be published in a consistent and predictable manner reasonably designed to put any affected person on notice of its contents.

L. Part XV – Regulations, Rules and Policies

(i) Subsection 267(3) – No finding of guilt or administrative sanction
Section 279 – No finding of guilt or administrative sanction

With respect to subsection 267(3) and section 279, it is not sufficient that the relevant rule or other material be "otherwise accessible". In each instance it is used, the word "accessible" should be replaced with "published in accordance with section 256". To the extent the rule (or the material incorporated in a rule, as applicable) is not published in the manner usually required, a person should not be liable for any contravention in respect of that rule (or that portion governed by the incorporated material, as applicable). This recommendation will be more effective if coupled with the implementation of our comment above in relation to the single, public source for all published information and rules.

(ii) Section 268 – Notice of proposed rule

It is in the public interest that prior notice of all proposed rules and forms should be published, regardless of their nature. Capital market participants must be aware of new rules and forms in order to govern themselves. As drafted, subsection 268(4) would not require notice of a proposed rule or form of the type referred to in clauses 1 to 5. Subsection 268(4) should be revised to except such proposed rules or forms only from the minimum 60-day comment period provided for in subsection 268(3). Alternatively, if it is determined that prior notice cannot reasonably be given in light of the circumstances, for clarity, subsection 268(4) should expressly provide that publication of any such rule is required as provided in subsection 272(3).

Consider also whether an exception equivalent to subsection 268(4)4 is required with respect to the notice of changes requirements in subsection 268(5) and subsection 268(6).

Finally, with respect to subsection 268(4), consider whether a class order may be extended by way of a temporary regulation per subsection 128(2) only where that temporary regulation is necessary to afford time to publish and allow for comment on regulation that will give permanent effect to the matters addressed in that order or temporary regulation similar to the condition to extending a temporary regulation under subsection 272(2).

(iii) Section 272 – Automatic revocation of certain rules

See the above comment in respect of prior notice of all proposed rules and forms, even those that are the subject of an expedited approval process by virtue of subsection 268(4). To the extent prior notice cannot reasonably be given in light of the circumstances, and must instead be given after the rule comes into force by way of the statement required under subsection 272(3), we submit that the statement should be accompanied by the full text of the relevant rule. As currently drafted, subsection 272(3) requires only a description, among other things.

(iv) Section 277 – Public access to rules, etc.

See our earlier comment as to a single public source for accessing all of these materials.

III. *Responses to Consultation Questions*

Q1. Are there concerns with changing the definition of “market participant” to reduce the regulatory burden of record-keeping requirements for the following persons:

- **A control person of a reporting issuer**
- **A person providing record-keeping services to a registrant**
- **A person distributing or purporting to distribute securities in reliance on an exemption, or their director, officer, control person or promoter**
- **A general partner of a person described above?**

We support changing the definition of “market participant” to exclude control persons of a reporting issuer, persons providing record-keeping services to a registrant, persons distributing or purporting to distribute securities in reliance on an exemption, or their directors, officers, control persons or promoters, and general partners of the foregoing. In our view, the definition of “market participant” in the Draft CMA published in 2015 was far too broad and inappropriately subjected such persons to record keeping and other requirements.

As noted above in our comments on section 142 of the Draft CMA, we have significant concerns with the scope of that provision, which concerns also extend to sections 67, 145(3) and 116(1)13. No case has been made for the broadening of powers of the regulator to the point of divorcing them completely from the traditional focus of securities regulation, namely public securities markets. As we have noted throughout this comment letter, the Draft CMA should not be a means to introduce major substantive changes to securities law unless the adoption of such changes is preceded by a thorough public consultation and study of the changes. With respect to sections 67, 142(2) and 145(3) in particular, the records should not be readily available to the Chief Regulator or a designated reviewer, as applicable, at their request, particularly when the Draft CMA does not specify the circumstances in which the Chief Regulator or a designated reviewer is entitled to make such a request.

Q4. Do the changes to narrow the scope of the obstruction offence address concerns about creating positive obligations to provide information to the OSC?

We have concerns with the broad scope of potential liability imposed by section 110. In particular, it is unclear whether the word “conceal” (bearing its ordinary grammatical meaning) would potentially capture and impugn withholding documents or information from disclosure on the basis of privilege. We recommend that language be added to clarify that the withholding or concealing of information on the basis of a good faith claim to privilege does not constitute a violation of section 110.

Q5. Should the protection against reprisals be expanded to include independent contractors?

The protection against reprisals should be expanded to include independent contractors. The growth of the “gig economy” has resulted (and will continue to result) in an increasing number of individuals who legally may not be characterized as employees as that term is used in the Draft CMA. Such individuals should be afforded protection from reprisals regardless of whether they are legally categorized as employees. Notably, the Commission’s website provides that “[e]mployees, former employees,

suppliers, contractors, clients and others" may be eligible for an award under the Commission's Whistleblower Program (https://www.osc.ca/en/enforcement/osc-whistleblower-program/award-eligibility-and-process). Expanding the group of individuals afforded protection from reprisals may have the potential to foster further participation and confidence in the Commission's Whistleblower Program.

Q6. Are there other measures that should be added to the list of reprisals to reflect the relationship between an employer and an independent contractor?

In the event that subsection 111(1) is expanded to include independent contractors, subsection 111(2) must be modified to accommodate for the nature of an entity's relationship with an independent contractor. By way of example, we recommend revising subsection 111(2)(a) as follows: "in the case of an employee, ending or threatening to end the employee's employment, and in the case of an independent contractor, ending or threatening to end the agreement or contract providing for the services of the independent contractor".

Q7. Are the Chief Regulator policy decisions that cannot be appealed to the Tribunal but are subject to judicial review appropriate?

It is not clear to us why the Draft CMA would preclude a person directly affected by certain decisions of the Chief Regulator from applying to the Tribunal for a hearing and review of those decisions. In this regard, we note that the Commentary does not provide any justification for the inclusion of subsection 137(2), but merely highlights the provision's existence. In our view, subsection 137(2) represents a significant and unwelcome departure from the current regime under the Ontario Act, which allows any person directly affected by a decision of the Director to request and be entitled to a hearing and review by the Commission without exception. Limiting the availability of a hearing and review before the Tribunal, the function of which is inherently and exclusively adjudicative, would imbue the Chief Regulator with undue authority and would force parties to incur substantial costs and delays associated with applications for judicial review.

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"?

The scope of the Commission's ability to disclose compelled evidence in subsections 148(2) and (3) is overly-broad as it relates to the ability to disclose compelled evidence in connection with "a proposed proceeding". The phrase "proposed proceeding" is not defined in the Draft CMA (indeed, the only time the phrase is used is in subsections 148(2) and (3)), and is unclear at what stage an investigation becomes a "proposed proceeding", or to whom such disclosure can be made. Subsection 148(1) sets out a general prohibition on the disclosure of compelled testimony, information, records or things, except as expressly permitted. If there are to be exceptions to this general prohibition, those exceptions and the circumstances in which disclosure will be permitted must be clearly identified.

Q9. Is the scope of periodic reviews appropriate? Should the proposed draft legislation include further details about how the review would be conducted?

In our view, a review of securities legislation, regulations and rules every five years would be appropriate. We do not believe that the Draft CMA should include extensive details about how the review would be conducted so as not to unduly constrain those charged with undertaking it. However, we would suggest that the references in subsections 276(1) and (2) to "one or more persons" be changed to "an advisory committee", as it would be unrealistic and inadvisable for a single person to be charged with such a review. We also propose revising subsection 276(3) to require the solicitation of the views of the public "by means of a notice and comment process" similar to subsection 143.12(2) of the Ontario Act. Finally, we propose that there be a requirement that the Minister table the report in the Legislature and that a committee be appointed to review the recommendations, hear the opinions of interested persons or companies and make recommendations to the Legislative Assembly regarding amendments to the legislation (see subsections 143.12(4) and (5) of the Ontario Act).

Q10. 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?

Providing stakeholders with a reasonable opportunity to comment on rules promulgated by the Commission is critical to ensuring that rules are proportionate and responsive to market realities. A 60-day consultation period would be sufficient for most rules. However, there will inevitably be circumstances in which a longer consultation period will be necessary to enable commenters to conduct more in-depth research and analysis in order to provide the Commission with more thoughtful insights and perspectives. It is difficult if not impossible to know in advance which rules will require a longer consultation period and which will not. However, factors that the Commission may wish to consider are the extent to which the rule represents a departure from the status quo (with a longer consultation period reserved for new rules or significant amendments to existing regimes), whether the rule is being introduced to address a novel issue or a longstanding one (with a longer consultation period reserved for novel issues that may not have been considered in detail by market participants) and, if the rule will be adopted in other CSA jurisdictions, the consultation period set by such other CSA members. The Commission should also consider engaging in targeted and confidential consultations with select interested parties prior to the publication of a rule in order to solicit their views as to the appropriate duration for the consultation period. By way of example, the CSA's recent consultation in respect of proposed National Instrument 51-107 *Disclosure of Climate-related Matters*, which contemplates the adoption of a new instrument that would represent a significant departure from the status quo, is the type of rule for which a longer consultation period is invaluable.

Q11. Will these new tools allow the OSC to effectively encourage compliance without unduly burdening market participants?

We are deeply concerned with the breadth and ambiguity of subsection 125(1) of the Draft CMA. The Commentary states that the Chief Regulator would be empowered to make compliance orders "to address specific situations where an issuer is non-compliant with requirements." The Commentary subsequently provides that this power "would not be appropriate for serious breaches of capital markets

law, which would continue to be addressed through enforcement processes." However, the limitations contemplated by the Commentary are in no way reflected in the Draft CMA. Rather, subsection 125(1) would enable the Chief Regulator to make a variety of potentially significant orders if "the Chief Regulator is satisfied that an issuer has not complied with capital markets law". "Capital markets law" is defined in section 3 to mean "the [Draft CMA], the regulations and the rules and, in respect of a person, includes a decision of the Commission, the Chief Regulator or the…Tribunal to which the person is subject". Accordingly, as drafted, subsection 125(1) could be applied to any instance of non-compliance, allowing the Chief Regulator to exercise discretion in unpredictable and problematic ways.

Further, in contrast with the discretion afforded to the Commission (not just the Director) to make analogous orders under subsection 127(1) of the Ontario Act, the discretion afforded under subsection 125(1) of the Draft CMA is not limited to circumstances where the order is "in the public interest". Instead, it refers to "non-compliance" as the trigger for this discretion – a significantly lower standard, particularly where there is no materiality threshold applied to the "non-compliance" for that trigger. Moreover, it is not clear that any order made under this provision must be proportionate, or even related, to such "non-compliance". Accordingly, a failure to strictly comply with even the most technical aspect of capital markets law (even one that has no bearing on whether an issuer's securities should be permitted to be traded during the pendency of that non-compliance) could result in an issuer's securities being cease traded or the issuer being denied an otherwise available exemption. In order to increase certainty among capital market participants, we recommend that the Draft CMA or the regulations at least codify the parameters under which the Chief Regulator may exercise the discretion afforded by this provision. Those parameters should in turn clarify that any order made must be proportionate to the non-compliance, thereby aligning the discretion in subsection 125(1) with the approach that the Commission has undertaken for future rule-making (as outlined in the Commission's November 2019 report entitled "Reducing Regulatory Burden in Ontario's Capital Markets").

We would add that section 125 of the Draft CMA inappropriately blurs the distinction that the Draft CMA and the *Securities Commission Act, 2021* attempt to draw between the Chief Regulator's regulatory function, on one hand, and the Tribunal's adjudicative function, on the other. While we appreciate the need for the Chief Regulator to make certain decisions in carrying out their regulatory responsibilities, section 125 is inherently adjudicative and should be left to the Tribunal. It is even more problematic that the powers in section 125 could be delegated to staff of the Commission's Corporate Finance Branch. Currently, if staff are of the view that a person has not complied with securities law, the onus is on staff to seek an order from, and plead their case before, the Commission. Section 125 would reverse that onus by empowering staff to make an order and forcing the subject of the order to apply to the Tribunal for a hearing and review of that decision. In our view, staff should continue to bear this onus.

Q12. Is the scope of the broader civil liability provisions for disclosure documents in the exempt market appropriate?

It is impossible to answer this question without further clarity as to several matters. Key among these is the disclosure documents to which subsection 183(1) will be applicable and the terms and purpose of the exemption for which that disclosure document is used. Generally speaking, we do not think it is at all appropriate to apply these broader civil liability provisions for (a) an "offering memorandum" used in

an exempt distribution to accredited investors or any other exemption from the prospectus requirement that is premised on the investor having the requisite knowledge, sophistication or resources to invest without the requirement of a prospectus; or (b) an alternative disclosure document prescribed by securities legislation. In all cases, such an offering memorandum should be subject only to the civil liability provisions of subsection 183(2) of the Draft CMA, as these mirror the civil liability provisions currently applicable under section 130.1 of the Ontario Act.

Also concerning is the breadth of the classes of persons who may be the subject of civil liability. For example, the "influential person" category could subject a shareholder to liability for a prescribed disclosure document merely by virtue of owning 10% of a reporting issuer's shares despite having no involvement, and gaining no direct benefit, from the distribution for which that disclosure document was used.

Finally, it is unclear what "experts" will be captured by subsection 183(2) and whether the proposal to make them liable will work as a commercial and practical matter. If this is intended to extend to an issuer's independent auditors or an independent qualified person responsible for a technical report (by requiring that the expert consent to the inclusion of its report in a prescribed disclosure document), will that expert choose to withhold its consent (or be required to do so under its professional standards) due to the risk of liability where the disclosure document is anything other than a prospectus? Even if permitted to consent, what additional procedures and assurances will that expert require? Will the additional risks to be borne by these experts result in additional costs to the issuer? Auditors, qualified persons and other experts who may be the target of these proposed provisions must be consulted to answer these questions. Only after that consultation will regulators be a position to assess whether this proposal is even workable and, if so, how to tailor the proposal such that its burden is proportionate to the regulatory objective. Further, we will need to consider this additional expert liability in light of the international nature of Ontario's capital markets – will Ontario investors' investment choices be limited as a result of foreign experts refusing to accept such additional liability?

For further details as to the issues with this proposal, and necessary amendments, see our commentary in respect of section 183 above.

Q13. Would the scope of the broader civil liability provisions for disclosure under a prospectus address the identified gaps?

As an initial matter, these provisions should apply only in the context of a prospectus. In our view, none of the liability provisions in sections 177 to 179 should also apply to a "prescribed offering document". It is entirely unclear what might constitute a "prescribed offering document"; however, the open-ended nature of the drafting allows regulators latitude to scope in an offering memorandum or other "prescribed disclosure documents" within this definition. For the reasons noted earlier, civil liability with respect to those documents is properly addressed through the applicable subsection of section 183. It should not be left to the rules or regulations to determine when and if an offering memorandum or other offering document may be "prescribed" to be subject to the even more expansive liability provisions of these sections.

Also, as noted earlier, the "influential person" category is far too broad to serve the purpose of these civil liability provisions. Among other things, it may scope in persons that have no involvement in the issuer's disclosure for the particular exempt distribution (or at all).

In sum, we do not think it is appropriate to allow for broad flexibility to determine by rule or regulation when and if a particular document or a class of person should be subject to something as fundamental as the civil liability provisions, which have been tailored to address investor protection concerns in a prospectus offering to the public. Limits to this discretion should be codified within our legislation.

Q15. What type of new requirements for managing conflicts of interest under this provision would be appropriate for capital markets law in Ontario?

MI 61-101 addresses some of the most controversial transactions in our capital markets. These include take-over bids made by issuers' insiders, transactions between reporting issuers and their related parties and privatizations of reporting issuers where their related parties are the purchasers and/or are receiving benefits to which other shareholders are not entitled. Given its importance, it is problematic that certain prevailing best practices applicable to conflict of interest transactions governed by MI 61-101 are not set out in the instrument itself. For example, MI 61-101 only mandates that a special committee of independent directors be established in connection with an insider bid. However, other types of conflict of interest transactions, including certain related party transactions and business combinations, frequently raise the same issues that a special committee would help to address in the context of an insider bid.

In addition, notwithstanding that special committees technically are not required for most transactions, as a practical matter, special committees are increasingly used as a procedural safeguard in a wide range of transactions and other high stakes and contentious situations. A material conflict of interest transaction that is negotiated or overseen by directors or management that are not fully independent risks failure as a result of increased regulatory scrutiny or legal challenges. Although many market participants are sensitive to the issues raised by material conflict of interest transactions and take steps to try to resolve them, it would be appropriate for the Commission's jurisprudence and staff's guidance to be codified to ensure a consistent standard of governance across all similar transactions.

Despite their utility, and notwithstanding our submissions above, special committees should not be mandatory for each and every conflict of interest transaction regulated by MI 61-101. In this regard, CSA Multilateral Staff Notice 61-302 – *Staff Review and Commentary on Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions* ("**Staff Notice 61-302**") provides that the CSA's guidance is meant to apply exclusively to "material conflict of interest transactions", being insider bids, issuer bids, related party transactions and business combinations that give rise to substantive concerns as to the protection of minority security holders. Staff Notice 61-302 notes that this would generally not include transactions that are captured incidentally within the scope of MI 61-101, such as transactions that are business combinations only as a result of employment-related collateral benefits. Although we agree, it is important that the term "material conflict of interest transaction" be defined in MI 61-101 to ensure that market participants have a clear understanding of the circumstances in which any additional requirements or guidance would be applicable or expected by CSA staff. For instance, does "material conflict of interest transaction" contemplate a related party

transaction for which minority approval is required, or does it contemplate some lower threshold, such as a related party transaction in respect of which a material change report must be filed (regardless of whether minority approval is also required)? We would add that the definition of "independent committee" in MI 61-101 should be revised to incorporate the concept noted in Staff Notice 61-302 that an independent committee includes a board of directors that is comprised entirely of independent directors or that takes appropriate steps to conduct its deliberations free from interference or influence by directors with a conflict of interest.

Finally, we believe that MI 61-101 should be amended to codify and clarify the disclosure that is expected of issuers in connection with material conflict of interest transactions. Pursuant to MI 61-101, a management information circular that an issuer must send to its security holders when seeking minority approval for a conflict of interest transaction must include, among other things, a description of the background to the transaction and a discussion of the review and approval process adopted by the issuer's board of directors and special committee, if any. Staff Notice 61-302 has helped to clarify these requirements by providing CSA staff's interpretation of what, in its view, constitutes satisfactory disclosure. In our view, it is important for these expectations to be codified if CSA staff continue to take the position that such information is, in fact, required in connection with a material conflict of interest transaction. This would also have a positive impact on board processes since any weaknesses would be more evident to CSA staff, issuers' security holders and other market participants, and all similar transactions would be subject to a common disclosure standard.

Q16. Would applicants apply to the Tribunal for these remedies instead of applying to the courts? If so, when and under what circumstances? Should guidance or a policy be provided by the OSC as to when they would exercise these powers? Should recourse to any of these remedies be limited to either the courts or the Tribunal? What, if any, would be the impact of changing the criteria for making an order to "in the public interest"? Are there additional remedies that the Tribunal should be able to order in M&A matters?

In our view, ensuring that the Commission has all of the tools necessary to address transactions that are abusive of shareholders specifically and Ontario's capital markets generally is vital to fostering investor confidence. Neither section 104 nor subsection 127(1) of the Ontario Act explicitly grants the Commission the authority to rescind a transaction or to prevent a party from exercising voting rights. Accordingly, if an abusive transaction were structured such that closing occurred immediately after signing, it is unclear whether the Commission would have the jurisdiction to grant an adequate remedy. This was a significant issue in *Re Eco Oro Minerals Corp*,[8] in which the Commission concluded that the issuer in question had inappropriately issued shares to friendly parties in the midst of a contested director election. The Commission indirectly ordered that the transaction be rescinded in reliance on sections 8(3) and 21.7 of the Ontario Act, which empower the Commission to review the decisions of recognized exchanges such as the Toronto Stock Exchange. However, the Commission's decision was not without controversy and was in the process of being appealed to the Ontario Superior Court of

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[8] 2017 ONSEC 23.

Justice (Divisional Court) when the issuer and the dissident shareholders entered into a settlement agreement.[9]

We suspect that the majority of applicants would prefer to apply to the Tribunal for the remedies set out in subsection 85(1) of the Draft CMA rather than apply to the Superior Court of Justice for the remedies set out in subsection 86(1) in virtually all circumstances. First, a court application is often much more expensive – or has the potential to be much more expensive – than an application to a securities regulator. In Ontario, this is due in part to the fact that the Ontario Act and the Draft CMA do not authorize the Commission and the Tribunal, respectively, to make cost awards in favour of private parties,[10] meaning that an applicant's maximum exposure is limited to costs associated with preparing an application. Conversely, courts have the discretion to determine by whom and to what extent costs should be ordered. The Tribunal's less formal process and the possibility that it may render decisions more quickly than a court in some cases are also relevant factors. Second, we understand that some market participants perceive courts to be more deferential to issuers than the Commission, which may prompt security holders considering challenging decisions made by an issuer's board of directors to apply to the Tribunal for relief rather than a court. Third, and as discussed in more detail below, the Tribunal would be empowered to make any of the orders set out in subsection 85(1) of the Draft CMA if a person has not complied with Part VIII or the rules relating to it, or if the Tribunal "considers that a person has acted or is acting contrary to the public interest…" In contrast, the Superior Court of Justice would be empowered to make any order that it considers appropriate only if it is satisfied that a person has not complied with Part VIII or the rules related to it. The implication of such drafting is that certain applications would have to proceed before the Tribunal. For example, given that the issue of defensive tactics adopted by boards of directors during or in anticipation of a take-over bid is regulated by National Policy 62-202 *Take-Over Bids – Defensive Tactics* rather than by way of a rule, an improper defensive tactic could only ever be found to be prejudicial to the public interest and could never rise to the level of non-compliance with Part VIII or its related rules, meaning that it could never be the subject of an application under subsection 86(1).

We strongly support the idea that the Commission should promulgate guidance or a policy regarding the circumstances in which the Tribunal would exercise the various new powers afforded by subsection 85(1). While it may not be possible for such guidance to be comprehensive, it would provide market participants with a better understanding of their respective odds of success in connection with an application for specific remedies, which could facilitate settlements and save parties and the Commission time and money. Further, we believe that such guidance should also clarify certain aspects of Commission's public interest power generally. For example, is the standard for invoking the

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[9] A panel of the British Columbia Securities Commission (the "**BCSC**") considered a similar issue in *Re Imex Systems Inc*, 2019 BCSECCOM 23, a decision that predated the recent amendments to the BC Act that authorized the BCSC to rescind transactions. Although it declined to make an order unwinding the transaction in question, the BCSC stated that "it may be in the public interest, in the appropriate circumstances, to order that a completed transaction be unwound. It is not consistent with our mandate to protect investors and to ensure fair and efficient capital markets to allow those engaged in a transaction that harms the capital markets to conclude, in all circumstances, that we simply cannot make an order because a transaction has closed. The incentive to rush to close transactions that are not in compliance with securities regulation to avoid regulatory intervention is simply too great."

[10] We note that section 144 of the Draft CMA authorizes the Tribunal to order a person to pay the Commission's costs in respect of an investigation or a hearing.

public interest that the conduct or transaction be abusive of shareholders and the capital markets, or must the conduct or transaction engage or undermine the animating principles underlying securities law? Does the standard differ depending on whether it pertains to enforcement proceedings or corporate transactions? Do the Commission or staff utilize a particular framework when conducting their public interest analyses? These questions and others evidence a lack of certainty and predictability with respect to the Commission's public interest power, which can have a chilling effect on novel but legitimate corporate actions.

In general, we do not object to the Tribunal and the courts having jurisdiction to grant the same remedies. While it is possible that this may contribute to forum shopping among applicants, we believe that this is outweighed by the benefits of ensuring that the Tribunal is not precluded from considering a matter within its expertise solely because it does not have the authority to grant an adequate remedy. We also trust that the Tribunal would refuse to consider an application under subsection 85(1) where an applicant tried and failed to obtain a remedy from the Superior Court of Justice under subsection 86(1), and vice versa. One exception is the Tribunal's ability to make "[a]n order rescinding a transaction with any interested person, including the issue of a security or an acquisition and sale of a security." As noted above, we believe that the Tribunal should have a suite of potential remedies available to it that it can use to address problematic transactions. However, this provision is overly-broad. On its face, it would empower the Tribunal to rescind purely corporate transactions that have no rational connection to Ontario securities law except for the fact that such transactions happen to involve an "interested person" as defined in section 77 of the Draft CMA. In our view, and notwithstanding the inclusion of a similar provision in the BC Act, the scope of subsection 85(1) should be narrowed to limit the Tribunal's ability to rescind transactions *only* to those that involve the issue of a security or the acquisition or sale of a security, as opposed to any transaction *including* those that involve the issue of a security or the acquisition or sale of a security.

As noted above, the impact of changing the criteria for making an order to "in the public interest" would be to expand the Tribunal's authority to make orders in circumstances in which a party's conduct or a given transaction is technically in compliance with securities law but where the conduct or transaction is nonetheless prejudicial. In the absence of such language, parties would be compelled to apply to court for a remedy regardless of the fact that the substance of the issue may be well within the Tribunal's purview. As such, we agree that the public interest language in subsection 85(1) should be retained.

Finally, the Draft CMA should explicitly provide that the Tribunal must grant leave in order for a private party to bring an application under subsection 85(1). That private parties cannot bring an application under subsection 127(1) of the Ontario Act as of right is well-established in the Commission's jurisprudence.[11] Even under subsection 104(1) of the Ontario Act, which explicitly contemplates applications to the Commission by interested persons, the Commission has held that it may

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[11] See, e.g., *Re MI Developments Inc*, 2009 ONSEC 47, *Re Catalyst Capital Group Inc*, 2016 ONSEC 14 and *Re The Catalyst Capital Group Inc*, 2020 ONSEC 6.

nevertheless decline to hear an application.[12] In our view, this is an important procedural matter than warrants codification in the Draft CMA.

Q17. 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?

We are strongly opposed to the adoption of the new prohibition against making or attempting to make false or misleading statements about public companies set out in section 94 of the Draft CMA, as we believe that it would have a significant chilling effect on legitimate and invaluable short selling activity.[13]

It is well-established that short selling is an important and legitimate investment strategy that provides many benefits to our capital markets, including improving price accuracy, increasing liquidity, identifying market bubbles and contributing to the discovery of fraud. So-called 'short and distort' campaigns whereby short sellers disseminate false or misleading information about an issuer in order to drive down the market price of the issuer's securities are unquestionably problematic and should not be tolerated in our capital markets. However, it is already the case that such conduct is not tolerated in our capital markets. Ontario securities law – and indeed securities law in most Canadian jurisdictions – prohibit a person or company from (a) directly or indirectly engaging or participating in any act, practice or course of conduct relating to securities that the person knows or reasonably ought to know results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security; (b) perpetrating a fraud on any person or company; and (c) making a statement that the person or company knows or reasonably ought to know, in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading and would reasonably be expected to have a significant effect on the market price or value of a security. The Commission also has broad powers to sanction conduct that is prejudicial to the public interest even in circumstances in which there has been no breach of Ontario securities law, but where a party's conduct is abusive of investors or the capital markets or is inconsistent with the animating principles underlying a particular requirement. Accordingly, an activist's attempt to depress an issuer's stock price by knowingly spreading material *mis*information is already prohibited conduct capable of redress by the Commission.

We note that the Ministry's question asks whether section 94 captures "the problematic behaviour seen in 'short and distort'…schemes". In our view, this begs the question. We are not aware of any

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[12] See, e.g., *Re Western Wind Energy Corp*, 2013 ONSEC 25, in which the Commission concluded that "the Commission can decline to hold a hearing on the merits in respect of an application brought under section 104 for any appropriate reason, including because the application is *prima facie* without merit, because no useful purpose would be served by the hearing or because holding such a hearing is not in the public interest."

[13] Our response to this question focuses on the impact of section 94 on the nuanced issue of activist short selling, however we do not believe that the provision is a necessary or appropriate means of addressing the more straightforward issue of 'pump and dump' schemes either. Although such schemes may be prevalent, the underlying conduct often fits squarely within existing provisions of the Ontario Act, specifically section 126.1, which prohibits fraud and market manipulation, and section 126.2, which prohibits the making of materially misleading or untrue statements that would reasonably be expected to have a significant market impact.

empirical evidence to suggest that abusive short selling campaigns are remotely prevalent in Canada. According to the data in CSA Consultation Paper 25-403 *Activist Short Selling* ("**CP 25-403**"), there were more than a dozen activist campaigns in Canada in a single year just three times between 2010 and 2020, there have been no more than five Canadian targets for every 1,000 Canadian listed issuers annually, and Canadian issuers are targeted by activist campaigns at a much lower rate than U.S. issuers. That activist short selling is a relatively infrequent occurrence does not mean that it should be ignored or that abusive activist short selling campaigns should not be addressed. However, the frequency of abusive campaigns – or the ostensible lack thereof – must be relevant to an assessment of whether the Canadian regulatory landscape should be fundamentally altered in a manner that will negatively impact legitimate conduct.

Similar to subsection 50(3) of the BC Act, section 94 of the Draft CMA proposes to make it an offense for a person engaged in promotional activities to make a statement or provide information about a reporting issuer or an issuer whose securities are publicly traded that the person knows or reasonably ought to know is false or misleading or omits information that is necessary to prevent it from being false or misleading and would be considered to be important by a reasonable investor in determining whether to purchase, not purchase, trade or not trade a security of the issuer or a related financial instrument. The provision omits any requirement for the statement or information to be *materially* misleading or untrue, or for the statement or information to be expected to have a significant market impact. In our view, both the recent amendments to the BC Act and proposed section 94 of the Draft CMA are overreactions to a perceived problem based on little more than anecdotal evidence. The elimination of a market impact assessment and a materiality threshold can be expected to have a significant chilling effect on legitimate short selling activities given that these market participants do not have access to issuer information beyond what the issuer itself chooses to disclose publicly, and are therefore forced to form opinions and draw conclusions from their own work and investigation. Moreover, such a provision would almost certainly capture analysts that may omit facts without an intention to mislead. Finally – and somewhat ironically given that the goal of section 94 appears to be to protect issuers – the provision would likely increase litigation risk for issuers themselves since they would potentially be liable for any untrue statement in a press release, investor presentation or earnings call regardless of whether such statement was material.

We also find it somewhat unusual that the Draft CMA takes a platform approach with respect to a variety of issues as a means to promote regulatory flexibility, but that a brand new and highly controversial provision would be hardwired into the legislation itself, thereby bypassing the Commission entirely. This is compounded by the fact that the Commission and the other members of the CSA are in the midst of a consultation process on activist short selling. Under the circumstances, it appears that the Commission is best-positioned to assess whether section 94, or some variation of it, should be adopted by way of a rule.

For complete details regarding our views on this issue, please refer to our firm's comment letter dated March 3, 2021 in response to CP 25-403.

Q18. Should the maximum amounts increase based on inflation or another factor? If so, how often should the maximum amounts increase?

We do not support increases in the maximum administrative monetary penalties ("**AMPs**"), unless such increases are accompanied by clear statutory guidance for determining when to impose an AMP and in what amount, including explicit language confirming that the purpose of the AMPs is to encourage compliance with securities law, rather than to punish respondents. We are concerned that without clear statutory guidance for the imposition of substantial AMPs, the proposed increases could, in some circumstances, unfairly and improperly punish individual and corporate respondents, as well as innocent shareholders already victimized by a corporation's violations of securities law.

The statutory guidance should include a list of aggravating and mitigating factors to be considered in determining the amount of an AMP. Similar guidance is provided in numerous other statutes, including, for example, the *Competition Act*. At a minimum, these factors should include: (a) the presence or absence of a direct benefit to the respondents; (b) the extent of injury to innocent parties; (c) for corporate respondents, whether participation in the securities law violations was widespread; (d) the intent of the respondents, with the most severe sanctions reserved for deliberate, intentionally fraudulent conduct; (e) the degree of difficulty in detecting the particular type of violation at issue, with the most severe sanctions reserved for securities law violations that are difficult to detect and thus call for an especially high level of deterrence; and (f) the respondents' cooperation and remedial actions. We note that a number of these factors are considered in the U.S. in determining the quantum of financial sanctions for securities law violations.

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?

While we generally support strengthening Commission staff's powers to obtain production of data within computer systems, the proposed new tools appear to go beyond what is necessary and appropriate to achieve the stated objectives. We do not support the proposed requirement that firms and individuals that are not targets of investigations be required to "prepare and produce" documents, records or electronic data to a peace officer or person investigating an offence under the Draft CMA. These powers appear to us to be overly-broad, disproportionate and subject to constitutional challenge.

Q21. Does this provide sufficient clarity that compliance with a summons would not be the basis of contractual liability?

In our view, the language of subsection 248(2) assists in confirming that compliance with a summons cannot form the basis of contractual liability. However, subsection 248(2) should be further amended to make clear that parties cannot agree to disregard or to contract out of the section. This could be achieved by adding the phrase "Notwithstanding anything in an agreement or contract to the contrary" at the outset of subsection 248(2).

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?

The recent addition to the Ontario Act of the confidentiality exception for disclosure to an insurer and an insurance broker was long overdue and important for reducing the regulatory burden on persons subject to an investigation.

We support the expansion of confidentiality and disclosure exceptions to any person where the disclosure is necessary to comply with requests from Commission staff, as well as to a company's board of directors and senior management. For example, in our experience, there is often a lack of clarity when Commission staff serve a summons on an individual to produce documents regarding their activities through a company, where Commission staff's clear intent is to require production of company documents. It is often not possible to fully comply with the scope of the summons without engaging other persons within the company or without such other persons becoming aware of the summons.

In addition to the specific confidentiality and disclosure exceptions set out in section 147, we suggest that consideration also be given to an exception for disclosure to a person's spouse and/or close family members in appropriate circumstances. In our experience, it can often be extremely difficult for individuals who are the subject of an investigation to maintain confidentiality from a spouse or close family members, and it can be quite difficult for individuals to go through an investigation without spousal or familial support.

The circumstances in which the Chief Regulator may prohibit disclosure to an insurer or insurance broker must be narrowly circumscribed, given that the result of such an order would likely be highly prejudicial, namely, to deprive market participants of defence funding (and, as a result, counsel of their choice) in the context of an investigation with potentially serious ramifications for the individual or company.

More broadly, we take this opportunity to note that the Draft CMA does not provide for default confidentiality in the context of an investigation by the Commission (as provided for in section 16 of the Ontario Act). In our view, this is a significant change that should not be adopted without a full understanding of the potential implications and a more robust consultation process.

Although subsection 146(11) provides that the Commission is not permitted to disclose certain matters pursuant to a request for information under the *Freedom of Information and Protection of Privacy Act*, the Draft CMA does not appear to restrict more broadly the disclosure of information (whether by the Commission or other persons) concerning any number of matters, including (but not limited to) the existence and contents of an order made under section 146 and the name of any person sought to be examined. This represents a significant departure from the current regime under the Ontario Act, which prohibits disclosure of such matters unless the Commission considers that it would be in the public interest to make an order authorizing such disclosure.

We recognize that section 147 of the Draft CMA permits the Chief Regulator to make an order "prohibiting a person from disclosing to any other person all or any of the matters relating to the investigation that are described in paragraphs 1 to 8 of subsection 146(11)". It is, however, unclear whether such orders will be granted by the Chief Regulator in the ordinary course, or whether such orders will be exceptional or infrequently granted. Further, such orders may only be granted "[f]or the purpose of protecting the integrity of an investigation authorized under section 146". Market participants must have the ability to themselves seek an order under subsection 147(1). Disclosure of the matters outlined in subsection 146(11), including the very existence of an investigation by the Commission, can be damaging not only to the integrity of an investigation, but also to the business and reputation of market participants. There is no valid public interest served by allowing speculation by the public into the merits (or lack thereof) of an investigation by the Commission. This concern is particularly acute in circumstances where an investigation is subsequently discontinued by the Commission and where there has been no finding of a breach of Ontario securities law.

To the extent confidentiality of an investigation is no longer the default, at the very minimum, section 147 should be amended to permit such orders to be sought by market participants involved in an investigation authorized under section 146.

Q32. What are the anticipated costs and benefits to market participants, stakeholders or the public of replacing the *Securities Act* and *CFA* with the CMA?

In our view, adopting the Draft CMA would be exceptionally costly and not remotely beneficial. The Commentary correctly notes that stakeholders and market participants would be forced to incur costs relating to administration, procedures and policies, compliance systems, and training and educational requirements. However, this is merely the tip of the iceberg. As discussed throughout this comment letter, numerous significant and substantive changes to Ontario securities law have been embedded in the provisions of the Draft CMA. Many of these changes have not been identified in the Commentary while the rationale for and implications of others have not been explored. The result is that many stakeholders and market participants will not fully appreciate just how costly the adoption of the Draft CMA will be for them until after it has been enacted, at which point it will be too late.

The Commentary identifies the "modernized and flexible" platform approach as a benefit of adopting the Draft CMA on the basis that it would allow for more timely rules and a reduced need to amend legislation. We view this as a negative, as it equates to the government deputizing securities regulators as *de facto* legislators and eliminating political accountability. We also disagree with the notion that using the Draft CMA as a vehicle to implement the Taskforce's recommendations "in a swift and timely manner" qualifies as a benefit. On the contrary, the Taskforce recommendations that warrant implementation could be codified via amendments to the Ontario Act much more quickly than they could be through the adoption of the Draft CMA. Finally, it is not clear to us how replacing the Ontario Act with the Draft CMA could help to incubate innovative companies, encourage economic activity among incumbents, increase investment from both Canadian and international institutional investors and contribute to economic recovery and growth. If anything, the sweeping authority and nearly unbridled discretion that the Draft CMA bestows upon the Commission generally and the Chief Regulator specifically is more likely to increase regulatory burden, stifle innovation and inhibit growth than it is to have the opposite effect.

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