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SUBMITTED VIA WEBSITE
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Re: Capital Markets Stability Act ("CMSA") – Draft for Consultation ("proposed CMSA")

The Investment Industry Association of Canada (the "IIAC") appreciates the opportunity to provide comments on the revised CMSA to the Governments of British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island, Yukon and Canada (the "Participating Governments") as they continue the work to establish the Cooperative Capital Markets Regulatory System ("CCMRS").

The IIAC is the national association representing the investment industry's position on securities regulation, public policy and industry issues on behalf of our 138 investment dealer member firms in the Canadian securities industry that are regulated by the Investment Industry Regulatory Organization of Canada ("IIROC"). These dealer firms are the key intermediaries in Canadian capital markets, accounting for the vast majority of financial advisory services, securities trading and underwriting in public and private markets for governments and corporations that is fundamental to economic growth.

We support the federal government's role in monitoring activity in national capital markets and to detect, identify and mitigate systemic risks arising in capital markets. The IIAC believes the proposed CMSA is an important tool to achieve this objective. It is important that the proposed CMSA is cost-effective and avoids unintended consequences. The revised version that incorporates the IIAC and other stakeholder comments moves the legislation closer to this objective.

The IIAC appreciates that the Capital Markets Regulatory Authority ("the Authority") has made significant revisions to the proposed CMSA to address our previous concerns that the CMSA not impose undue regulatory burdens on capital market participants and the power to regulate systemic risk be applied judiciously and in a manner that reflects coordination and cooperation with other regulators.

We are also pleased to see that concerns with procedural protections, including the rights of affected parties to make representations before a designation is made, have been addressed.

The IIAC examines these changes in more detail below, in addition to outlining further amendments for consideration by the Participating Governments.

1. Designation and Systemic Risk

Overview

The IIAC previously raised concerns about the need to ensure the power to regulate systemic risk is used judiciously and suggested further guidance be provided to minimize this concern. While guidance was not included, we note a number of positive changes to the proposed CMSA that will help to ensure that the new systemic risk powers are used only if necessary and in coordination with other regulators.

Definitions

We are pleased to see the proposed CMSA has been revised so that the broad term “integrity” has been removed from the definition of “systemic risk related to capital markets” in section 3 and a materiality test has been added. We agree with the Participating Governments that a materiality threshold helps to limit the scope of the Authority’s regulatory powers to threats to financial stability “that are sufficiently large to potentially have a material adverse effect on the Canadian economy.”

The addition of the words “related to capital markets” in the heading to section 3 also helps to focus on the key purposes of the CMSA.

However, we note our previous request for clarification in section 3 was not addressed as it relates to the intention to capture foreign capital market intermediaries. The IIAC would again recommend that section 3 be clarified regarding the extra-territorial implications when, for example, foreign investment dealers are trading in Canada. The scope of section 3 as it pertains to foreign domiciled entities should be clearly outlined and we suggest that foreign investment dealers be specifically excluded.

Systemic Risk Provisions and Designation Categories

The IIAC supports the decision to remove most of the entity-level designation powers from the proposed CSMA. This adjustment will narrow the range of regulation-making powers to focus strictly on systemically important products and benchmarks, and systemically risky practices.

While this is a positive change, the IIAC has some concerns relating to the designation of a class of securities or derivatives as systemically important under section 20, or the designation of a systemically risky practice under section 22. While both sections outline the factors for consideration in determining whether a product or practice could pose a systemic risk to capital markets (resulting in the creation of a regulation), given the potentially wide implications for the capital markets, and lack of an appeal process, we request more details on the circumstances when the Authority would make such designation.

In particular, with respect to the wide scope of the term “systemically risky practice”, we suggest clarification and further guidance on these practices and on the specific factors that determine the designation of an entity as “systemically risky”. For example, paragraph 22(2)(a) references the “financial effect” of engaging in the practice. This term is quite vague and potentially far-reaching. The IIAC recommends greater detail on its meaning. In addition, both paragraphs 20(2)(i) and 22(2)(g) outline “any other risk-related factors that the Authority considers

appropriate." Again, given the importance of these provisions and the potential impact across the capital markets, further guidance for such catch-all provisions should be considered.

We agree with the Participating Jurisdictions' decision that, to further address concerns about the Authority's potentially broad discretion under the CMSA, paragraph 24(2)(a) has been revised to remove the overly wide scope contained in the provisions that would have allowed the Authority to "do anything else" with respect to urgent orders.

Finally, neither sections 20 or 22 include the ability for an "opportunity to be heard" unlike subsection 18(3) when a benchmark is designated as systemically important. The IIAC believes that a similar procedural right should be granted to entities who could be directly affected when securities or derivatives are designated as systemically important or a specific practice is designated as systemically risky.

Enhanced Regulatory Coordination

The IIAC agrees with the revisions to the proposed CMSA to address stakeholder concerns regarding the potential for an increased regulatory burden as a result of national data collection powers and measures to address systemic risk.

We commend the Participating Jurisdictions on amendments to subsections 9(2) and 10(2) that require the Authority consider whether the keeping of records and information is already required, and the extent to which it is practicable for the Authority to obtain records and information from another source. Further, we also support the provisions in subsections 18(2) and 20(2) requiring the Authority to consider whether a benchmark, practice, security or derivative is already regulated before designation as systemically important or systemically risky.

Furthermore, we are pleased to see that with respect to urgent orders, the Authority must, as soon as feasible, notify the capital markets regulator in each non-participating province or territory about the nature of the risk and notify them after an order is made.

The amendments further support and promote the mandate outlined in subsection 6(2) of the proposed CMSA that requires the Authority to coordinate, to the extent practicable, its regulatory activities with those of other federal, provincial and foreign financial authorities to promote efficient capital markets, achieve effective regulation and avoid imposing an unnecessary regulatory burden.

These changes to the proposed CMSA help to address some of the IIAC's concerns regarding interaction with non-participating jurisdictions and the importance of ongoing coordination and cooperation with all Canadian regulators.

Procedural Fairness

We are also pleased to see concerns relating to procedural protections, including the rights of affected parties to make representations before a designation is made, have been recognized.

In particular, we note our concerns regarding the notice of violation provisions under section 34 of the proposed CMSA have been addressed. The IIAC had argued that a recipient of a notification of violation issued by the Chief

Regulator should not have to appear and make representations to the same decision-maker. We are pleased to see that notices of violation can now be contested before the Tribunal. However, the IIAC previously raised the issue that rights of appeal to a court of competent jurisdiction should also be set out.

More generally, the CMSA is silent on the process for appealing or seeking judicial review of any Tribunal decision made pursuant to the CMSA. We suggest the addition of a provision that sets out the appropriate process.

2. Information Collection and Disclosure

In our earlier submission, the IIAC requested further guidance on the manner that the Authority would minimize the data collection burden on market participants, ensure full consultation on proposals to collect market data, and coordinate with other regulatory authorities. The IIAC had outlined concerns of members in terms of the costs and time of providing the same information to multiple authorities. The new CMSA now includes provisions under subsections 9(2) and 10(2) to reduce the potential increased regulatory burden with respect to reporting requirements by requiring the Authority consider whether records and information are already required by capital markets or financial legislation, and whether it is practicable to obtain the records and information from another source.

The IIAC also outlined concerns about safeguards to protect the confidentiality of the information collected and that the discretion given to the Authority in the previous draft to decide whether to treat information as confidential. The Participating Jurisdictions have responded positively by removing subsection 14(b) that permitted the Authority to disclose confidential information if, in its view, the public interest outweighed a private interest.

While we support the foregoing revisions to the proposed CMSA, the IIAC suggest that, when regulations are made related to record-keeping and/or the provision of records to the Authority, or following a request of the Chief Regulator to provide records, consideration should be given to impediments to the release of such information under privacy legislation. There may be privacy issues when information is requested from a member firm that was originally obtained from third-parties, such as outside vendors, which may raise possible impediments for a member firm in providing this information to the Authority. Furthermore, it would be helpful if some details as to how the Authority plans to protect, store and return any records or information provided.

The IIAC would also like to point out some concerns with section 17, which permits compelled testimony to be disclosed if the Tribunal authorizes it on an *ex parte* basis. Given the differing self-incrimination protections in Canada as opposed to the U.S., it is problematic if compelled evidence is disclosed to the Department of Justice or other law enforcement agency. There is no right to refuse to answer questions that might incriminate oneself in Canada – one must answer, but those answers cannot be used against an individual. In the U.S., one's protection is the ability to refuse to answer, but once an individual does answer, the information can be used for any purpose. The impact of sending testimony compelled in Canada to U.S. law enforcement is that the individual is deprived of his/her right against self-incrimination. We suggest this issue be addressed by either not permitting disclosure without the opportunity to be heard, or carving out disclosure to law enforcement altogether.

3. Criminal Offences

The IIAC agrees that the inclusion of criminal offences in the proposed CMSA will better position the Authority to contribute to the investigation of capital markets criminal offences and lead to strong criminal enforcement in Canada. We support the movement of existing offences from the *Criminal Code* to Part 5 of the proposed CMSA. However, it is important to ensure that the offences, such as those related to insider trading and tipping under section 57, should be consistent with criminal offence provisions contained in existing provincial statutes and the *Criminal Code*.

The IIAC welcomes the opportunity for a continued dialogue with the Participating Governments regarding the proposed CMSA, and would be pleased to discuss this submission should you have any questions.

Yours sincerely,

A handwritten signature in cursive script that reads "M. Alexander".