DAVIES

155 Wellington Street West
Toronto ON M5V 3J7
dwpv.com

December 8, 2014

BY E-MAIL: commentonlegislation@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Thank you for the opportunity to comment on the draft Provincial Capital Markets Act (the "PCMA" or the "Draft Act") and the draft Capital Markets Stability Act (the "CMSA").

Our detailed comments are set out below and range from high level policy-oriented comments to drafting points. The comments on the PCMA can be found under Part I and the comments on the CMSA can be found under Part II below.

The members of the Davies working group who participated in the comment process are listed at the end of this letter.

PART I - PROVINCIAL CAPITAL MARKETS ACT

INTRODUCTION

The achievement of consensus among the several participating provinces is a great accomplishment and one that we applaud and support. That said, we have one overarching concern that makes it difficult to support this legislation. Our concern is with the extent to which the PCMA introduces significant substantive changes into the law and the lack of consultation process.

The Draft Act introduces numerous substantive changes from the current securities law of the Province of Ontario. These include:

(a) change to the longstanding definition of "misrepresentation";

(b) the broadening of the insider trading prohibition to include conduct that stops short of a sale of a security and to include transactions in securities of non-reporting companies;

(c) change to the exception to the tipping prohibition;

(d) introduction of a novel fiduciary relationship between underwriters and their clients;

(e) unprecedented regulation of shareholders holding 20% or more of a public company as if they were "market participants"; and

(f) introduction of a novel "obstruction" prohibition prohibiting the withholding of information from the regulatory authority and potentially intruding on the solicitor/client relationship.

These and other substantive changes are touched on in the commentary below.

As a general principle, the introduction of the PCMA 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 Ontario Securities 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 comments, and its implications explained and the necessity justified. Comment would be sought from the broad community in a process that is often iterative and sometimes extends for months or years.

Here, the changes are buried in an avalanche of draft legislation in the context of a fundamental regime change and can only be identified by feats of memory or blacklining, without the benefit of any justification for the change or any explanation as to its expected or intended implications.

We recognize that the PCMA is not based on the Ontario Securities Act (the "Ontario Act") (a decision that we find curious given that the Ontario Act governs the largest portion of Canada's capital market), and that it reflects various elements of the provincial securities acts. Nonetheless, we believe it is incumbent on the Province of Ontario to identify, in the manner described above, the changes against the Ontario legislative base line and to ensure a robust consultation process. This is all the more critical here given that the PCMA, once passed into legislation by the several participating provinces, will be exceedingly difficult to change.

GENERAL COMMENTS

1. We are also concerned about the extent to which the PCMA takes a platform approach to legislation. Not only are entire areas of the law proposed to be addressed in regulations, but the legislation omits a number of well-established elements of securities law, for example, the 20% threshold for a takeover bid and the two-day cooling off period for a prospectus offering. We believe that such fundamental established elements of the existing law should be enshrined in the legislation itself. The commentary accompanying the release of the draft legislation noted that the platform approach was intended to promote "regulatory flexibility allowing the Authority to respond to market developments in a timely manner". Our concern with this is threefold:

   (a) it allows for legislation by regulatory fiat with limited political accountability;

   (b) it undermines one of the key features of a sound capital market, namely, stability and predictability in the legal and regulatory regime which allows for transaction planning. With vast sections of the law, including key cornerstone elements,

being left to regulation, there is significant risk of instability in the law, with the potential for substantive changes to be effected through a process subject to no more discipline than a 90-day request for comments; and

(c) we are sceptical of the premise that more regulatory flexibility is required than exists under the current regime. In fact, with the introduction of the CMSA which will allow the Authority to act to address systemic risks to the capital markets, one could argue that less rather than more "regulatory flexibility" is necessary at the PCMA level.

2. Meaningful progress towards harmonization of securities laws has been made in recent years. It is critically important that these efforts be preserved in the move to the PCMA and we would urge that the national and multilateral instruments be adopted, initially without change. It is also important that the new model be designed so as to prevent fragmentation of regulation within the participating jurisdictions. It is not clear to us that the memorandum of understanding or the legislation would restrict the ability of a province to enact local securities regulation in the future.

3. The Draft Act does not address the nature of the interface between the Authority and the non-participating provinces. From the perspective of a practitioner, the quality of that interface is critical to the successful implementation of the new regime and we are hopeful that resolution of the issues around the interface will be a precondition to the implementation of the new system.

PART 1 - INTERPRETATION

Derivative

We note the definition of derivative is identical in substance to that set out in the Ontario Act, and we are supportive of retaining this definition without change.

Investment Fund Manager

The definition of Investment fund manager has been revised to include a person who "directs the business, operations or affairs of an investment fund from outside the province and knows or reasonably ought to know that the investment fund has a security holder resident in the province". The effect of this change is to require the investment fund manager of every investment fund with investors in a province to register in such province. As you are aware, all of the provinces and territories had considerable difficulty in agreeing on the appropriate approach to the registration of non-resident investment fund managers. The end result is that Ontario, Quebec and Newfoundland & Labrador take the approach that will be imposed by the definition of investment fund manager in the PCMA. All of the other provinces and territories require registration of an investment fund manager only if it carries on the activities of an investment fund manager from within the jurisdiction. These changes took effect starting in

September 2012 and provided grandfathering for existing investment fund manager that no longer wanted to market in the province. It is unclear if such grandfathering will be respected under the PCMA. Further, in our view the approach taken in Ontario has had unintended negative consequences on the capital markets in Ontario For example, numerous investment funds that are publicly offered outside Canada have elected not to offer by way of private placement in Canada because of the investment fund manager registration requirement, denying institutional investors the opportunity to participate in such offerings. In addition, the investment fund manager category of registration is inconsistent with securities regulation regimes in other countries, including the United States, that do not impose a registration requirement on investment fund managers. As such, we believe the PCMA should not regulate non-resident investment fund managers.

Market Participant

The definition of market participant has been broadened to include issuers relying on an exemption from the prospectus requirements thereby requiring every foreign and domestic non-reporting issuer and every private company to become subject to the record keeping requirements of the PCMA and the obligation to provide such records to the Authority. This is a significant departure from the Ontario Act and could negatively impact the exempt market and willingness of foreign issuers to offer securities in the Canadian exempt market. The definition has also been broadened to include control persons and persons providing "record keeping services". As discussed below in our Part 9 comments we do not think it is appropriate for control persons to be included in this definition. The term "record keeping services" is undefined and could capture law firms which maintain record books or minute books on behalf of clients. We suggest removing persons providing record keeping services from the list of market participants.

Misrepresentation

We note that the definition of "misrepresentation" has been modified from the definition of such term found in the Ontario Act. It is not clear if the intention in changing the definition was to import a different meaning to the term. As the term runs throughout securities legislation an understanding of its meaning is critical to the application of the legislation. There are significant practical consequences to this term, in particular, as a result of the term now having different meanings under the PCMA and the securities legislation of the non-participating jurisdictions. The definition in the PCMA also differs from the definition in the CMSA. As such, we would suggest that the definition of misrepresentation found in the Ontario Act be imported into the PCMA.

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, there are certain changes to paragraph (a) of the definition that

cause confusion and should be reversed, 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, based on or vary with the market price, value or payment or settlement obligations of the security". This change is required so that "materiality" qualifies each of "derived from, referenced to, based on or vary" and not just "vary".

Reporting Issuer

General Commentary

We note that the definition of "reporting issuer" in Section 1 of the Draft Act does not address all circumstances in which an issuer may have become a reporting issuer under the current securities legislation of any participating province or territory. 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 Section 1 of the Draft Act should be amended to preserve the reporting issuer status of any issuer who is, at the effective time of the Act, a reporting issuer under prior legislation and would not otherwise be deemed a reporting issuer under the PCMA.

Clause (b)

Clause (b) of the "reporting issuer" definition should be amended to clarify that only the issuer of the securities being offered as consideration in a take-over bid is deemed a reporting issuer (i.e. it should read: "… it offers securities of *its own issue* as consideration…).

Clause (c)

The "reporting issuer" definition in each Canadian jurisdiction 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 Act 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 is made merely to effect an internal

reorganization. In circumstances in which the Authority determines it in the public interest to do so, it has the authority (on its own initiative or an application) to order a given issuer to be a reporting issuer pursuant to Section 95(2). We further notes that this clause (c) is missing certain language from the clause on which the current legislation is modelled. We submit this language should be included in the Draft Act.

Revised to address the above concerns, clause (c) could be revised as follows:

> (c) has exchanged its securities for the securities of another issuer, where the exchange is with that other issuer or with the holders of the securities of that other issuer (excluding an exchange that is merely to effect an internal reorganization) and is in connection with an amalgamation, merger, reorganization, arrangement or similar business combination if one of the parties was a reporting issuer at the time;

Clause (e)

We submit that clause (e) should be removed. It is unclear why this broad authority is required to prescribe any "class of issuers" to be reporting issuers. The necessary authority for designating a reporting issuer as such is already contained in clause (d), which refers to the authority in subsection 95(2) of the Draft Act. This authority is properly prefaced by a public interest requirement.

Take-over Bid

The definition of "take-over bid" does not specify a threshold of 20% of the outstanding securities. Even if one accepts the platform approach to legislation, we believe that fundamental elements of the take-over bid regime should be in the statute including, at the very least, the 20% threshold.

Trade

Under paragraph (b) of the definition of "trade", it is not clear how the termination of a derivative can constitute a "trade" or why it is necessary to treat such termination as a trade separate from the sale or distribution of such derivative. We believe that the implication of including the reference to termination in paragraph (b) is that anything a person must do to enter into or sell a derivative (e.g. file and deliver a prescribed disclosure document or make other filings with the Chief Regulator), such person must also do to terminate the derivative transaction.

PART 2 – RECOGNIZED ENTITIES

Section 10 – Duty to Provide Information

We note that recognized entities must provide certain information to the Chief Regulator but the legislation does not provide an exception to the disclosure requirement that would protect information that is subject to solicitor–client privilege. This is all the more troubling by the explicit protection given to privileged information under Section 16 with respect to auditor oversight. It should be made clear that disclosure obligations do not require a recognized entity to waive any applicable privilege.

PART 3 – DESIGNATED ENTITIES AND OTHER MARKET PLACES

Section 18 – Duty to Provide Information

As with Section 10 of the Draft Act, we note that designated entities must provide certain information to the Chief Regulator but the legislation does not provide an exception to the disclosure requirement that would protect information that is subject to solicitor–client privilege. It should be made clear that disclosure obligations do not require a recognized entity to waive any applicable privilege.

PART 4 – REGISTRATION

Section 23(2) – Conditions, etc. of Registration

Subject to giving the applicant an opportunity to make representations, the Chief Regulator may impose conditions, restrictions or requirements on registration. Section 23(2) should clarify whether the conditions, restrictions or requirements that can be imposed are at the discretion of the Chief Regulator or whether there is a prescribed list of conditions, restrictions or requirements. It would also be helpful to list the conditions that can be imposed by the Chief Regulator, even if such list is not exhaustive (similar to Section 27(3) of the Ontario Act and Section 36(1) of the *Securities Act* (British Columbia)).

PART 5 – PROSPECTUS REQUIREMENTS

Section 27(1) – Requirement to File Prospectus

We note that the word "distribute" is not a defined term, although "distribution" is defined. As such, we suggest revising Section 27(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.

It is not possible at this time to comment on the prescribed period for the distribution concept included in this section other than to state that this time period should be enshrined in the PCMA rather than left to the regulations, similar to the current Section 62(1) of the Ontario Act.

Section 28 - Restriction on Distribution of Information, Record or Thing

The concept of restricting the distribution of any "information, record or thing" is very broad and likely impossible to properly regulate or comply with. In our view, the section should be deleted. Significant amendments were made last year to the pre-marketing and marketing regimes in Canada following extensive consultation with market participants. Accordingly, we urge you not to make further changes to securities laws governing these marketing regimes.

Section 30(2) - Receipt for Prospectus

Unlike the Ontario Act, the Draft Act does not specify the circumstances in which the Chief Regulator may refuse to issue a receipt for a prospectus. Having a defined list of conditions under which the Chief Regulator may refuse to issue a receipt for a prospectus provides certainty to issuers seeking to access the Canadian capital markets.

Section 32 – Requirement to Provide Further Information, etc.

The Ontario Act does not include a similar ability of the Chief Regulator to impose additional filing requirements and conditions before issuing a receipt for a preliminary prospectus. The Chief Regulator already has the ability to refuse a receipt for a prospectus under Section 30(2) of the Draft Act. It would be helpful to understand in what circumstances the Chief Regulator would not rely on Section 30(2) but instead impose additional requirements under Section 32.

Section 33 – Order to Provide Information re Distribution of Previously Issued Securities

Section 33 of the Draft Act tracks Section 64(1) of the Ontario Act but Section 64(2) of the Ontario Act was not incorporated into the Draft Act. It would be helpful to understand the rationale for excluding this section.

Section 34 - Permitted Activities Under A Preliminary Prospectus

Section 34 provides that the marketing activities permitted during the waiting period will be set out in the proposed regulations. As with many other parts of the Draft Act, it is impossible to comment comprehensively on this section without knowing the content of the regulations. Given the recent reformulation of the pre-marketing and marketing regime in Canada, we expect that the proposed regulations will establish regimes that are identical to those provided in the existing National Instruments 41-101 and 44-101 and related companion policies.

In addition, we propose that Section 28 be revised to expressly include the activities that are currently permissible pursuant to Section 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 regulations. We believe that the basic marketing rights provided in Section 65(2) of the Ontario Act should be enshrined in the PCMA rather than by way of regulation.

Section 37 - Obligation to Send Prospectus, etc.

The Draft Act 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 37 appears to broaden the delivery obligation to others that may be involved in the offering. If that was the intention, it would be helpful to understand the rationale underpinning this change. Conversely, if it was not the intention, we would recommend clarifying the provision by removing the reference to "person who trades in securities", and replacing it with "dealer".

Cooling-Off Period

We note that the Draft Act does not include the two day "cooling-off period" found in Section 71(2) of the Ontario Act. We assume that this provision will be included in the proposed regulations which would differentiate the PCMA from the Ontario Act. As noted above, this is an established area of law that we feel should be enshrined in the Draft Act for the purposes stated above as well as for the purpose of maintaining a harmonized approach to the regulation of Canadian securities laws.

PART 6 – TRADING IN DERIVATIVES

General Comment

As with other parts of the Draft Act, much of the substance of this part will be set out in the proposed regulations and, accordingly, it is impossible to comment comprehensively without seeing the regulations. However, we note that it appears the Draft Act and proposed regulations will adopt a regime in respect of trading in derivatives similar to that set out in Sections 64.1 and 64.2 of the Ontario Act and we are supportive of that approach. It also appears the Draft Act, together with the proposed regulations, will adopt the concepts set out in *Ontario Securities Commission Rule 91-506 – Derivatives: Product Determination* and *OSC Rule 91-507 – Trade Repositories and Derivatives Data Reporting*, and we are similarly supportive of that approach given the progress that has been made in recent years in respect of the regulation of the trading of derivatives in Canada. However, we would expect that, among other things, the concerns expressed among derivatives market participants concerning the scope and nature of data reporting for derivatives transactions will be addressed in the proposed regulations.

PART 7 - DISCLOSURE AND PROXIES

General Comment

Disclosure obligations and proxy rules (apart from differences among jurisdictions arising from divergent provisions in corporate statutes) are harmonized across all provinces and territories in National Instrument 51-102 – *Continuous Disclosure Obligations* and National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer* ("NI 51-102")

as well as several other harmonized instruments, such as National Policy 43-101- *Standards of Disclosure for Mineral Projects*. We would urge you to adopt these instruments as regulations without substantive change in order to minimize disruption in the transition to the new regime and to preserve harmony with the legislation in those jurisdictions that do not opt-in to the cooperative system.

Section 44 –Reports, etc., by Insiders

It is not clear in the Draft Act whether Section 44 is intended to enable the early warning type of disclosure currently required under Section 102.1 of the Ontario Act and under section 5.2 of MI 62-104. If it is intended to enable such disclosure requirements in the regulations, we note that the definition of "insider" as it applies to a beneficial owner of 10% of more of a reporting issuer's voting securities, is narrower than the class of security holders that are required to file early warning reports pursuant to Section 102.1 of the Ontario Act and the definition of beneficial ownership in Section 90 of the Ontario Act.

Section 44(b) should be revised to include a reference to the requirements of the regulations to be consistent with similar provisions in Section 43(c). That is, it should read "make any other disclosure required by the regulations."

Section 45 – Information from Directors, etc.

Section 45 introduces a sweeping new open ended power for the Chief Regulator to require a director, officer, promoter or control person of an issuer to give the Authority any information, record or thing in the person's possession or under the person's control that relates to the administration or enforcement of capital markets law. There are several troubling aspects to this provision:

(a) While contained under Part 7 of the PCMA, 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.

(b) The Draft Act does not impose any procedural safeguards with respect to this power and references no regulations that would impose any restrictions or protocols around such demands.

(c) There is no exception to the disclosure requirement that would protect information that is subject to solicitor–client privilege.

(d) Although the information, records or things demanded by the Chief Regulator must relate to the administration or enforcement of "capital markets law", the obligation extends to directors, officers, promoters or control persons of issuers that are neither reporting issuers nor registrants. No explanation is given for why

the provision should apply to private companies or control persons of issuers whether or not reporting issuers or registrants.

(e) Section 45 is both broader and more vague than similar provisions, such as Section 54 of the Draft Act.

For the reasons stated above, we suggest deleting Section 45 of the Draft Act.

PART 8 – TAKE-OVER BIDS AND ISSUER BIDS

General Comment

Take-over bid and issuer-bid regulation was recently harmonized across all provinces and territories in Multilateral Instrument 62-104 – *Take-over Bids and Issuer Bids* ("MI 62-104") and Part XX of the Ontario Act which largely mirrors MI 62-104. We would urge you to adopt MI 62-104 as a regulation without substantive change (other than to address the changes proposed by the CSA on September 11, 2014) in order to minimize disruption in the transition to the new regime and to preserve harmony with the legislation in those jurisdictions that do not opt-in to the cooperative system.

PART 9 – MARKET CONDUCT

Definition – "market participant"

The term "market participant" now includes a number of new categories, including "control persons" of reporting issuers. A control person for this purpose is not someone who necessarily "controls" a reporting issuer, but rather someone with 20% (or, in some circumstances, less) of the voting rights attached to outstanding securities of a reporting issuer. Requiring market participants, such as registrants, exempt registrants, directors and reporting issuers to maintain certain records is appropriate to ensure that the purposes of the PCMA continue to be achieved. Many of these market participants owe duties to persons with whom they deal in their capacity of "market participant" and therefore it is reasonable to require them to maintain proper records of their business transactions and financial affairs. Unlike these market participants, a controlling shareholder of a public company does not, solely as a result of being a control person, owe a duty to other security holders or the public. Requiring a control person to maintain these records goes beyond the scope of the purposes of the PCMA. We recommend removing control persons from the definition of "market participant".

Section 54 - Requirement to Keep Records

As stated above, a controlling shareholder of a public company does not, solely as a result of being a "control person", owe a duty to other security holders or the public. Requiring a control person to maintain the records required by Section 54 of the Draft Act goes beyond the scope of the purposes of the PCMA. Furthermore, these records should not be readily available to the

Chief Regulator, at his or her request, particularly when the PCMA does not specify in what circumstances 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.

Section 55 - Duty to Client

Section 55 of the Draft Act extends the duty of good faith and fair dealing from that imposed by OSC Rule 31-505 on dealers and advisors to underwriters. As the underwriter's client is the issuer these words would import into the relationship between an underwriter and its client a statutory quasi-fiduciary duty of good faith and fair dealing. The prevailing view among practitioners is that today underwriters do not owe such a duty to their clients. In fact, engagement letters and underwriting agreements typically disclaim that relationship. Moreover, 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. The underwriting and dealing functions of a registered dealer are quite different. Consistent with this notion, the statement in OSC Rule 31-505 that "a registered dealer shall deal fairly.." should and has been read as: "a registered dealer *acting as a dealer* shall deal fairly…". The more general reference in Section 55 of the Draft Act to "a registrant" in the statement that a "registrant must deal fairly…." does not allow for this limitation to be read in. Such a significant change should not be adopted without a full understanding of the implications and a process of consultation.

Section 57 - Conflicts of Interest- Registrants, etc.

We suggest that National Instrument 31-103 be adopted without modification as the regulations dealing with conflicts of interest for registrants.

Section 58 - Conflicts of Interest- Offeror, etc.

We surmise that Section 59 is included in the Draft Act as a jurisdictional peg on which to hang Multilateral Instrument 61-101. Nonetheless, the section imposes a mandatory obligation on directors and officers and others to "manage conflicts of interest" that is startling in its breadth, unprecedented in the law and premised on terms that are undefined in the Draft Act. We would urge you to consider re-casting this merely as a head of regulation-making powers and not as an obligation.

Section 62 - Market Manipulation

This section 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 only apply to wilful or reckless conduct.

Section 63 – Unjust Deprivation, Fraud

The term "unjust deprivation" is not defined in the Draft Act nor is it a concept that currently exists under the Ontario Act. As stated above, the introduction of the PCMA 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.

With respect to the prohibition on perpetuating a fraud, for the reasons stated above, the section 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 perpetuates a fraud.

Section 66(1) - Insider Trading

The insider trading rule in Section 66(1) of the Act makes significant substantive changes to the law in Ontario. The section now extends to "purchases and trades" in securities of a reporting issuer and "an issuer whose securities are publicly traded".

The term "publicly traded" is not defined in the Draft Act but we assume that the intention of the section is to regulate Canadian investors trading in securities of foreign issuers not reporting in Canada. Canadian securities legislation is intended to regulate Canadian capital markets and not foreign markets. Regulating the foreign trading activities of an investor in Canada should be dealt with under the public interest jurisdiction of the Tribunal.

The insider trading prohibition has been extended well beyond the current prohibition in the Ontario Act against *purchasing or selling* a security to prohibit the *purchase or "trade"* of a security and the entering into of a transaction involving a security including a termination or material amendment of a pre-existing obligation with respect to a security or any related financial instrument. Such an extension of the well-settled insider trading law in Ontario should not be included in the new legislation without a full airing of the purpose of the change and a full appreciation of the implications.

Section 66(2) – Tipping

This section provides an exemption from the tipping prohibition where it 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 National Policy 51-201 section 3.3). Changing the phrase to "necessary in the course of business" suggests a change in the meaning of the section under Ontario law which we assume is not the intention. We would recommend reverting to "in the necessary course of business" in this section of the PCMA.

Section 66(3) – Tipping – Take-over or Other Action

This section introduces a new and evidently more limited exception to the tipping prohibition in Ontario. The exception departs from both the "necessary course of business" exception under Section 76(3) of the Ontario Act and from the "necessary in the course of business" exception in proposed subsection (2). It requires instead that the tipper prove that the disclosure was "necessary to effect the proposed action". The section on its face appears to us to be overly narrow and as a drafting matter it seems undesirable to have two different standards for permissible tipping in the section.

Section 66(4) – Recommending

Section 66(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 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 National Policy 51-201- section 3.3(4). 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.

Section 70 – Unfair Practice

Section 70 is very broad and far-reaching. The concept of unfair practice is already captured in the IIROC rules. Including provisions in the PCMA that are duplicative of other provisions will result in confusion and an uncertainty in respect of the interpretation of such provisions.

Section 76 – Obstruction

We have serious concerns about the introduction of a general "obstruction" prohibition without discussion and consultation. We are concerned by the extension of the prohibition to the mere "withholding" of information or records, and the fact that the obstruction prohibition can apply to wide range of communications with the regulators such as a routine continuous disclosure review. We are particularly troubled by the fact that the obligation might apply to lawyers dealing with the Authority (for example, in asserting privilege on behalf of a client or counselling a client not to cooperate on a voluntary basis in an investigation).

PART 10 - ORDERS, REVIEWS AND APPEALS

Section 87 – Cease-Trade Order – Market Fluctuations

This provision does not have a specific counterpart in the Ontario Act. That said, we are of the view that this provision is reasonable and appropriate.

However, that the interaction of Section 89(4) and Section 87, as currently drafted, raises some ambiguities and potential conflicts. (For example, must the conditions set out in Section 87 be met even where the Tribunal exercises its power to make a temporary cease-trade order under Section 89(4)?) These issues could be very simply addressed by making it clear that Sections 87 and 88 are intended to be a complete code for all circumstances in which a cease-trade order may be issued by the Tribunal without a hearing. Accordingly, paragraph 1(b) should be carved out of Section 89(4).

Section 89 – Orders of Tribunal – General

General Comment

As is the case with Section 127 of the Ontario Act, Section 89 does not specify or provide any guidance as to who is entitled to make application to the Tribunal for relief under this provision. Given that Section 89 is primarily in the nature of enforcement and is the seat of the Authority's public interest jurisdiction, we accept that the Chief Regulator should be entitled as a matter of right to commence proceedings before the Tribunal to seek relief under this section. The more difficult issue which is not addressed in the PCMA is *when*, and *if*, it is ever appropriate for a private litigant to commence proceedings before the Tribunal seeking relief (and to advance its personal interests) under this section. The Ontario Securities Commission considered this issue and provided some guidance on this issue in *In the Matter of MI Developments Inc.* (2009), 32 OSCB 126. The British Columbia Securities Commission in *Severstal Gold NV (Re), 2010* BCSECCOM 181 also considered the issue.

We suggest that the PCMA should provide guidance/clarification on this point and that it would not be unreasonable for the PCMA to provide that:

(a) the Chief Regulator may commence proceedings before the Tribunal for relief under Section 89 as of right;

(b) private litigants may commence proceedings before the Tribunal only for relief under Section 89 and only with leave of the Tribunal; and

(c) leave shall be granted to private litigants in circumstances only where:

  (i) the relief sought is future-looking, and not regulatory or enforcement in nature;

(ii) the private litigants have a direct interest in the outcome (for example, as a bidder or target shareholder in a poison pill or other defensive tactics hearing); and

(iii) the Tribunal, considering any other matters it deems relevant, including the Chief Regulator's reasons for not commencing the proceedings, is satisfied that it is in the public interest to grant leave.

Section 89(4) – (7) – Order Without Delay

We recognize that there are certain circumstances which necessitate the making of a temporary order in the public interest, in circumstances 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 Section 89(4) is overbroad. We suggest that it would be appropriate to carve paragraphs 89(1)(a), (h), (i), (j), (k), (l) and (m) out of Section 89(4) as these provisions imply a finding of breach (e.g. Section 89(1)(a) – an order that a person comply with the Act) or have potentially significant ramifications to a person's livelihood (e.g. Sections 89(1)(h), (i), (j), (k) and (l)).

As currently drafted, Section 89(4) fails to require the Tribunal to take steps to expedite a hearing and, at least theoretically, permits the Tribunal to extend a temporary order for a significant period of time. We strongly recommend the inclusion of a provision similar to Section 127(7) of the Ontario Act. Fairness requires that the legislation mandate an expedited hearing where a temporary order is issued. The requirement to hold an expedited hearing should not be left to the Tribunal's discretion or scheduling convenience.

Section 90(4) – Order on Consent

The intent behind Section 90(4) is unclear. If the payment referred to is a payment under subsection (2), this should be specified. Also, it is unclear how a person can be made subject to an order which is somehow contingent upon a person first obtaining consent from a third party. Furthermore, it is not clear why the Chief Regulator (as opposed to the Tribunal) is being granted power to issue an order in such circumstances.

Section 91 – Freeze Order

There are some significant differences between Section 91 of the Draft Act and Section 126 of the Ontario Act. Given the intrusiveness of a freeze order and given the apparently low standards (when compared to the test for a *Mareva* injunction) for issuing such an order and the fact that it is issued prior to any hearing finding a breach of securities laws, we believe that there should be a requirement to have such an order reviewed by a court and any extension of such order should be made subject to court approval, as in Section 126(5) of the Ontario Act.

Sections 95 and 96 – Designation Orders and Direction of Class Orders

As is the case in Sections 1(10) - 1(15) of the Ontario Act, the various orders contemplated in Sections 95 and 96 should be made only after a hearing or, at the very least, an opportunity to make representations. We do not believe that there is a principled basis for affording such opportunity only in the narrow instances identified at Section 95(3). To the extent that an order under Section 95 is intended to apply to a particular class, we also have difficulty understanding why this should be achieved by way of an order rather than regulation (as is currently the case under the Ontario Act -- see for example Section 143(7)) and we recommend that Section 95 be accordingly modified.

Generally, the Authority's discretion to designate a person to be a market participant should be limited to persons who perform roles similar to those of the enumerated market participants. In particular, the ability of the Authority to designate a person as an insider should be limited to the specific limitations contemplated in Section 1(11) of the Ontario Act.

Section 100(1)

The 30 days should start to run only from the later of the making of the decision or the issuance of reasons for the decision (as is the case in Section 9(1) of the Ontario Act). In the circumstances where reasons are to be issued, it is practically very difficult (if not impossible) to file the requisite appeal notice in the absence of such reasons.

PART 11 - ADMINISTRATION AND ENFORCEMENT

General Comment

We note that the disclosure obligations contained in subsections 102(2), 103(3), 104(7) and 111 would, on their face, require a person to produce privileged documents in their possession. It should be made clear that the disclosure obligations in Part 11 do not require a person to waive any applicable privilege.

Sections 103 and 104 – Reviews and Investigations

We believe the language in subsections 103(4)(a) and 104(8)(a) that provide for an examination of "anything in the place" to be overly-broad, and should be narrowed to "anything in the place that reasonably relates to" the review or investigation.

Paragraphs 103(4)(f) and 104(8)(f) also do not provide for the return of records or things removed from the place, and we suggest that the language similar to that found in subsection 14(2) of the Ontario Act be added.

With respect to subsection 104(6), we suggest the words "and may claim any privilege to which the person is entitled" be added as is found in subsection 13(2) of the Ontario Act.

Sections 112-115 – Offences and Penalties

With respect to subsection 112(3), it is unclear whether the order to pay is in addition to the penalties prescribed by subsection 112(1). This needs to be made clearer as is done in Section 122.1 of the Ontario Act. We would also suggest that the language in subsections 122.1(6) and (7) of the Ontario Act be added.

We believe the words "directly or indirectly" found in paragraph 112(3)(b), and which qualify the payment to the Authority of any amount obtained or payment or loss avoided, give rise to uncertainty and that they should be deleted.

As drafted, Section 115(1) is a significant departure from the Ontario Act. We suggest that the maximum fine set out in Section 115(1) of the Draft Act accord with Section 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 PCMA, rather than by "all persons".

PART 12 – CIVIL LIABILITY

Section 117(1) – Actions Relating to Prospectus or Prescribed Disclosure Document

Section 117(1) provides for a right of action where the prospectus or prescribed disclosure document contains a misrepresentation "at the time of purchase". These words are not found in Section 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 previously noted, we are of the view that substantive changes should not be introduced into the Draft Act without an appropriate explanation of the policy rationale and an opportunity to fully canvass the implications of the change.

Section 118 – Actions Relating to Special Warrants

Section 118 appears to codify the policy view described in section 2.8(3) of 41-101CP that a special warrant offering should be viewed as a single distribution. Accordingly, as set out in Section 118(3), the statutory right of rescission entitles the investor to recover the amount paid to the issuer or underwriter for the special warrants. However, it is not clear why Section 118(2) states that the action is for rescission of the exercise of the special warrants. We would expect the purchase of the special warrants – and not their subsequent exercise – to be the rescinded transaction.

We also have the same comment as above regarding Section 117.

Section 119(2)(b) – No Liability – Other Circumstances

Section 119(2)(b) changes the threshold for a person withdrawing their consent on the filing of a prospectus or prescribed disclosure document in order to avoid liability. Under the Ontario Act,

a person could avoid liability by withdrawing their consent if they discover "*any* misrepresentation" whereas under the Draft Act, a person may avoid liability only if they withdraw their consent upon becoming aware of "*the* misrepresentation". The investor protection aims of the Draft Act would be more fully satisfied by permitting persons to withdraw their consent upon becoming aware of "any misrepresentation" rather than requiring the discovery of a particular misrepresentation.

Section 119(3) – Liability - Purported Authority of Expert, (4) - Liability - No Purported Authority of an Expert

The wording of these sections 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.

Section 121(3) – Liability - Purported Authority of Expert, (4) - Liability - No Purported Authority of an Expert

Same comment as above regarding Sections 119(3) and (4).

Section 122(1) – Actions Relating to Prescribed Disclosure Document

This provision creates a new statutory right of action against directors of the issuer and persons who signed the prescribed disclosure document. This represents an expansion from Section 130.1(1) of the Ontario Act which limits the statutory right of action to claims against the issuer and a selling security holder. 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 market participants. As you are aware, the Canadian exempt market comprises a significant component of our capital markets and hundreds of deals are done each year in reliance on the current, well-established liability regime. A discussion of the necessity and desirability of expanding the class of potential defendants should precede this change, which will impose significant costs on market participants.

Section 128 – 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 128, 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. If this is the intention the rationale should be explained.

Section 128 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.

Section 129(1) – Action for Damages – Insider Trading, etc.

This provision of the Draft Act represents a major substantive expansion of the existing insider trading liability regime under the Ontario Act. Section 129(1) expands exponentially the category of plaintiffs to whom damages are payable. Under Section 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 Section 129(1) of the Draft Act, damages would be payable to every person who purchases or trades in 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 traded during the relevant time period, not just persons who traded with the defendant. Further, there would be liability not only in respect of purchases and "sales", but purchases and "trades". As a result, any person who engaged in any act directly or indirectly in furtherance of, among other things, a sale of a security, would be subject to insider trading liability. This formulation not only expands the scope of insider trading liability, but creates uncertainty as to its application due to the inherent subjectivity of applying the definition of "trade". 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.

Section 129(2) – Amount of Damages

Damages are capped at triple the profit made or the loss avoided by all persons as a result of the contravention where the actual damages incurred by the plaintiff exceed such amount. We understand that such a cap is necessary given the expanded class of plaintiffs under Section 129(1). However, in our view, the better approach is to limit the plaintiff class under Section 129(1) and remove the cap under Section 129(2).

The reference to "all persons" should be qualified to read "all persons who have contravened Section 66 " in order to link the remedy to the contravention.

Section 130(1) – Payment of Benefit – Insider Trading, etc.

In our view, the reference to "the person and all other persons" should be changed to "such person" in order to ensure that the remedy (which is of a restitutionary nature) is tied to the contravention.

Section 130(2) – Payment of Benefit – Front-running

Same comment as above regarding Section 130(1).

Section 131 – Generally

The Draft Act does not contain a provision analogous to Section 135(9) of the Ontario Act, which provides for a right of appeal. In our view, such a provision should be added, so that an order made under Section 131 of the Draft Act could be appealed to a court.

Section 131(1) – Action on Behalf of the Issuer – Insider Trading, etc.

The phrase "authorizing the Chief Regulator or the applicant" is inaccurate, given that the Chief Regulator would also be an "applicant" in such circumstances. We suggest that this phrase should be replaced with "authorizing the applicant".

Section 132(1) – Action on Behalf of the Investor – Front-Running

Same comment as above regarding Section 131(1).

Section 133(1) – Action on Behalf of an Investment Fund – Improper Use of Information

Same comment as above regarding Section 131(1).

Section 138(1)

As discussed above, in our view, the Draft Act should specify a cooling off period of two business days and not leave this important time period to be determined in accordance with the regulations.

Section 145 – Intervention by Chief Regulator

We are of the opinion that providing the Chief Regulator with a statutory right of intervention in a proceeding to enforce a right or obligation created by Part 12 constitutes an unjustified intrusion by the Chief Regulator into the private, civil liability regime created under the Draft Act. The Chief Regulator's purpose is deterrence while the policy objective underlying civil liability is compensation and deterrence. To this end, we are of the opinion that providing an unqualified statutory right to intervene may compromise the Authority's role as an independent regulatory body.

PART 13 – CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

General Comments

We applaud the decision to incorporate into the Draft Act the provisions of the Ontario Act relating to civil liability for secondary market disclosure with no substantive changes (other than that found in Section 172(2) of the Draft Act which corrects judicial interpretation of the limitation period in Section 138.14(1) the Ontario Act). This is consistent with our view that the introduction of the PCMA is not the occasion to introduce major substantive changes to Canadian securities law. However, as set out further below, we do suggest that judicial developments regarding the interpretation of the conditions for leave be monitored in case revisions need to be made to Section 166(2) of the Draft Act in order to maintain the original legislative intent espoused when its equivalent provision in the Ontario Act – Section 138.8 – was adopted.

Section 147 – Definitions

The definition of "responsible issuer" has been recast so that it is too broad, as there is no geographical limitation imposed. To parallel the comparable definition in the Ontario Act, we suggest that this definition be revised to read "…a reporting issuer or an issuer who is not a reporting issuer but an issuer with a real and substantial connection to a participating province or territory whose securities are publicly traded."

Section 152 – Failure to Make Timely Disclosure

Section 152 speaks to circumstances where a responsible issuer "fails to make timely disclosure", however, we note that such phrase is not defined for the purposes of the Draft Act. 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 152 be revised to accommodate the actual defined term.

Section 166(2) – Conditions for Leave

Section 166(2) of the Draft Act provides that a court may grant a plaintiff leave to commence an action under any of Sections 149 to 152 only if the court is satisfied that "(a) the action is brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff". We note that these conditions for obtaining leave are identical to the conditions for obtaining leave under Section 138.8 of the Ontario Act.

There is currently a live issue in Canadian jurisprudence respecting what constitutes a "reasonable possibility" that an action will be resolved at trial in favour of the plaintiff. Several Canadian courts, including the Ontario Court of Appeal, have interpreted this to be a "preliminary low-level merits based leave test", stating that leave should only be denied where it is "plain and obvious" that the plaintiff's case will not succeed at trial. We are concerned that

these interpretations provide too low of a standard for plaintiffs to be granted leave to proceed with an action and accordingly too much scope for unmeritous actions to proceed, resulting in unnecessary cost and expense for reporting issuers.

We are of the view that this interpretation is inconsistent with the legislative intent underlying the enactment of the conditions for leave, which was to prevent harm to long term investors and damage to the capital markets. In 2000, CSA released draft legislation proposing a statutory cause of action for secondary market misrepresentation, and in December 2005, this draft legislation became Part XXIII.1 of the Ontario Act. The most notable aspect of the statutory cause of action was that plaintiff investors would not be required to prove individual reliance as an element of the cause of action. In preparing the draft legislation, the CSA recognized that removing the reliance requirement to the benefit of (often former) shareholders of the target company could result in a corresponding adverse effect on the other current shareholders of that company if unmeritous actions were commenced. Accordingly, the CSA recommended the enactment of the conditions for leave found in Section 138.8 of the Ontario Act.

On August 7, 2014, the Supreme Court of Canada agreed to hear appeals in three Ontario secondary market securities class actions. A central issue on these appeals is what constitutes a "reasonable possibility" that an action will be resolved at trial in favour of the plaintiff. We encourage the Chief Regulator to monitor the outcome of these appeals to ensure that the Court reinstates and captures the legislative intent underlying the enactment of the conditions for leave in its decision.

PART 14 - GENERAL

General Comments

In our view, it is important to clarify how and where any prescribed notice, regulation or form must be "published" or made "accessible to the public" for purposes of this Part. 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 from the Authority for informing themselves of all regulations made by the Authority and all forms and policy statements issued by the Chief Regulator. We suggest that this single source be, at a minimum, the public website maintained by the Authority. While Section 197 suggests that the Authority may alternatively provide a notice or other information "in electronic form through an electronic medium", 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.

Section 172(2) – Power to Revoke or Vary Decisions

We suggest that this provision does not offer sufficient procedural protections to those directly affected by decisions of the Authority. We are concerned that a decision of the Authority made on notice to affected parties can be varied or revoked without similar notice. To address this concern, we recommend that Section 172 be revised to include the following subsection (3):

> (3) The Authority shall not make a decision under subsection (2) without giving an opportunity to be heard to persons and companies who are directly affected by the decision and who had an opportunity to be heard at the time the decision was made, and the opportunity to be heard may be oral or in writing in the discretion of the Authority.

Section 187 – Duty to Provide Records to Authority

As with much of the Draft Act, the substance of this section will be set out in the proposed regulations and, accordingly, it is difficult to assess the potential impact of this section at this stage. However, we note that this section could potentially grant to the Authority extremely broad powers to compel the disclosure of records and information for the purposes of "monitoring activity in capital markets or detecting, identifying or mitigating systemic risks in relation to capital markets…or conducting policy analysis related to the Authority's mandate…". The potential scope of information that, not only market participants, but also any "other person" may be required to disclose to the Authority without judicial 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 regulator. 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 187.

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 (and, indeed, certain such disclosure is expressly permitted under Section 193). 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 Act be amended to clearly segregate the multiple functions of the

Authority to ensure that information shared between these functions adequately protects the procedural rights and privacy of market participants.

Section 195 – Prohibition re: Privileged Information

We suggest that the intent behind Section 195 is unclear and, rather than providing additional certainty regarding the treatment of privileged materials introduces uncertainty. Section 195 is, presumably, intended to protect privileged materials from disclosure to the Authority under Sections 187, 189, 193 and 194. However, there is a risk, in our view, that this section could be wrongly interpreted in such a way as to merely prohibit the Authority from disclosing privileged materials collected under those sections to others pursuant to Section 193(2). Moreover, Section 195 is too narrowly drafted to the extent that it does not refer to all sections that allow the Authority to gather information For example, it omits Sections 10, 18, 39, 45 and 101. Finally, the current formulation could be read as a prohibition on the disclosure of privileged material to the Authority, which would prevent persons from electing to waive privilege when in their interests to do so. To address the above concerns, Section 195 could be revised as follows:

> **195.** For greater certainty, no person shall be required to disclose privileged documents, privileged information, or information based on privileged information to the Authority pursuant to this Act.

PART 15 - REGULATIONS, FORMS AND POLICIES

Section 205 – Notice of Proposed Regulation

We suggest moving subsection (3) to Section 205 in order that notice of any form must be given in the same manner, and be subject to the same comment period, as any proposed regulation. Corresponding edits should be made throughout Section 205 to clarify that it applies equally to such forms. While subsection (3) contemplates proposed forms, the balance of the clauses in Section 205 fail to refer to proposed forms.

In our view, it is in the public interest that prior notice of all proposed regulations and forms should be published, regardless of their nature. Capital market participants must be aware of new regulations and forms in order to govern themselves. As drafted, subsection (4) would not require notice of a proposed regulation or form of the type referred to in clauses (a) to (d). Subsection (4) should be revised to except such proposed regulations or forms only from the minimum 90 day comment period provided for in subsection (3). Alternatively, if it is determined that prior notice cannot reasonably be given in light of the circumstances, we submit that, for clarity, subsection (4) should expressly provide that publication of any such regulation is required as provided in subsection 210(4).

We presume the intent of the exception in clause (d) of subsection (4) is to afford an expedited process for the approval of temporary regulations where failure to provide a prior comment period would not be prejudicial to the public interest. However, clause (d) is drafted without

reference to the urgency of the subject regulation. We suggest that subsection (4) be revised to better limit its scope in line with the aforementioned intent.

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

Section 210 – Automatic Revocation of Certain Regulations

It is unclear when subsection 210(2) would apply. Subsection 205(4) specifically excepts the specified regulations from the application of subsection 205(1). Clarifying changes are appropriate if the intent of subsection 210(2) is to allow for an extension of these temporary regulations in order that they may become permanent regulations by way of the publication and comment process applicable to regulations that are not so excepted.

See our earlier comment in respect of prior notice of all proposed regulations and forms, even those that are the subject of an expedited approval process by virtue of subsection 205(4). To the extent prior notice cannot reasonably be given in light of the circumstances, and must instead be given after the regulation comes into force by way of the statement required under subsection 210(4), we submit that the statement should be accompanied by the full text of the relevant regulation. As currently drafted, subsection 210(4) requires only a description, among other things.

PART II - CAPITAL MARKETS STABILITY ACT

General Comments

1. The CMSA introduces novel regulatory structures and many substantive changes. It is difficult to support this legislation without a fuller discussion between regulators and market participants on its implications. This is particularly germane with respect to the proposed regulation of market infrastructure entities, credit rating organizations, benchmarks, capital markets intermediaries, products and practices designated as systemically important (jointly "Systemically Important Entities" or individually a "Systemically Important Entity"), which will expose a broad range of previously unregulated persons to new regulation and substantially reconfigure the relationship among existing regulatory structures. In addition, we cannot provide meaningful comments on sections of the proposed legislation that are subject to regulations without the benefit of reviewing those regulations.

2. We are gravely concerned about the lack of adequate procedural protections for Systemically Important Entities or persons who are subject to criminal liability under Part 5 of the CMSA. To this end, we believe that the Authority should be subject to stronger accountability mechanisms, in light of the significant powers and discretion afforded to it under the CMSA. As drafted, the legislation provides for broad powers to collect information without a warrant. We believe the Authority should not be able to use such

information for criminal proceedings. In addition, the CMSA does not restrict the sharing of information with criminal enforcement agencies obtained by the Authority without a warrant as part of its market surveillance activities. 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 liability. We strongly urge you to amend the CMSA to clearly segregate the multiple functions of the Authority and ensure that any information shared between these functions adequately protects the procedural rights of market participants.

3. We are also concerned by the vague and broad definitions in the CMSA, particularly with respect of the management and regulation of systemic risk in Canadian capital markets. While we understand that the concept of systemic risk serves as the lynchpin for the operation of the Authority, Section 3 of the CMSA defines systemic risk and integrity of the financial markets very broadly. There also does not appear to be a lower boundary for what qualifies as a systemic risk. This lack of certainty and predictability significantly limits the ability of Systemically Important Entities to proactively anticipate their regulatory responsibilities under the CMSA. As the enabling legislation for the Authority, the CMSA should more clearly codify core concepts such as systemic risk and lay out – in the statute – more detailed expectations for the regulation of Systemically Important Entities.

4. In light of our concerns but recognizing your intention to introduce these regulatory changes in an expeditious manner, we believe that transitional provisions would greatly assist in the development of regulations for previously unregulated persons. We strongly recommended that the Authority adopt an incremental approach to regulation which ensures all market participants are able to obtain the expertise necessary to fully evaluate and provide representations on the effect of any proposed regulations on their businesses as well as Canadian capital and financial markets more generally. We recommend that the Authority ensures that sufficient time is provided when rolling-out the regulations to ensure that affected market participants have the resources, tools and access to experts necessary to implement the policies and procedures necessary to comply with these new regulatory obligations.

5. To the extent that provisions of the CMSA are duplicative of existing legislation, the language used should be consistent with the existing provisions unless there is a clear intention to make a change. If a change is intended, it should be expressly noted together with its rationale. To the extent that CMSA provisions are duplicative of existing provisions, the language used in the CMSA and existing legislation should be consistent so as to reduce the risk of regulatory uncertainty.

6. Finally, we are of the opinion that the CMSA should include a statutorily mandated legislative review, similar to what is provided in the *Bank Act*. The inclusion of a sunset clause in the CMSA would ensure that the legislation reflects changes in Canadian capital markets, financial systems and systemic risk factors threatening the Canadian economy.

Definitions

The definition of "trade" in Section 2 of the CMSA refers to "any transaction involving a derivative." It is not clear how the termination or settlement of a derivative contract can constitute a trade. We believe that the implication of this definition is that anything that a person must do to enter into or sell a derivative contract (e.g. file and deliver an offering document, make filings with the Chief Regulator etc.) the person would also be required to do in order to terminate or make payments pursuant to this derivatives contract. It is our opinion that the definition of "trade" should be amended so as to exclude any transactions taken to discharge a counterparty's contractual obligations under a derivative contract.

Section 7 – Reference to this Act

Any powers conferred under the *Bank Act* may be assigned to the Authority. Although we are supportive of this effort to reduce duplicative regulatory structures, we have concerns that such an approach would further blur the separation between financial systems regulation and securities regulation thereby reducing the healthy balance of regulatory competition that otherwise exists between these two pillars. To the extent that regulatory authority is vested in a single body, there are risks that the expertise present within Canadian prudential banking regulatory bodies may be sacrificed and the constructive relationship that exists between financial institutions and these agencies may be diminished.

PART I – INFORMATION COLLECTION AND DISCLOSURE

Section 9 – Duty to Keep and Provide Information

The CMSA regulations may prescribe requirements relating to the provision of records and information to the Authority for the purposes of monitoring market activity and detecting, identifying or mitigating systemic risks. We are of the opinion, that given the multiple mandates of the Authority, clear limits must be established to govern the collection of this information and ensure its use relates to systemic market issues rather than the regulation of particular persons or products. Moreover, the purpose of the collection of such information should be limited to the administration of capital markets or financial regulation in Canada only.

Section 10 – Request of Chief Regulator

Section 10 is too broad as it requires disclosure from any person, whether or not a market participant, and could compel the disclosure of information that is privileged or prohibited at law from being disclosed.

Section 12 – Disclosure of Personal Information to Authority

Any person, self-regulatory organization, financial regulatory authority, governmental or regulatory authority is permitted to disclose personal information to the Authority for the purpose of the administration of the CMSA or assisting in the administration of capital markets or financial legislation in Canada or elsewhere. We suggest that this provision is overbroad as it

permits these persons to opine on the proper balance between privacy legislation, which may attach to the personal information, and its relevance to the administration of the CMSA or capital markets or financial legislation in Canada or elsewhere. We suggest that Section 12 of the CMSA be amended to clearly delineate the circumstances under which institutions, persons or governmental or regulatory authorities are permitted to disclose personal information and the Authority is permitted to receive such information. The purpose of the collection of such information should be limited to the administration of capital markets or financial regulation in Canada only.

Section 13 – Confidential Information

We will need to review the regulations before providing meaningful comment on subsection (1). Subsection (1) only requires the Authority to maintain information that is collected as "confidential". There does not appear to be a similar obligation on the part of the Chief Regulator. Subsection (2) highlights the concern of sharing information with law enforcement agencies where that information is not obtained by way of a warrant. It appears to us that the term "Authority" and "Chief Regulator" are used interchangeably in this section, which requires the Authority to keep information confidential subject to Section 15, which allows the Chief Regulator to disclose information under certain circumstances.

Section 14(b) – Disclosure of Information

Section 14 allows for disclosure of information for the purposes set out in the Act. Once confidential information is obtained by the Authority, this information may be disclosed to any person if the Authority is of the opinion "that the public interest in disclosure outweighs any private interest in keeping the information confidential". This broad public interest power to disclose confidential information is not qualified by or referable to the Authority's mandate of addressing systemic risk and therefore, we suggest, that this provision is overbroad. Such disclosure is particularly problematic if the personal information is disclosed to a foreign regulatory body who may or may not accord the information the same confidentiality or security that it was otherwise entitled to in Canada. It is suggested that this section be qualified to ensure that the disclosure of information held by the Authority supports its mandate of addressing systemic risk so that such disclosures are not vulnerable to *ad hoc* pronouncements of what is in the public interest.

Section 15(1)(b) – Disclosure of Information – Administration of Act and Other Legislation

The CMSA permits the Chief Regulator to "disclose any information obtained" under the CMSA to "a financial regulatory authority, a self-regulatory authority or a governmental or regulatory authority, in Canada or elsewhere if the disclosure is for the purpose of assisting in the administration of capital markets or financial legislation in Canada or elsewhere." We are of the opinion that the Chief Regulator's capacity to disclose such information should be limited to ensure it promotes Canadian interests and does not unduly trammel on the rights and protections accorded to individuals or corporations who may face regulatory actions or criminal prosecution under Canadian or foreign legislation or prejudice Canadian institutions operating abroad.

We have grave concerns with the Chief Regulator's capacity to share information obtained in the course of its audit and supervisory duties with investigative and enforcement functions of the Authority and other bodies. We are of the opinion that in order to facilitate candid communications and cooperation with the Authority, a clear separation between the regulatory and enforcement functions of the Authority is required and the CMSA should establish parameters under which this information may be shared.

Section 15(2) provides an even broader right to disclose information under "exceptional circumstances". We suggest that this provision be deleted as it creates too much uncertainty.

Section 16 – Disclosure Outside Canada

Before disclosing information to a person, authority, entity or agency outside of Canada, the Authority is required to enter into an agreement regarding the terms of this disclosure. Although we are generally supportive of the Authority prescribing the terms of any disclosure, given the potential consequences of such disclosure, we suggest that the CMSA specify the factors that should be considered when establishing the terms of this disclosure and the issues that should be addressed in such an agreement.

PART 2 – SYSTEMIC RISK

We are generally supportive of the framework approach developed for designating and regulating systemically important institutions. However, to the extent that these institutions are regulated under securities legislation, we are of the opinion, that the Authority should seek to avoid duplicative regulatory structures.

Because the Authority considers, among other factors, the magnitude of a capital market participant's activity and the use and reliance on its services when determining whether it should be designated as systemically important, certain persons in a particular industry may be subject to regulation as a Systemically Important Entity whereas their competitors may not be. To the extent that these regulations have the capacity to increase costs or reduce the competitiveness of systemically important persons, the Authority should take steps to mitigate the market distorting effects of this regulatory intervention.

Once a person is designated as a Systemically Important Entity, the Authority may make regulations to address systemic risk to capital markets and may prescribe requirements, prohibitions and restrictions. Without knowledge of the proposed regulatory structure, is not possible for persons to understand and make representations on the implications of being a Systemically Important Entity. Given that it is unlikely that the Authority's regulatory framework for Systemically Important Entities will be fully developed before the classes of Systemically Important Entities are identified, we are of the opinion that it is incumbent that these Systemically Important Entities be accorded the right to make subsequent comments on whether, in light of these regulatory structures developed to govern their operations, they should retain their designation as a Systemically Important Entity. Similarly, as Canada's capital and

financial markets continue to evolve, the character and scope of systemic risks may change. Consequently, and in light of the costs for the Authority in regulating a Systemically Important Entity and the costs borne by the Systemically Important Entity itself, we are of the opinion that Systemically Important Entities should be permitted to petition the Authority to have their status as a Systemically Important Entity rescinded.

PART 3 – ADMINISTRATION AND ENFORCEMENT

We are gravely concerned by the absence of any exceptions for communications between a solicitor and their client from the broad disclosure requirements established by the CMSA for the purposes of compliance reviews and inquiries. We believe that an exception similar to that provided in Section 13(3) of the Ontario Act should be created to protect documents or things maintained by a lawyer in respect of his or her client's affairs, as well as other correspondences held by the person that are subject to solicitor and client privilege.

Section 37(2) – Requirement to Provide Records of Things

In our view, the requirement that a person provide a person designated with verifying compliance with the CMSA with "any records or other things in their possession or control" is an overly broad and unwarranted requirement. We suggest instead that such records should be limited to the "books, records and other documents that are required to be maintained under securities laws". In this regard the CMSA should adopt language similar to Sections 19 and 20 of the Ontario Act.

Section 37(3) – Powers – Entry

We are concerned that this provision permits a designated person to conduct a search of any place (without limitations) and without court oversight. Given that the powers of entry rest with a designated person and are not subject to any order or search warrant (and are therefore not subject to appeal or oversight of a court), we believe that the powers provided to the designated person in Section 37(3) go too far and should, instead, be limited to the powers set out in Section 20(2) of the Ontario Act. By way of example the powers provided in Section 37(3): (i) are not limited to particular locations or premises of market participants, (ii) the scope of review is not limited to particular records, and (iii) they are not limited to copying records.

We strongly believe that a designated person should be required to apply to a court for an order authorizing a search in circumstances beyond those specified in Section 20(2) of the Ontario Act.

Section 38(3)(b) – Summons and Production

We have grave concerns regarding the Chief Regulator's power to compel a person to give evidence under oath, especially in light of the criminal offences created under Part 5 of the CMSA and the contempt provision for failure to give such evidence under Section 38(5). At the very minimum, additional protections similar to Section 16(2) (confidentiality), Section 17(3) (disclosure to police) and Section 18 (prohibition on the use of compelled testimony) of the Ontario Act should be considered.

We are further of the opinion that the Chief Regulator's power to compel a person to give evidence under oath is particularly troublesome as it uses Canadian investigative powers to potentially subject a party to foreign prosecution where they may not be entitled to the same protections otherwise available under Canadian legislation.

Section 38(6) – Representation by Counsel

Persons giving evidence under Section 38(3) of the CMSA have the right to be represented by counsel. However, the CMSA omits the right to claim any privilege to which the person is entitled, as otherwise provided under Section 13(2) of the Ontario Act. The protection accorded by solicitor and client privilege is a fundamental tenet of the Canadian legal system, which should be reflected within the CMSA.

Section 38(7) – Powers – Entry

We are concerned that the powers of entry in Section 38(7) (i) are not subject to any court order or search warrant, (ii) are not limited to particular locations or business premises, (iii) and the scope of review is not limited to particular records. In this regard, we rely on the model contained in the Ontario Act (see Section 13 and, in particular, Sections 13(3)-(7)). We strongly believe that Section 38 should require an authorized person to apply to a court for an order authorizing a search in circumstances beyond those specified in Section 13(3) of the Ontario Act.

Section 38(10) - Prohibition on Communication

We suggest that consideration be given to making the prohibition in Section 38(10) more specific (and potentially more expansive), along the lines of Section 16 of the Ontario Act. For example, it is not clear whether Section 38(10) as currently drafted would be broad enough to encompass an order prohibiting a person from communicating the existence of an investigation.

Section 39 – Duty to Assist

This provision, to our knowledge, is without parallel in Ontario securities law. It imposes a vague and indefinite obligation to "give all assistance that is reasonably required" and is subject to the General Offences provisions of Part IV. In our view, the vagueness and breadth of this provision impose obligations that may be virtually impossible to meet and therefore the provision should be removed from the draft.

Section 43(4) – Monetary Penalties

Section 43(4) provides that persons other than individuals who contravene a provision of the CMSA – other than Part 5 or the regulations – may be subject to a penalty of up to $15 million plus the sum of any amounts obtained or payments or losses avoided. We are of the opinion that a sanction of this magnitude is unduly punitive. Thus we would suggest the adoption of the framework established in Section 127(1.9) of the Ontario Act, which treats individuals and corporations alike and imposes a penalty of up to $1 million for each failure to comply.

Sections 44 and 45 - Notice of Violation

Under the CMSA the Chief Regulator not only issues a notice of violation, but is also the person to whom representations are made by a respondent served with the notice. It is also the Chief Regulator who then determines whether there has been a violation of the CMSA and who imposes a penalty for the violation.

We strongly recommend that in order to ensure due process, respondents who contest a notice of violation (Section 45(2)) should be entitled to have the matter referred for decision in the first instance to an independent decision making body such as the Tribunal and should have the opportunity to make representations directly to such independent decision-making body. The nature of such representations (written, in person, etc.) should be clearly specified.

Furthermore, where a respondent does not "seek to appear or make representations" (per Section 45(3)), the Chief Regulator should nevertheless be required to establish before an independent decision-making body that there has been a violation and it should be that body that determines and imposes any penalty.

In addition to the foregoing, the opportunity to make representations to the Chief Regulator (per Section 44(1)(d)) before a matter is referred to an independent decision-making body remains valuable. It would be helpful for the CMSA to specify whether such representations are to be made in writing or in person.

Section 47 - Contravention by Directors or Officers

This provision should be amended to make it clear that the individuals referred to in this provision may be found liable only in circumstances where they were served with notice and given an opportunity to make representations both to the Chief Regulator (per Section 44(1)(d)) and to the independent decision-making body (see comments re: Sections 44 and 45).

Section 49(2) – Temporary Order

We recognize that there are certain circumstances which necessitate the making of a temporary order in the public interest because there is not sufficient time to hold a hearing. However, the range of temporary orders authorized in Section 49(1) is overbroad. It would be appropriate to carve out paragraph (a) out from the temporary order provision since paragraph (a) implies a finding of a breach of the CMSA and may require the person to take positive (irreversible) steps that have serious ramifications for the person's livelihood or operation of the business going forward.

Section 49(3) – Extension of Temporary Order

As currently drafted, Section 49(3) fails to require the Tribunal to take steps to expedite a hearing and, at least theoretically, permits the Tribunal to extend a temporary order for a significant period of time. In this regard, we strongly recommend the inclusion of a provision similar to Section 127(7) of the Ontario Act. We strongly believe that fairness dictates that the

legislation should mandate an expedited hearing in circumstances where a temporary order is issued and that the requirement to hold an expedited hearing should not be left to the Tribunal's discretion or scheduling convenience.

Section 50 - Freeze Order

There are some significant differences between Section 50 of the CMSA and Section 126 of the Ontario Act. Given the intrusiveness of a freeze order, the apparently low standards (when compared to the test for a *Mareva* injunction) for issuing such an order and the fact that it is issued prior to any hearing finding a breach of securities laws, we believe that there should be a requirement to have such an order reviewed by a court and any extension of such order should be made subject to court approval, as in Section 126(5) of the Ontario Act.

Sections 54 and 55 – Orders for the Production of Information

We are supportive of the requirement that peace officers and persons designated under Section 36(1) be required to apply to a judge or justice for the production of information for which there are reasonable grounds to suspect that the information will assist in the investigation of an offence under the CMSA.

We note that, unlike the CMSA, the Ontario Act does not contain any provisions requiring a person to either create and produce a record containing information (see Section 54(1) and Section 55(1)(c)) or to prepare and produce a written statement (see Section 55(1)(b)). While we note that there is precedent in other federal legislation for such provisions (see for example Section 11(1)(c) of the *Competition Act*, R.S.C. 1985, c. C-34), such provisions are expressly made subject to the condition that such statements may not be used or received against the individual in any criminal proceedings (see Section 11(3) of the *Competition Act*). If the provisions in Sections 54(1), 55(1)(b) and 55(1)(c) are maintained, the statements produced thereby should be made subject to a similar condition. (In this regard, as noted above in connection with comments on Section 38(3)(b), reference should be made to Sections 16(2), 17(3) and 18 of the Ontario Act.)

Section 55(3) - Order for Production - Terms

This section provides that an order for production under Section 55 "*may*" contain terms the judge considers appropriate "*including terms to protect a privileged communication*". This suggests that the protection of privileged communications is somehow discretionary and/or not a matter of course. In this regard, see our general comments above regarding the protection of privilege. The CMSA should be amended to make it clear that there is a general exception for privileged communications. In this regard, see Section 13(3) of the Ontario Act.

PART 4 – GENERAL OFFENCES

Section 58(1) – Contravention of the Act

For general offences, persons other than individuals may receive a fine of up to $25 million on proceedings by way of indictment and $5 million on summary conviction. We are of the opinion that a sanction of this magnitude is unduly punitive and would suggest the adoption of the framework established in Section 122(1) of the Ontario Act, which treats individuals and corporations alike and imposes a fine of up to $5 million.

PART 5 – CRIMINAL OFFENCES

Section 64 – Market Manipulation

We are concerned that the offence of market manipulation under the CMSA differs materially from the offence of fraudulent manipulation of stock exchange transactions under Section 382 of the Criminal Code. To the extent that these provisions are duplicative or redundant, we are of the opinion that identical language should be used to eliminate the possibility of inconsistent jurisprudence and regulatory uncertainty.

We are also significantly concerned that the reference to "appearance of trading activity" in Section 64(1)(a) could limit the ability or willingness of market intermediaries to serve as market-makers.

Section 65(1) – False Information – Benchmark

We are gravely concerned that criminalizing the reckless provision of information for the purpose of determining a benchmark may unduly stifle the willingness of persons to create, provide and support benchmarks. We are of the opinion that absent any intent to manipulate the benchmark, the reckless provision of information is more properly addressed under a regulatory rather than criminal law regime.

Section 66(1) – Definitions

The definition of related financial instrument falls within the definition of a derivative contract in Section 2 of the CMSA. To the extent that these two provisions overlap, similar terminology should be used throughout the CMSA.

Section 66(4) – Control

The definition of "control" in paragraph (a) does not specify an ownership threshold for the percentage of voting securities held. Because the number of votes required to elect a majority of directors may vary significantly based on the number of securities voted at a general meeting the absence of a defined threshold creates uncertainty for investors. It is suggested that the definition of "controlled companies" in Section 1(3) of the Ontario Act be incorporated to provide greater certainty for market participants.

Section 67 – Insider Trading

The insider trading rule in Section 67 of the CMSA now extends to trades of "an issuer whose securities are publicly traded." Although "publicly traded" is not defined, we assume that the intention of the section is to regulate Canadian investors trading in securities of foreign listed issuers. Canadian securities legislation is intended to regulate Canadian capital markets and not foreign markets.

The insider trading prohibition has been extended well beyond the current prohibition in the Ontario Act against the purchasing or selling of a security to prohibit a transaction involving a security that result in the termination or material amendment of a pre-existing obligation with respect to a security or any related financial instrument. Such a radical extension of the well-settled insider trading law in Ontario and other provinces should not be included in new legislation without a full airing of the purpose of the change and a full appreciation for the implications.

Section 67(4) – Tipping

This section provides an exemption from the tipping prohibition where it is "necessary in the course of their business". Under existing Ontario securities legislation the phrase employed in the tipping and other prohibitions is "in the necessary course of business." This phrase has been interpreted by courts and regulators across Canada (See National Policy 51-201 section 3.3). Changing the phrase to "necessary in the course of their business" suggests a change in the meaning of the section which we assume is not the intention. We would recommend reverting to "in the necessary course of business" in this and other sections of the CMSA.

Section 67(5) – Tipping Based on Action

This section introduces a new and evidently more limited exception to the tipping prohibition. The exception departs from both the "necessary course of business" exception under existing Canadian securities legislation and from the "necessary in the course of their business" exception in proposed Section 67(4). It requires instead that the tipper prove that the disclosure was "necessary in order to effect the proposed action or actions". This section on its face appears to us to be overly narrow and as a drafting matter it seems undesirable to have two different standards for exceptions to the tipping prohibition in the section.

Section 67(6) – Recommending

Section 67(6) 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 or material change.

However, we note one possible anomalous effect in the private placement area. In the course of making a private placement an issuer or agent may need to disclose material, non-public

information to a potential investor, which it does pursuant to the "necessary course of business" exception. This has been a practice that has been accepted by the Canadian securities regulators, as reflected in National Policy 51-201, section 3.3(4). 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 ordinary course business activities that involve recommending an issuer's securities (such as investor relations activities, non-deal road shows, etc.) should be excepted.

Section 68 – Misrepresentation

We are gravely concerned about the creation of a novel offence of recklessly making a misrepresentation that might induce a person to trade a security or derivative or deceive a person about a security or derivative. Such an offence could have a significant chilling effect on the willingness of market participants to provide commentary regarding securities or derivatives. It is suggested that this provision is overbroad as it does not limit the definition of person to include only those persons who are in a special relationship with the issuer.

Section 69 – Criminal Breach of Trust

To the extent that this provision is duplicative of the offence of criminal breach of trust in Section 336 of the Criminal Code, we are of the opinion that identical language should be used to eliminate the possibility of inconsistent jurisprudence and regulatory uncertainty.

Section 70 – Forgery

The CMSA does not include the right to prosecute forgery as a summary offence. By contrast, Section 367 of the Criminal Code permits the prosecution of forgery as a summary offence. We are of the opinion that the CMSA should be amended to allow the Crown to proceed by way of summary offence.

Section 73 – Threats and Retaliation Against Employees

As a matter of statutory construction, we are concerned by the discrepancy between the CMSA's standard of disadvantaging an employee and Section 425.1 of the Criminal Code's standard of adversely affecting an employee. To the extent that these provisions are intended to be duplicative, we suggest that consistent language should be used throughout.

Section 80 – Immunity

The immunity standard provided in Section 80 of the CMSA differs from that, which exists under Section 83.1(2) of the Criminal Code in that it does not provide protection from criminal liability for persons making disclosure at the request of a peace officer or a designated person under the CMSA. Given the Authority's broad powers to compel disclosure, we are of the opinion that persons called to give evidence should be protected from any criminal liability in conjunction to their testimony therewith.

Section 99 – Limitation

Given the broad investigative powers accorded to the Authority, we are of the opinion that there should be a correspondingly broad right of judicial review in order to ensure the procedural rights of regulated persons are adequately protected.

Yours very truly,

(signed) Davies Ward Phillips & Vineberg LLP

Davies Working Group

Tim Baron

Andrea Burke

James Doris

Richard Fridman

Mindy Gilbert

Steve Harris

Bryan McLeese

Alex Moore

Rob Murphy

Patricia Olasker

Poonam Puri

James Reid

Luis Sarabia

Brett Seifred

Chantelle Spagnola

David Wilson