CFA Societies Canada

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February 18, 2022

VIA EMAIL/ONLINE SUBMISSION

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

Re: Capital Markets Act – Consultation Draft (the "Consultation Draft")

The Canadian Advocacy Council of CFA Societies Canada[1] (the "CAC") appreciates the opportunity to provide the following general comments on the Consultation Draft and respond to the specific questions outlined below. We have been publicly supportive of a number of recommendations made by the Capital Markets Modernization Taskforce (the "Taskforce"), and are pleased to see some of them addressed via draft legislation in the Consultation Draft. We are also happy to see specific inclusions relating to the regulation of benchmarks, cryptocurrency, and derivatives in the legislation itself, as it provides important legislative direction and structure for additional future regulatory initiatives.

Introductory Comments

While we support the platform legislation approach of the Consultation Draft in order to promote regulatory flexibility to create and amend rules quickly, in the era of burden reduction we would appreciate additional information with respect to the need for an entirely new statute in lieu of substantively equivalent targeted amendments amending the existing Securties Act and consolidating the Commodity Futures Act. Given that a new Act in form of the Consultation Draft was the chosen course of action, publishing of the cost-benefit analysis prepared in connection with this decision would also likely be of interest for stakeholder review. Given the Consultation Draft, and given the length of time one would anticipate the resulting final Act to be force, we believe there may be room for additional forward-thinking policy innovation (particularly given that 'facilitating innovation' is one of the stated principles of the Consultation Draft) and additional legislative provisions with regard to topical issues in securities regulation such as sustainability and diversity. We believe consideration should be given to enshrining

[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 19,000 Canadian CFA Charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 178,000 CFA Charterholders worldwide in over 160 markets. CFA Institute has nine offices worldwide and there are 160 local member societies. For more information, visit www.cfainstitute.org.

these important concepts in securities legislation while providing meaningful guidance as to how the regulator should balance them with the other purposes of the Consultation Draft, including protecting investors from unfair, improper or fraudulent practices.

As an example, there is no mention of sustainability reporting for reporting issuers in the Consultation Draft. Given the importance of sustainability-related disclosure to investors and the proliferation of communicated issuer environmental, social and governance goals, we believe the Consultation Draft should specifically reference these matters, even if the specific reporting requirements are in the process of being developed and prescribed in regulation. For our views relating to Proposed National Instrument 51-107, please see our relevant comment letter. Similarly, the Consultation Draft mentions diversity narrowly in the context of reporting issuer governance, but does not address diversity, equity, or inclusion more broadly within registrants or market participants, ostensibly also areas of relevant legislative and regulatory jurisdiction. We would encourage legislative support for a wider definition of diversity, and more robust action on diversity, equity, and inclusion in the capital markets. We also believe that the capital markets have a role to play in the realization of Indigenous reconciliation, and that this may need to be addressed in legislation to be then effectively promulgated into regulatory initiatives. For a fuller explanation of our views on diversity in the capital markets, please review our comment letter in response to a recent joint consultation by the FCNB and NSSC.

We are supportive of the proposed inclusion of prescriptive rules for benchmarks and benchmark administrators in the Consultation Draft. In our comment letter to the CSA on its consultation on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators*, we noted we shared concerns about the prior instances of benchmark manipulation, and as a result agree with proposed section 100 of the Consultation Draft where benchmark manipulation will be specifically prohibited. We believe that given the global nature of our markets, it is also important that our rules conform to the IOSCO Financial Benchmark Principles.

Additional Items for Legislative Consideration

We believe that a number of important topics were left either partially or wholly unaddressed in the Consultation Draft that taken collectively could be seen as the meaningful step forward for Ontario investors that would reasonably justify the introduction of a new Act that will costly and disruptive for Ontario's (and Canada's) securities industry and regulators to implement.

The first and most important of these topics is the introduction of an expanded legislative best interest standard. As CFA charterholders, we have always been proponents of a robust and overarching best interest standard for securities registrants. Section 116 of the *Securities Act* (Ontario) as well as section 89 of the Consultation Draft references a specific duty for investment fund managers. Specifically, investment fund managers are expected to exercise the powers and perform the duties of the investment fund manager's office honestly, in good faith and in the best interests of the investment fund. In contrast, proposed ss. 88(1) of the Consultation Draft with respect to other registrants (including with respect to derivatives transactions) only references a duty to

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act fairly, honestly and in good faith with the registrant's clients and meet such other standards as may be prescribed.

We believe the duty to act in the best interests of a client for any registrant with discretionary authority should be enshrined in the Consultation Draft. Such an approach would be similar to jurisdictions such as Alberta, where the duty of care set out in ss. 75.2(2) of the *Securities Act* (Alberta) provides that a registrant that manages the investment portfolio of a client through discretionary authority granted by the client shall act fairly, honestly and in good faith toward the client and in the client's best interest.

As an additional secondary topic, we think that there may also be an opportunity to revisit the definition of a non-redeemable investment fund at this time, as we understand it may be interpreted differently by market participants and the implications of qualifying (or not qualifying) as an investment fund can be substantive with respect to registration and reporting requirements. In many other jurisdictions such as Australia, we understand that most pooled investment vehicles are subject to some level of regulatory awareness and oversight, albeit a "lighter touch" than what is required for Canadian investment funds.

With respect to the draft new prohibitions on misleading statements, we are concerned that s. 94 of the Consultation Draft does not contain a materiality qualifier—there is no requirement that the misstatement or omission make the statement materially misleading. In its current form, the section contains the following prohibition:

False or misleading statements, information about reporting issuers, etc.

94. *(1) A person engaged in a promotional activity shall not make a statement or provide information about a reporting issuer or an issuer whose securities are publicly traded that the person knows or reasonably ought to know,*

(a) at the time and in the circumstances in which it is made or provided, is false or misleading or omits information that is necessary to prevent it from being false or misleading; and

(b) would be considered to be important by a reasonable investor in determining whether to purchase, not purchase, trade or not trade a security of the issuer or a related financial instrument.

We believe the foregoing introduces a test that differs from many similar prohibitions in the Consultation Draft which contain a materiality qualifier, such as the general prohibition on false and misleading statements set out in section 93. As drafted, almost any statement intended to affect a reasonable investor's view about an issuer could breach section 94 of the Consultation Draft because absent having obtained such information as an insider of the issuer, that statement might always be able to be characterized as incomplete or inaccurate.

We also believe that with respect to Consultation questions 28–30 on ETFs, we agree that the recent decision in *Wright v. Horizons*[2] has introduced some uncertainty with

[2] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2021 ONSC 3120.

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respect to the statutory right of action that could apply to various purchasers of ETF securities due to the inability to distinguish investors who have purchased creation units from those that have purchased the ETF securities in the secondary market. A legislative solution is required, although we do not believe that all persons who purchase such securities should have only secondary market civil liability rights, even if supplemented by certain prospectus rights such as an increase in the limit on damages. Instead, we believe that persons who would typically be considered retail investors (i.e., not a permitted client or an accredited investor under National Instrument 31-103 or National Instrument 45-106, respectively), should be entitled to prospectus rights even if they purchased the securities in the secondary market. As it may be expected that the retail market would otherwise invest in mutual fund securities (and receive certain prospectus rights as a result), we do not believe there is a policy reason to distinguish some of the rights to which they should be entitled because a product has been formed as an exchange-traded fund.

Finally, we note that there may be some comments made on the former 2015 draft CMA as part of the CCMR initiative that have not been addressed in the Consultation Draft or the Consultation Summary. Absent a blackline or hyperlinks to the existing *Securities Act* or the former 2015 draft CMA, we are currently unable to determine if there are other specific areas that we could or should provide commentary on, and look forward to the opportunity to engage on such matters in future.

Responses to Specific Consultation Questions

	Question	Relevant CMA Part/Section
Q 1.	Are there concerns with changing the definition of “market participant”[3] to reduce the regulatory burden of record-keeping requirements for the following persons: • A control person of a reporting issuer • A person providing record-keeping services to a registrant • A person distributing or purporting to distribute securities in reliance on an exemption, or their director, officer, control person or promoter • A general partner of a person described above? **Response:** We are unclear as to the excess regulatory burden seeking to be removed, and have some general concerns as to the resulting loss of regulatory authority and oversight that could result from this change.	3 Definitions
Q 2.	What would be the impact of including the independent review committee (established under the terms and conditions of exemptive relief received by the fund) of a non-reporting issuer investment fund to the definition of “market participant”? **Response:** We are unclear as to the exact intent of this change, but see an expanded role for the independent review committee in this instance to be generally net-positive for investors in the investment fund in question.	3 Definitions

[3] Note that the persons outlined were included in the 2015 CMA Draft definition of “market participant” but have been removed from the definition in the CMA. The Chief Regulator’s powers to gather information from these persons and to designate a person to review their business and conduct and the Tribunal’s powers to order they submit to an audit or review of their practices and procedures were retained in the CMA.

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	Question	**Relevant CMA Part/Section**
Q 3.	Is it appropriate to have an OTC derivatives-specific registration rule to address the regulatory gap that exists for derivatives firms that are not able to rely on a registration exemption for certain specified financial institutions in the CMA? **Response:** Yes, we're broadly in favour of registration rule coverage for OTC derivatives market participants, though believe these registration rules should be harmonized with other registration categories and regulatory oversight to the greatest degree possible.	35 Requirement to be registered 36 Exemptions for certain financial institutions
Q 5.	Should the protection against reprisals be expanded to include independent contractors? **Response:** Yes, we've of the review that expanded protection against reprisals is generally positive, and should be extended to independent contractors where employee-equivalent functions are being performed or fear of reprisal would be a reason for non-reporting.	111 (1), No reprisal by employer
Q 8.	Is the scope of the OSC's ability to disclose compelled evidence without a Tribunal order or a Chief Regulator order (following notice and an opportunity to be heard) in subsections 148 (2) and (3) too broad or too narrow? For example, should the OSC be permitted to disclose compelled evidence without a Tribunal order or a Chief Regulator order "in connection with an investigation under section 146" instead of "in connection with the examination of a witness under the CMA"? **Response:** While our knowledge of the relevant operative legal principles is limited, we're supportive of enhanced tools for enforcement staff and criminal investigative authorities in response to alleged violations of the Act and criminal behaviour.	148 (2) Disclosure in investigation or proceeding 148 (3) Same

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	Question	Relevant CMA Part/Section
Q 9.	Is the scope of periodic reviews appropriate? Should the proposed draft legislation include further details about how the review would be conducted? **Response:** We believe that the legislative review process should be designed so that stakeholders representing as broad a demographic as possible can provide meaningful input. The lack of any legislative guardrails around review committees' substantive mandates or consultation processes is potentially problematic. Consideration should be given to providing review committees with a more targeted mandate that focuses them on specific issues where they might be most likely to add value, whether via resulting legislation or via more targeted mandates from the Minister. This would give stakeholders a better idea of what issues are on the table, so that they can make stronger contributions to the committee's analysis of these issues and resulting recommendations.	276 Period review of Act
Q 10.	Are there circumstances where a minimum consultation period of 60 days would be inappropriate? If so, please explain. Are there particular factors the OSC should consider in determining when a consultation period should be longer than 60 days? **Response:** We believe that the existing cohort of non-industry respondents to regulatory consultations is very limited, and limitation of comment periods on proposals that may have broad effect or interest should be taken with care. We believe that complex and widely impactful proposals such as the introduction of a major new National Instrument, or a major revision to a foundational Instrument such as the client-focused reforms/31-103 should be considered for a longer consultation period such as 90 days. This could be linked to an analysis by regulators of the complexity, cost, or impact of implementation on industry, investors and other stakeholders.	268 (3) Content of notice

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	Question	Relevant CMA Part/Section
Q 12.	Is the scope of the broader civil liability provisions for disclosure documents in the exempt market appropriate? **Response:** Yes, we believe this is appropriate.	183 Actions relating to prescribed disclosure documents
Q 17.	Is the scope of the definition of promotional activity appropriate? Do the elements outlined in the prohibition against making false or misleading statements about public companies capture the problematic behaviour seen in "short and distort" and "pump and dump" schemes? What types of activities should be exempt from this prohibition? **Response:** We don't believe that legitimate analytical work and airing of reasonably grounded views on public companies should be generally constrained. Please see our prior related comments in this letter and related comments in our response to CSA Consultation Paper 25-403 Activist Short Selling.	94 False or misleading statements, information about reporting issuers, etc.
Q 18.	Should the maximum amounts increase based on inflation or another factor? If so, how often should the maximum amounts increase? **Response:** Yes, we believe maximum amounts should be increased annually, indexed to inflation or perhaps some combination of inflation and a measure of aggregate investor harm or risk in the capital markets.	119 Maximum amount 171 Offences and penalties 174 Increased fines for specified contraventions
Q 24.	Are there additional persons that the Chief Regulator should not be able to order a person to not communicate with about an investigation that need to be included in the legislation? Should the Chief Regulator be able to prohibit disclosure to an insurer or insurance broker when the disclosure may compromise the investigation? **Response:** We believe that the integrity of an enforcement investigation should be protected to the greatest degree possibly, and that it should be within the Chief Regulator's discretion to prohibit such disclosures where they deem it required by the specific circumstances.	147 Order prohibiting disclosure of investigation

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	Question	Relevant CMA Part/Section
Q 28.	Are there any ETF statutory causes of action options that would be more appropriate for Ontario capital markets than the two identified above? If so, please identify and explain. **Response:** Please see earlier discussion.	N/A
Q 29.	Of the two options identified above, please identify which option you think would be more appropriate for Ontario capital markets and explain why. **Response:** Please see earlier discussion.	N/A
Q 30.	If Secondary Market Rights supplemented by Prospectus Rights would be more appropriate for Ontario capital markets, please identify the Prospectus Rights that persons or companies who purchased ETF units on an exchange should be deemed to have and explain why. **Response:** Please see earlier discussion.	N/A
Q 32.	What are the anticipated costs and benefits to market participants, stakeholders or the public of replacing the *Securities Act* and *CFA* with the CMA? **Response:** We're unclear why this is being asked at the end of a series of consultation questions, when we would see preparation and presentation of satisfactory cost-benefit analysis information as a necessary precondition and element of the introduction of a major piece of legislation such as the CMA. We would strongly suggest that existing analysis to this point be made public, such that industry/market participants, investors, stakeholders and the public may have the opportunity to review the findings. The responsible agency (the Ontario Securities Commission) is regularly held to the standard of having to produce cost-benefit analysis for public consumption in making regulatory proposals, and we believe the Ministry and Government should be held to the same standard in proposing this type of major legislative change.	N/A

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Concluding Remarks

We support efforts to modernize securities legislation and rules in Ontario and were pleased to see that a number of recommendations made by the Taskforce have been addressed. While we appreciate the platform approach taken by the Consultation Draft and the myriad proposals embedded in the draft Act, we believe that additional investor-friendly defining principles for the Act, such as an expanded legislative best interest standard to registrants with discretionary authority over client assets, would make the proposed Act worth the immense prospective effort of implementation for capital markets participants, investors, and regulators.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of*
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