CCGG Canadian Coalition for Good Governance
THE VOICE OF THE INVESTOR

February 17, 2022

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
VIA Email

Dear Sir/Madam,

Re: Capital Markets Act Consultation

The Canadian Coalition for Good Governance (CCGG) welcomes the opportunity to provide its comments to the Ontario Ministry of Finance (the "Ministry") on the draft Capital Markets Act (the "draft CMA").

CCGG's members are Canadian institutional investors that together manage approximately CDN $5 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. A list of our members is attached to this letter as Appendix A. CCGG promotes good governance practices, including the governance of environmental and social matters, at Canadian public companies and assists institutional investors in meeting their stewardship responsibilities. CCGG also works toward the improvement of the regulatory environment to best align the interests of boards and management with those of their investors and to increase the efficiency and effectiveness of the Canadian capital markets.

General Comments

The draft CMA represents a significant regulatory evolution in Canada's largest capital market. CCGG applauds the Ministry for publishing the draft CMA and seeking stakeholder views prior to introducing a bill in the legislature, and we encourage continued transparency. We further encourage the Ministry to continue to engage with stakeholders following the close of the comment period as the draft legislation evolves and issues become clearer.

Due to the volume and complexity of the material to review, CCGG's initial comments are limited to those core governance issues we observed in our review of the draft CMA and we look forward to providing further and additional comments and feedback.

Principled support for the platform approach

In general, we are supportive of the effort to modernize Ontario's capital markets regulation through the draft CMA and the proposed "platform approach" to rulemaking. The platform approach is described in the Ministry's Consultation Commentary as setting out "the fundamental provisions of capital markets law while leaving detailed requirements to be addressed in the rules"[1]. The stated purpose for this approach is "to promote regulatory flexibility, which is intended to allow the OSC to respond to market developments in a timely manner and to tailor its regulatory treatment of various entities and activities". We agree with these sentiments in principle.

OSC independence is paramount

The success of the modernized capital markets regime established by the draft CMA depends on the success of the OSC as a regulator and requires the OSC to be and to be seen as independent and impartial. The draft CMA cannot be read in isolation from the governance changes recently made to the OSC through the *Securities Commission Act* (the "SCA")[2]. The OSC's own governance structure is undergoing a significant modernization at the same time that the draft CMA is being introduced. We agree with the reforms in the SCA, including the separation of the roles of CEO and Chair, the establishment of a dedicated oversight Board and the creation of a separate Tribunal within the OSC. These are positive developments from a governance perspective.

The recent value for money audit of the OSC by Ontario's Auditor General gives us significant grounds for concern, however, as we review the interaction of the draft CMA and the SCA through an investor protection lens. The Auditor General's Report[3] identifies instances of political interference by the government in appointments to the OSC Board; political efforts to delay or postpone implementation of investor protection focused policies or reforms; and an increase in the direct oversight by the Minister's office in gatekeeping or pre-vetting policy and regulatory initiatives before they are published for stakeholder comments.

In the context of this response to the draft CMA, we have endeavoured to identify some specific areas where we recommend that safeguards/guardrails be integrated into the draft CMA that would reinforce and prevent erosion over time of the OSC's independence. Recommendations include aligning the OSC's capital formation mandate with investor protection, adding statutory guardrails to the statutory review process and adding additional transparency requirements to the

[1] Ministry of Finance, Capital Markets Act – Consultation Commentary, October 21, 2021 at p.18. [online at: Capital Markets Act - Consultation Draft (ontariocanada.com)]

[2] *An Act to implement Budget measures and to enact and amend various statues*, C. 8, S.O., 2021, Ch. 9 (not yet proclaimed), as amended by An Act to implement Budget measures and to enact and amend various statutes, C. 40, S.O., 2021, Ch. 19 (not yet proclaimed).

[3] Office of the Auditor General of Ontario, Value-for-Money Audit: Ontario Securities Commission, December 2021 [online: Value for Money Audit: Ontario Securities Commission (auditor.on.ca)] see findings at Section 4.1 The OSC has Been Slow in Adopting Protections for Mutual Fund Investors and the Need for Additional Action Should be Assessed; Section 4.2 Untimely Political Interference Undermined the OSC's Operating Independence in Setting Evidence Based Market Rules; including findings at 4.2.1 The Government Did not Follow a Consultative Appointment Process for OSC Board Members.

Minister's authority to make a request that the OSC consult and consider making a rule on any capital markets related matter.

Follow the independence precedent of the CMRA

With regard to the interaction between the draft CMA and the SCA, we recommend that the SCA could be enhanced by codifying board and tribunal independence. The OSC board/tribunal appointment process under the SCA (as it is reflected in amendments passed on December 9, 2021) is that board appointments are made by the Lieutenant Governor in Council (LGIC) on the recommendation of the Minister of Finance[4]. This is slightly different than under the current *Securities Act*, which provides for LGIC appointments but does not require a Ministerial recommendation.

This is in contrast to the structure of the 2015 draft Capital Markets Act, which was created in support of the Cooperative Capital Markets Regulatory System (CCMRS) and is the legislation upon which the Ontario draft CMA is built. The CCMRS was the product of multi-jurisdictional negotiations. It creates a Capital Markets Regulatory Authority (CMRA) which was to be established and governed through a Memorandum Of Agreement (MOA) between participating jurisdictions. The MOA endeavoured to promote independence and minimize the possibility of political interference in the regulatory authority's governance structure.

Pursuant to the MOA, the CMRA was structured such that no one jurisdiction/government had control of the Authority through its board. Under the MOA, the CMRA's oversight body, the Council of Ministers, appointed the board and tribunal members based on recommendations from a formally established nominating committee. It is notable that the MOA stipulates that the members of the nominating committee must be "independent of the governments represented by the Council of Ministers and possess appropriate qualifications and capital-markets related experience". In addition, there were qualification requirements for who the nominating committee could consider for board candidates, such that "in making a recommendation, the nominating committee must select nominees pursuant to a merit-based search and evaluation process in accordance with the highest standards of corporate governance"[5].

We recognize that the OSC board appointment structure under both the current *Securities Act* and the new *Securities Commission Act* are in the normal course for government and are supposed to adhere to government appointment and agency directives and an agency and Ministry Memoranda of Understanding (Agency MOU). Such documents are not binding, however, and cannot fetter the discretion of Cabinet to act unilaterally. In addition, the Auditor General has cautioned that such procedural guardrails have been ignored in the context of appointments to the OSC. In light of this reality and because capital markets require predictability, stability, and the independence of the regulator to be shielded from short-term political calculations, we would encourage the Ministry to revisit some of the independence safeguards structured into the CMRA with a view to elevating

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[4] Supra note, 1 at Ss. 8(1).

[5] Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System, dated March 27, 2020 [online: http://ccmr-ocrmc.ca/wp-content/uploads/MOA_Conformed-2020-09-25.pdf] see Article 6: Nominating Committees; and Article 7.3 Appointment of Board of Directors.

them to statutory requirements. For example, through a requirement for recommendations supporting a board appointment to be made to either the Minister or Cabinet by an independent nominating committee. The Ministry may also consider establishing an authority in the SCA for a bylaw to prescribe some qualification or other criteria for board composition.

An alternative, although more vulnerable to materialization of the issues already raised by the Auditor General, would be similar requirements and procedures being incorporated into the OSC's Agency MOU with the Minister.

As we have noted, where the draft CMA is designed to provide the OSC with significant authority and flexibility to determine what should and should not be regulated and how, its independence and expertise is vital to ensuring that Ontario's capital markets are globally perceived as fair to investors, efficient and competitive.

Responses to consultation questions

Q.9 Is the scope of periodic reviews appropriate?

Yes. The scope of the periodic reviews is appropriate. Capital markets are becoming increasingly dynamic and fast paced. Capital markets legislation needs to be regularly tested against innovations in capital formation, emerging threats to investor protections and global regulatory developments in order to stay relevant and globally competitive. Regular reviews every five years are sufficiently frequent to permit the regulator and regulatory framework to be nimble and responsive while providing the predictability and stability that capital markets crave. This facilitates more incremental enhancements or "tweaks" in contrast to the current review, which is the first in more than 15 years and is more sweeping in nature (and therefore significantly more complex for stakeholders and the market to digest).

Should the proposed draft legislation include further details about how the review would be conducted?

Yes. The proposed legislation should include further details about how the review would be conducted. We recommend the inclusion of process guardrails with respect to the selection and membership of the individuals appointed to conduct the review. In particular, the individuals put forward to the Minister for potential appointment should be determined through a transparent merit-based process. The appointees should be independent from government and the regulator, and should include representatives from all major stakeholder groups with a view to ensuring there is sufficient representation of stakeholders with potentially divergent viewpoints. We agree with the draft legislation's requirements that the review include public consultation and publication of the recommendations. We further recommend that the legislation require transparency through timely publication of written comments/submissions received from stakeholders through the public consultation process and disclosure of which stakeholders the appointed reviewers met with during the development of its recommendations.

Finally, we note that the wording of S. 276(1) would prescribe the review every five years after the *Section* comes into force – not the *Act*. This could create a situation where the Act, or significant

portions of it are in force, but the section is not proclaimed, thus delaying review. We recommend that this be amended to ensure that the five-year time period begins to run from the proclamation of the Act itself.

Q.10 Are there circumstances where a minimum consultation period of 60 days would be inappropriate? If so, please explain.

In our view the public consultation period should remain at 90 days for a proposed rule. Stakeholders would be challenged to provide meaningful and thorough responses in a shorter timeframe given the complex nature of many of the issues for which the OSC seeks public comment. We are also mindful of the prevalence of multiple overlapping requests for comment which often rely on the same resources within a stakeholder for response. We would expect that this would be particularly challenging for smaller, less sophisticated entities and issuers.

Are there particular factors the OSC should consider when determining when a consultation period should be longer than 60 days?

In the event that draft CMA does not retain the current 90 day consultation period across the board, we would recommend that the following be considered as factors for which a longer consultation period should be considered: multi-issue or structural consultations (proxy plumbing); new or novel areas of rulemaking or an area that could be considered to be relatively contentious; where there are significant substantive changes to existing rules; and where there are overlapping multiple consultations (more time permits more thoughtful and responsive submissions and reduces strain on stakeholder resources).

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

We are generally in agreement with the various orders for non-compliance in S. 124 which are intended to apply to less serious instances of non-compliance. Continuous disclosure compliance and exemption compliance are cornerstone principles of Canadian capital markets. Compliant disclosure and the related regulatory capacity of the OSC to review and enforce compliance requirements, including with respect to new areas of disclosure being called for by investors such as with respect environmental and social matters, is vitally important to institutional investors. We would note that the importance of increased capacity to correct continuous disclosure non-compliance is underscored where the regulatory approach taken in the draft CMA proposes to shift toward more deeming or automatic decision making or proposes to remove reporting requirements to facilitate other reforms (for example, one of the floated requirements for the automatic receipts for prospectuses and other offering documents is that the issuer have an appropriate disclosure record).

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

CCGG strongly supports the recommendation to amend securities law to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions. The protection of the interests of minority shareholders in material conflict of interest transactions

where those interests differ from the interests of related parties is one of the most important roles of independent directors and fundamental to promoting institutional investor confidence in the markets.

We note that best practices for independent committees as described in Multilateral Staff Notice 61-302 (the Staff Notice), provides meaningful guidance as to the actions to be taken by special committees of independent directors in conflict of interest transactions in order to give effect to the principle of the need for fair treatment of all shareholders that underlies the existing MI 61-101 Protection of Minority Security Holders in Special Transactions. Regulation should be amended to include the clarification of what the arms-length protection of minority shareholders' interests by a strong independent committee with a positive mandate to defend those interests entails in practice.

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?

Costs to investors are difficult to forecast with certainty at this time. We anticipate that there will be increased initial internal costs in reviewing, interpreting and understanding the implications of the new CMA within investor organizations. We further anticipate that the platform approach may lead to increased rulemaking, or rulemaking in novel areas which may also create additional resource requirements and costs.

Additional comments on specific provisions

Inclusion of capital formation in mandate should be tied to adequacy of investor protection

We are concerned that the addition of capital formation and competitiveness to the mandate of the OSC has the potential to create conflicts within the regulator as it is unclear how the Commission is expected to, or intends to, balance these new obligations against its existing mandates, most notably, investor protection. Given concerns with potential politicization of the Commission already noted, we are of the view that the statute should clarify that the capital formation mandate must be achieved in a way that is not inconsistent with investor protection. We would point the Ministry to the language in the *Nova Scotia Securities Act* as a good precedent for this approach[6].

In light of the foregoing, we recommend the following amendment be made to the draft CMA S.(1)(c):

> **Purposes of Act:**
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> **1.** The purposes of this Act are,

[6] Securities Act (Nova Scotia) C. 418, RSNS 1989 as amended. Purpose of Act 1A (1) The purpose of this Act is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, *where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation*. [Emphasis added]

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair, efficient and competitive capital markets and confidence in capital markets;

(c) to foster capital formation ***[where it would not be inconsistent with an adequate level of investor protection to do so OR where doing so is not inconsistent with Ss. 1(a)]***; and

(d) to contribute to the stability and integrity of the financial system and to the reduction of systemic risk.

Section 65(a) – Disclosure requirements, reporting issuers and others to expressly provide for non-financial reports to facilitate evolutions in E&S disclosures

We are supportive of the inclusion of Section 65 in the draft CMA including the degree of flexibility provided to the OSC to promulgate rules in respect of periodic corporate disclosures. Taking into account the increased interest of investors in environmental and social disclosures and accelerating work focused on consolidating, clarifying and standardizing such disclosures[7], we would recommend that non-financial reports be explicitly incorporated into the language of Ss. 65(a). We recognize that this is implicitly covered by Ss. 65(c), but including a specific reference to non-financial disclosures in Ss. 65(a) alongside financial reports which are already expressly referenced in Ss. 65(a) would send a clear signal that reporting on E&S matters is potentially of equivalent weight as financial reports.

In light of the foregoing, we recommend the following amendment be made to the draft CMA S.(65)(a):

Disclosure requirements, reporting issuers and others

65. A reporting issuer or any other issuer within a prescribed class shall, in accordance with the rules, provide,

(a) prescribed periodic disclosure about its business and affairs, including financial reports ***[and non-financial reports]***;

(b) disclosure of a material change; and

(c) any other disclosure required by the rules.

[7] See by way of example: CSA proposed National Instrument 51-107 Disclosure of Climate-related Matters; formation by the IFRS of the International Sustainability Standards Board; announcements by the US Securities Exchange Commission in 2021 that it will be embarking on rulemaking in the context of climate related disclosures and human capital management disclosures.

Inclusion of Section 69 – Governance of reporting issuers, etc. and in particular Ss. 69(a) which focuses on diversity

We are fully supportive of the inclusion of specific governance rulemaking authority in the draft CMA as set out in the entirety of S. 69. In particular the inclusion of Ss. 69(a) which provides the OSC with ability to promulgate rules in respect of board composition and membership including with respect to diversity of officers and directors. We encourage the OSC to move forward with implementing this section as a priority.

Section 74(1) Issuer's Meetings with Security Holders – Implementation mechanism for Say on Pay

The draft CMA includes the rulemaking authority to allow for requirements to be placed on issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation. Such voting provides critical input to boards and facilitates shareholder engagement in ensuring that approaches to executive compensation reflect shareholders' best long-term interests.

Ss. 74(1) of the draft CMA (Issuer's meetings with security holders) provides that issuers must comply with such requirements as may be prescribed in OSC rules for meetings of issuers with security holders. This establishes a clear statutory authority for the OSC to move forward with implementation of non-binding advisory shareholder votes on the board's approach to executive compensation. Say on pay is an important accountability mechanism for investors to signal their approval or disapproval with reporting issuers and to facilitate engagement. We encourage the OSC to move forward to implement say on pay rulemaking in this area as a priority.

We also note that this section is broad and allows for other requirements of meetings between issuers and shareholders. While it is unclear at this time what rules may be initiated pursuant to this authority, investors will be watching closely to ensure that any rules take into account and promote investor access and experience at such meetings.

Section 273 Request by Minister should incorporate existing transparency and publication requirements where the Minister has made a request to the OSC.

The proposed S. 273 does not provide the public with any visibility into the nature of the requests made by the Minister and the Commission's related response, or seemingly even the fact that a request was made.

As set out below, the existing *Securities Act (Ontario)* incorporates a level of transparency with respect to requests received from the Minister, including a requirement that such requests be in writing and that the OSC publishes any such requirements received from the Minister [emphasis added].

> **Securities Act (Ontario) S. 143.7(1) Studies**
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> **143.7** (1) The Minister may *in writing* require the Commission,
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> (a) to study and make recommendations in respect of any matter of a general nature under or affecting this Act, the regulations or the rules; and

(b) to consider making a rule in respect of a matter specified by the Minister. 1994, c. 33, s. 8.

Publication

(2) The Commission shall publish in its Bulletin notice of every requirement from the Minister made under subsection (1). 1994, c. 33, s. 8.

Notice

(3) The notice must include the following:

1. A statement of the substance of the requirement.

2. A reference to every unpublished study, report or other written materials provided to the Commission by the Minister other than materials that the Minister has asked the Commission to treat as confidential. 1994, c. 33, s. 8.

In contrast, the equivalent section in the draft CMA, S. 273, does not carry over this transparency. It provides that the Minister may request that the Commission "consult" on a matter and consider making a rule about it, but it does not specify how that consultation is to be conducted or that the link between the Minister's request and any consultation be made public[8]. There is also no requirement that the Minister's requests be made in writing to the OSC. There is a requirement for the Commission to report to the Minister within one year of the request being made, but there is no requirement for the OSC to publish either the fact of the request, details of any consultation process or its report/findings. In our view, this creates the potential for Minister's requests to be made verbally and privately. Given the concerns with potential political interference with the OSC that have been raised by the Auditor General of Ontario, it is essential that there is full transparency for capital markets stakeholders with respect to requests from the Minister that may have the effect of diverting resources and publicly stated priorities and workstreams of the OSC given the newly established requirement that the Commission must consult and report back within one year.

In light of the foregoing, we recommend the following amendments be made to the draft CMA S. 273:

Request by the Minister

273. (1) The Minister may ***[in writing]*** request that the Commission consult on a matter that the Minister specifies and consider making a rule about it.

[8] By way of contrast, the periodic review regime set out in S.276 of the draft CMA requires public consultation and public disclosures of the recommendations: see section 276(3) Public Consultation – When conducting a review, the appointees shall solicit the views of the public. And S. 276(4) Available to the public – The Minister shall make the recommendations of the appointees available to the public.

Report

(2) The Commission shall report to the Minister on the Commission's response to the request within one year after the day on which the request is made.

[Publication of Request

(3) The Commission shall publish in its Bulletin notice of every request from the Minister made under subsection (1).

Notice

(4) The notice required by subsection (3) must include the following:

> ***1. A statement of the substance of the request.***
>
> ***2. A reference to every unpublished study, report or other written materials provided to the Commission by the Minister other than materials that the Minister has asked the Commission to treat as confidential.***
>
> ***3. A description of Commission's proposed consultation process.***

Publication of Report

(5) The Commission shall publish in its Bulletin a copy of every report made to the Minister made under subsection (2).]

Conclusion

We thank you again for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Catherine McCall, at cmccall@ccgg.ca or our Director of Policy Development, Sarah Neville at sneville@ccgg.ca.

Yours truly,

"Marcia Moffat"

Marcia Moffat
Chair, Canadian Coalition for Good Governance

CCGG MEMBERS 2021

- Alberta Investment Management Corporation (AIMCo)
- Alberta Teachers' Retirement Fund (ATRF)
- Archdiocese of Toronto
- BlackRock Asset Management Canada Limited
- BMO Global Asset Management Inc.
- Burgundy Asset Management Ltd.
- Caisse de dépot et placement du Québec
- Canada Pension Plan Investment Board (CPPIB)
- Canada Post Corporation Registered Pension Plan
- Capital Group Canada
- CIBC Asset Management Inc.
- Colleges of Applied Arts and Technology Pension Plan (CAAT)
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- Fiera Capital Corporation
- Forthlane Partners Inc.
- Fondation Lucie et André Chagnon
- Franklin Templeton Investments Corp.
- Galibier Capital Management Ltd.
- Healthcare of Ontario Pension Plan (HOOPP)
- Hillsdale Investment Management Inc.
- IGM Financial Inc.
- Investment Management Corporation of Ontario (IMCO)
- Industrial Alliance Investment Management Inc.
- Jarislowsky Fraser Limited
- Leith Wheeler Investment Counsel Ltd.
- Letko, Brousseau & Associates Inc.
- Lincluden Investment Management Limited
- Manulife Investment Management Limited
- NAV Canada Pension Plan
- Northwest & Ethical Investments L.P. (NEI Investments)
- Ontario Municipal Employee Retirement System (OMERS)
- Ontario Teachers' Pension Plan (OTPP)
- OPSEU Pension Trust
- PCJ Investment Counsel Ltd.
- Pension Plan of the United Church of Canada Pension Fund
- Public Sector Pension Investment Board (PSP Investments)
- QV Investors Inc.
- RBC Global Asset Management Inc.
- Régimes de retraite de la Société de transport de Montréal (STM)
- RPIA
- Scotia Global Asset Management
- Sionna Investment Managers Inc.
- SLC Management Canada
- State Street Global Advisors, Ltd. (SSgA)
- Summerhill
- Pension Plan Corporation of Newfoundland and Labrador
- Teachers' Retirement Allowances Fund
- UBC Investment Management Trust Inc.
- University Pension Plan Ontario (UPP)
- University of Toronto Asset Management Corporation (UTAM)
- Vestcor Inc.
- Workers' Compensation Board – Alberta
- York University Pension Fund