VIA E-MAIL (**CMA.Consultation@ontario.ca)**

February 18, 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

Re: Consultation – Capital Markets Act

Background

The Portfolio Management Association of Canada (**PMAC**) is pleased to have the opportunity to provide feedback to the Ministry of Finance (**Ministry**) on the *Capital Markets Act* Consultation (the **Consultation**). PMAC represents over 300 investment management firms registered to do business with the various members of the Canadian Securities Administrators (**CSA**) as portfolio managers (**PMs**). Approximately 70% of our members are also registered as investment fund managers (**IFMs**). Close to 70% of our member firms are principally regulated by the Ontario Securities Commission (**OSC**) and almost all members do business in Ontario.

PMAC's membership is comprised of firms of varying sizes and models, ranging from one-person firms to international and bank-owned firms, including more traditional models and online advisers. In total, our members manage in excess of $2.9 trillion of assets under management for institutional and private client portfolios.

Portfolio Managers

PMAC's mission statement is "advancing standards". We are consistently supportive of measures that elevate standards in the industry, enhance transparency, improve investor protection, and benefit Canadian capital markets as a whole. Registered PMs have discretionary authority over investments they manage for their clients and have a duty to act in the best interests of their clients, also referred to as the fiduciary duty. PMAC strongly believes that this fiduciary duty is of utmost importance to investors, that its existence increases confidence in the capital markets and that it informs the way that PM firms operate their business and service their clients.

KEY RECOMMENDATIONS:

1. **Adopt platform legislation and continue to align regulation across the CSA jurisdictions.** The OSC should be empowered to respond to the evolving capital markets landscape with necessary speed and flexibility. It is equally important that regulations maintain harmonization with existing National Instruments, as deviation represents a significant burden on firms and hinders competition.
2. **Maintain the minimum 90-day consultation period.** The proposed 60-day comment period is not sufficient to conduct meaningful stakeholder consultation and obtain feedback.

We have the following feedback on certain sections of the CMA. Our responses to certain specific consultation questions follow.

Regulatory framework

PMAC is generally supportive of the move to platform legislation and efforts to harmonize Ontario capital markets law requirements with those of other Canadian jurisdictions. We agree that the OSC should be given the flexibility to respond to new and emerging issues, products and trends in the capital markets. Generally, we believe that the proposed *Capital Markets Act* (**CMA**) will achieve these objectives.

However, as noted in section 2.5 of the CMA, "The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of capital markets regulation regimes." We would not want to see the CMA or gap-filling rules used in ways that would make regulation more fragmented across Canada and we emphasize the importance of continued cooperation and coordination among CSA members.

Legislative and regulatory harmonization across Canada is of paramount importance to PMAC members, most of which are registered in multiple CSA jurisdictions. The burden, complexity, and costs of compliance with various legislative and regulatory requirements is an enormous drain on firm resources. Jurisdictionally fragmented regulation not only increases regulatory burden and hinders competition, but can also make Ontario a less attractive market for new entrants and expensive for investors.

In addition, the new OSC mandates of fostering capital formation and competition in capital markets must not come at the expense of investor protection. Its regulatory response must be measured and should always prioritize investors' interests. We urge the OSC to adopt principles-based regulation which takes into account the different registration categories and business models of registrants. We also believe that regulation should provide exemptions where appropriate and avoid a one-size-fits-all approach.

Independence of the OSC

The modernization of Ontario's legislative framework and the OSC's mandate provide an opportunity to examine the independence of the OSC. It is important to respect the OSC's rule-making authority, the experience and specialized expertise of OSC Staff and the OSC's relationship with other CSA jurisdictions, and not subject it to undue political interference.

Implementing legislation in a transparent manner is one of the Ministry's regulatory principles identified in the Consultation Commentary.[1] In the December 2021 report *Value-for-Money Audit: Ontario Securities Commission,* the Auditor General of Ontario made findings regarding the OSC's vulnerability to political interference, which the Auditor General found risks undermining the OSC's independence and impartiality. The circumstances that led to the Auditor General's findings involved the OSC's rule-making with respect to deferred sales commissions, and the Ministry's pre-clearance process for rule-making. The Auditor General made recommendations with respect to providing additional transparency into the decision-making process. We are deeply concerned about these findings and support the recommendations of the Auditor General on this issue, as well as the findings and recommendations regarding the appointment process and independence of the OSC Board.[2]

Delegation of authority

We are generally supportive of the CMA's approach to rule-making authority. Under the current *Securities Act* and the *Securities Commission Act, 2021*, the OSC may authorize its directors to exercise any of the OSC's powers or perform any of its legislative duties. The CMA confers significant authority on the Chief Regulator, and the delegation of powers or duties to OSC Staff or a recognized entity. The delegation power is very broad and does not specify when, in what circumstances, or specifically to whom such a delegation or sub-delegation could be made. Given the broad scope of the Chief Regulator's authority and responsibilities set out in the CMA, additional clarity on this point would be welcome.

Consultation Period

We are very concerned with the proposed reduction of the minimum consultation period from 90 days to 60 days. We strongly believe that meaningful public input is essential to effective regulation. A 60-day comment period is not sufficient to obtain meaningful stakeholder feedback, especially with respect to complex, multi-jurisdictional issues. We acknowledge that this is a minimum period, and that a longer period may be prescribed where it is considered to be warranted; however, we nonetheless believe that there is a risk that this timeframe will be insufficient and will impact the quantity and quality of stakeholder feedback. Engaging with stakeholders gives regulators the benefit of multiple perspectives and experiences, and the

[1] Ministry of Finance*, Capital Markets Act – Consultation Commentary*, October 2021 at page 3

[2] Please see Office of the Auditor General of Ontario, *Value-for-Money Audit: Ontario Securities Commission*, December 2021, Recommendations 5 and 6.

knowledge and expertise of registrants and other relevant stakeholders, such as investor advocates. PMAC's over 300 member firms are registered in multiple registration categories in various jurisdictions, and are significantly impacted by regulatory changes. Even seemingly minor changes can have a material and significant impact on firms' policies and procedures, and may require significant investment of resources, time and capital to implement. Regulation of the financial markets is extremely complex and multi-faceted. Analyzing and responding to the numerous and frequent consultations from the CSA, local CSA jurisdictions, provincial and federal governments and international bodies is both an important and time and resource-intensive process. We strongly urge Ontario to maintain a minimum 90-day consultation period, which is necessary to allow for meaningful stakeholder feedback.[3]

Additional accredited investor categories

We agree that moving the accredited investor prospectus exemption to National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) and providing the OSC with the ability to introduce additional categories could harmonize the requirements with those of other jurisdictions and allow for greater flexibility. We believe that any prospectus exemptions must continue to be subject to appropriate stakeholder consultation, and that investor protection considerations must be prioritized. The use of such exemptions should be judicious and carefully monitored for unintended uses and or/consequences of their use.

While we believe that the OSC should be able to make rules regarding exemptions, including the accredited investor prospectus exemption as proposed in subsection 266(5), we do not believe that the Chief Regulator should be given the authority to designate a person as an accredited investor as set out in CMA subsection 127(2)(n). The definition should be set out in NI 45-106 in order to facilitate harmonization across multiple jurisdictions and any change should be subject to public consultation. In the interest of national harmonization, ease of doing business in Canada and reduction of regulator burden, a national instrument is the preferable tool for changes of this nature.

Derivatives regulation

We are supportive of moving the regulation of derivatives, including commodity futures regulation, into the CMA. We understand that the CMA will allow the OSC to make rules relating to over-the-counter (**OTC**) derivatives. PMAC will respond to the CSA's Notice and Third Request for Comment, Proposed National Instrument 93-101 and Companion Policy *Derivatives: Business Conduct*. We have previously advocated that, due to the already robust existing framework to register and regulate the

[3] Please see Securities and Exchange Commission (SEC) Commissioner Hester M. Pierce's recent Statement on Comment Period Lengths

business conduct of advisers, advisers should not be subject to a separate derivatives registration regime.[4]

It is not clear what effect eliminating the CFA will have on current exemptive relief for international dealers, advisers and sub-advisers which were recently proposed in Proposed OSC Rule 32-506 *(Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers* (Interim Class Order) and temporarily provided in Ontario Instrument 32-507 *(Commodity Futures Act) Exemptions for International Dealers, Advisers and Sub-Advisers* (Interim Class Order). We believe the intention is that such relief will no longer be necessary because the proposed exemptions, which are analogous to those available in NI 31-103, will be made available under the CMA (or under local rules), and will include exemptions from registration related to derivatives activity for international firms. Clarification on this point would be helpful.

Transition

As noted in the Consultation Commentary, market participants will need time to adapt to the new regime and adjust to on-going regulatory changes. We would expect generous transition periods to be provided for any new requirements that involve changes to registrants' policies and procedures, compliance systems, training and education, and regulatory filings. These can be costly and time-consuming for firms and may represent a significant burden. We also urge flexibility with respect to continuing existing exemptive relief or providing new relief to firms where appropriate. We encourage the OSC to consider fee moratoria and forgiveness where appropriate to reduce the costs of bringing firms into compliance with new requirements.

We understand that new rules may be required to address regulatory gaps. We expect that any rules representing a material change from the status quo under the existing *Securities Act* be published with ample time for public consultation to allow for meaningful stakeholder participation. We are concerned with the draft provisions in Part XVI of the CMA with respect to the type of rules that would be considered "initial rules" in section 280. This provision appears to exclude the customary publication for comment, as compared to "transitional rules" in section 281. As noted above, we believe that public consultation on any new rules or requirements is fundamentally important and must not be eliminated for the sake of expediency.

[4] Please see our response to the CSA Notice and Request for Comment on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy 93-101CP; our response to the CSA Notice and Request for Comment on Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102; our response to the OSC on its Statement of Priorities for the Financial Year to end March 31,2023; our response to OSC Staff Notice 11-784 *Burden Reduction*; and, our response to the OSC's Internal Taskforce on Regulatory Burden Reduction.

Wright v. Horizons

We agree that the CMA provides an opportunity to review the issues raised in the *Wright v. Horizons* case with respect to the civil liability regime for ETF issuers and investors. The specifics of any changes should be subject to consultation and comment to ensure that the industry has sufficient time to analyze and respond to any proposals and consider whether they may have unintended consequences or repercussions. Our initial view is that the gap would be appropriately addressed by applying the secondary market regime to investors who purchase ETF securities on an exchange. Similar to the purchase of common shares in the secondary market, purchases are generally made at market price on an exchange and not directly from the ETF issuer at net asset value per unit.

PMAC Responses to Specific Consultation Questions

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"?

It is not clear what the regulatory objective is for expanding the definition of "market participant" to include an independent review committee of a non-reporting issuer investment fund. Further clarification on this point is needed in order to properly assess the impact. There is a concern that this could be problematic for firms that only have private funds that must form an IRC to rely on exemptive or codified exemptive relief for inter-fund trades. It could potentially make it more difficult for them to recruit members if the potential liability is too high and/or the cost of insurance is too high.

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?

While we understand that the CMA will allow the OSC to make a rule imposing registration requirements on OTC derivatives dealers and derivatives advisers not otherwise subject to registration exemptions in the CMA, it is our understanding that the CSA has no immediate plans to adopt such a rule.[5] As noted above, we have consistently taken the position that, due to the already robust existing framework to register and regulate the business conduct of advisers, advisers should not be subject to a separate derivatives registration regime.

[5] According to CSA Notice and Third Request for Comment, Proposed National Instrument 93-101 and Companion Policy Derivatives: Business Conduct, "Please note that the CSA will not be publishing Proposed National Instrument 93-102 Derivatives: Registration and Proposed Companion Policy 93-102 Derivatives: Registration concurrently with the Proposed Instrument at this time".

As we expressed in our previous comments on this issue (please see footnote 4), the registration regime proposed in NI 91-102 would impose significant regulatory burden on firms without a corresponding investor or market protection benefit. These measures could have a significant impact on investors and could deter international participation in our markets.

Our suggested approach has been to leverage the existing regime under NI 31-103 and to address any identified regulatory gaps through minor amendments to that instrument.

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

PMAC supports the harmonization of prospectus exemptions and civil liability rights for misrepresentations nationally and encourages Ontario to continue to work towards harmonization with other CSA jurisdictions. The Consultation Commentary suggests the broader liability provisions will be utilized in connection with the prescribed offering memorandum exemption in section 2.9 of NI 45-106. Further guidance as to any intention to expand the scope of this provision to other offering memoranda provided under other prospectus exemptions on a voluntary basis, such as the accredited investor prospectus exemption, would be helpful.

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?

As noted previously, we encourage the harmonization of requirements across Canada. The definition of promotional activity aligns with the definition in the British Columbia *Securities Act*. In our response to the British Columbia Securities Commission (**BCSC**) regarding British Columbia Instrument 51-519 *Promotional Activity Disclosure Requirements*, we noted that the definition is very broad. While we agree that any form of market manipulation or investor deception must be deterred and appropriately punished, we are generally of the view that regulation should be focused on specific behaviours and desired outcomes. For example, we urged the BCSC to narrow its proposed disclosure requirements in terms of persons to whom they apply and the types of communications and media to which they apply. We believe targeted provisions to be more practical and more enforceable, and more likely to achieve the desired regulatory outcomes.

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.

As noted above, we are supportive of a change to address the gap in the secondary market regime for purchasers of ETF units and would provide the same rights as

purchasers of other exchange traded securities in the secondary market. Our initial view is that the gap would be appropriately addressed by applying the secondary market regime to investors who purchase ETF securities on an exchange. Similar to the purchase of common shares in the secondary market, purchases are generally made at market price on an exchange and not directly from the ETF issuer at net asset value per unit. We note that if there are issuers with public ETF prospectuses that are combined with mutual fund units, there could be a scenario where investors who purchase the mutual fund units receive primary prospectus civil liability / recission rights and the purchasers of ETF units would go through the secondary market liability rights process, but that is likely only a small group. As noted above, the specifics of any changes should be subject to consultation and comment to ensure that the industry has sufficient time to analyze and respond to any proposals and consider whether they may have unintended consequences or repercussions.

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?

As noted above, we believe the CMA will provide greater flexibility to the OSC and allow it to respond more efficiently and effectively to developments in the capital markets. We encourage the OSC not to make changes unilaterally and to continue to work with other CSA jurisdictions to achieve harmonization across Canada.

Even in circumstances where no material changes are made to the obligations and duties placed on registered firms, registrants will be required to update their policies and procedures and client documentation to reference the new provisions of the CMA and any applicable rules which could be a costly and time-consuming process. We therefore emphasize the need for a lengthy transition period and public consultation on material changes and new requirements.

Conclusion

We thank you again for the opportunity to participate in this Consultation. If you have any questions regarding this letter, please do not hesitate to contact Katie Walmsley (kwalmsley@pmac.org) at (416) 504-7018 or Victoria Paris (vparis@pmac.org) at (416) 504-1118.

Yours truly,

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