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July 6, 2016

Cooperative Capital Markets Regulatory System
c/o: The Government of Canada
The Government of British Columbia
The Government of New Brunswick
The Government of Ontario
The Government of Prince Edward Island
The Government of Saskatchewan
The Government of Yukon

Re: Capital Markets Stability Act—Revised Consultation Draft

Dear Sirs and Mesdames:

ICI Global[1] appreciates the opportunity to comment on the revised consultation draft of the *Capital Markets Stability Act* (CMSA), which has been proposed as part of the governance and legislative framework for a cooperative capital markets regulatory system (Cooperative System) in Canada.[2] Our members have a keen interest in a strong and resilient global financial system that operates on a foundation of sound regulation. As discussed in this letter, we believe that the revised CMSA is much improved over the initial draft, but that the governments participating in the Cooperative System (the governments) should consider further improvements in two areas: (1) the designation of benchmarks or classes of securities or derivatives as systemically important; and (2) information collection and confidentiality.

Over the last seven years, ICI and ICI Global have provided extensive commentary, empirical data and economic analysis on legislative and regulatory proposals intended to address problems highlighted by the global financial crisis and to bolster areas of insufficient regulation. We have engaged actively in the global debate about the appropriate scope of systemic risk authorities,

[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.4 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

[2] Capital Markets Stability Act – Revised Draft for Consultation (Jan. 2016), available at http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf.

with a particular focus on how such authorities would affect the asset management industry and, more specifically, regulated funds and their managers.[3] In this vein, we commented on the initial draft of the CMSA. Our December 2014 letter discussed several areas of concern—particularly the prospect of "SIFI" designations for capital markets intermediaries—and offered recommendations on how the governments should tailor the systemic risk powers granted to the Capital Markets Regulatory Authority (Authority).[4]

We applaud the governments' efforts to respond to public input. Most notably, the governments have revised the CMSA to move away from entity-level systemic designations in favor of a regulatory focus on practices or activities giving rise to systemic risk concerns.[5] As ICI and ICI Global repeatedly have stressed, an activities-based approach to risk mitigation is particularly suited to asset management, given the highly substitutable nature of investment funds and asset managers. This is because regulation intended to mitigate the specific risks posed by a practice or activity can be applied broadly to entities engaged in that practice or activity (in contrast to regulation applicable only to entities designated as systemically important).

Notwithstanding the significant and positive changes made to the CMSA, we suggest that the governments consider further improvements in two areas: (1) the designation of benchmarks or classes of securities or derivatives as systemically important; and (2) information collection and confidentiality.

*Designation of Benchmarks, Classes of Securities/Derivatives as Systemically Important*

Under the revised CMSA, the Authority would have the ability to designate a benchmark, or a class of securities or derivatives, as systemically important. The Authority then could prescribe requirements, prohibitions, or restrictions applicable to such benchmark or class of securities or derivatives.[6] As modified from the initial draft, these provisions now require the Authority first to consider whether and how the benchmark, or the securities or derivatives within the class, is already regulated. This modification, while useful, does not alleviate our concerns with these provisions.

In their commentary on the revised CMSA, the governments have offered no insight into why they believe it is necessary or appropriate for the Authority to label particular benchmarks or classes of securities or derivatives as inherently systemically risky. We note, as we did in December 2014, that these provisions have no counterpart in the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act or, to our knowledge, any other existing law globally. These unprecedented types of systemic designations strike us as an impractical approach to mitigating systemic risk and, more importantly, one that could interfere with legitimate activity within the

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[3] By "regulated funds," we mean Canadian investment funds subject to National Instrument 81-102, US investment companies registered under the Investment Company Act of 1940, and funds organized or formed in other jurisdictions and substantively regulated to make them eligible for sale to retail investors (*e.g.*, funds qualified under the UCITS Directive).

[4] *See* Letter from Paul Schott Stevens, President & CEO, ICI, dated Dec. 8, 2014. The letter is available at https://www.ici.org/pdf/28565.pdf.

[5] *See* Sections 22-23 (systemically risky practices).

[6] *See* Sections 18-19 (systemically important benchmarks) and Sections 20-21 (class of securities or derivatives, which are referred to as systemically important products).

capital markets. Instead, we continue to believe that any concerns relating to the use of a benchmark or certain securities or derivatives are best addressed through the capital markets regulatory framework, which concerns matters such as how securities and derivatives are offered, sold, traded, and used by market participants.

For these reasons, we urge the governments to consider removing Sections 18-19 (concerning the systemic designation of a benchmark) and Sections 20-21 (concerning the systemic designation of a class of securities or derivatives) from the revised CMSA.

Alternatively, if the governments disagree with this recommendation and determine not to remove these provisions, we urge that the CMSA be modified to require the Authority to follow identical processes in exercising its systemic risk powers. At present, the revised CMSA contemplates somewhat different processes for designating and regulating a systemically important benchmark, on the one hand, and for designating and regulating a systemically important product or practice, on the other hand. For example, it appears that the Authority could issue an order designating a benchmark as systemically important and seek public input only on how it plans to regulate that benchmark.[7] In contrast, in the case of a product or practice, the Authority must give the public the opportunity to comment both on its analysis of why the product or practice is systemically important and on how the Authority plans to regulate that product or practice.[8] We can think of no reason to justify this disparate approach. Accordingly, we recommend that the governments modify the CMSA as necessary to make the process for designating and regulating a systemically important benchmark consistent with the processes for designating and regulating a systemically important product or practice.[9]

*Information Collection and Confidentiality*

As the governments have acknowledged, commenters on the initial draft of the CMSA expressed concerns about the scope of the Authority's powers to request records or information from any person, as well as the broad exceptions in Sections 14-15 that would allow the Authority to disclose information that is not otherwise publicly available. In our December 2014 letter, we urged the governments to eliminate or scale back these exceptions, and to give the highest priority to protecting the confidentiality of the information it receives, including a company's business information.

We are pleased that the revised CMSA no longer would allow the Authority to disclose nonpublic information in situations where it "considers that the public interest in disclosure outweighs any private interest in keeping the information confidential." Nevertheless, we urge the governments to narrow the exceptions in Sections 14-15 even further. The revised CMSA, for example, still would permit the Authority to disclose information "if the disclosure is consistent with the purposes for which the information was obtained." This is a vague standard, and one that could result in inappropriate disclosure of nonpublic information. As our earlier letter noted, the US Dodd-Frank Act imposes confidentiality obligations on both the US Financial Stability Oversight Council (FSOC) and its member agencies. It does not contain provisions that would

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[7] See Sections 18, 19 and 75.

[8] See Sections 20-21, 22-23 and 75, including in particular Section 75(2)(e).

[9] For example, corresponding changes will be needed to Section 81(3).

allow FSOC or its member agencies to disclose nonpublic information, as contemplated by Sections 14-15 of the CMSA.

We likewise have concerns about a provision the governments have added to Section 23 of the CMSA. Section 23 specifies the content of the regulations that the Authority may adopt to address a systemically risky practice. The initial draft of Section 23 would have allowed these regulations to include "disclosure to the public" regarding such a practice. In the revised draft, however, Section 23 contemplates "disclosure to the public of information whose disclosure is not otherwise required." We see nothing in the commentary that explains the intent of this change. It too is a vague standard and, without further clarification, could result in inappropriate disclosure of nonpublic information. For these reasons, we urge the governments to consider tailoring this provision to avoid any harmful or unintended consequences.[10]

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We appreciate the opportunity to comment on the revised draft of the CMSA. As the governments proceed toward finalizing this legislation, we urge that you continue to be guided by the objective of ensuring that the Authority exercises its systemic risk authorities "in a manner that complements existing provincial-territorial capital markets regulatory frameworks with safeguards to avoid undue regulatory burden."[11]

If you have any questions regarding our comments or would like additional information, please contact me at (011) 44- 203- 009- 3101 or dan.waters@iciglobal.org, Susan Olson, Chief Counsel, ICI Global, at (202) 326-5813 or soloson@iciglobal.org, or Rachel Graham, Associate General Counsel, ICI, at (202) 326-5819 or rgraham@ici.org.

Sincerely,

/s/ Dan Waters

Dan Waters
Managing Director

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[10] We note that Section 21, which addresses the content of regulations respecting systemically important products (*i.e.*, class(es) of securities or derivatives), also contemplates "disclosure to the public of information whose disclosure is not otherwise required." For the reasons noted above, we urge the governments to make corresponding changes to this provision.

[11] *See Commentary on the Capital Markets Stability Act* (Jan. 2016) at 9, available at http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-commentary-en.pdf. In this regard, we suggest that the governments provide greater clarity as to how the Authority will operate with non-participating jurisdictions.