Capital Markets Act – Consultation Commentary

Ministry of Finance

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Ontario

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1.0 Summary

As part of its Capital Markets Modernization Review, the Ontario government has developed a draft Capital Markets Act (CMA) that would support a modern capital markets regulatory system in Ontario and lead to future economic growth and job creation. The CMA is new draft legislation intended to replace the *Securities Act* and the *Commodity Futures Act* (*CFA*) in Ontario. As part of the government's commitment to burden reduction and streamlining regulatory oversight, the CMA would significantly modernize Ontario's capital markets regulatory framework, align it with developments in a rapidly evolving sector and further enhance Ontario's position as a globally competitive capital markets jurisdiction.

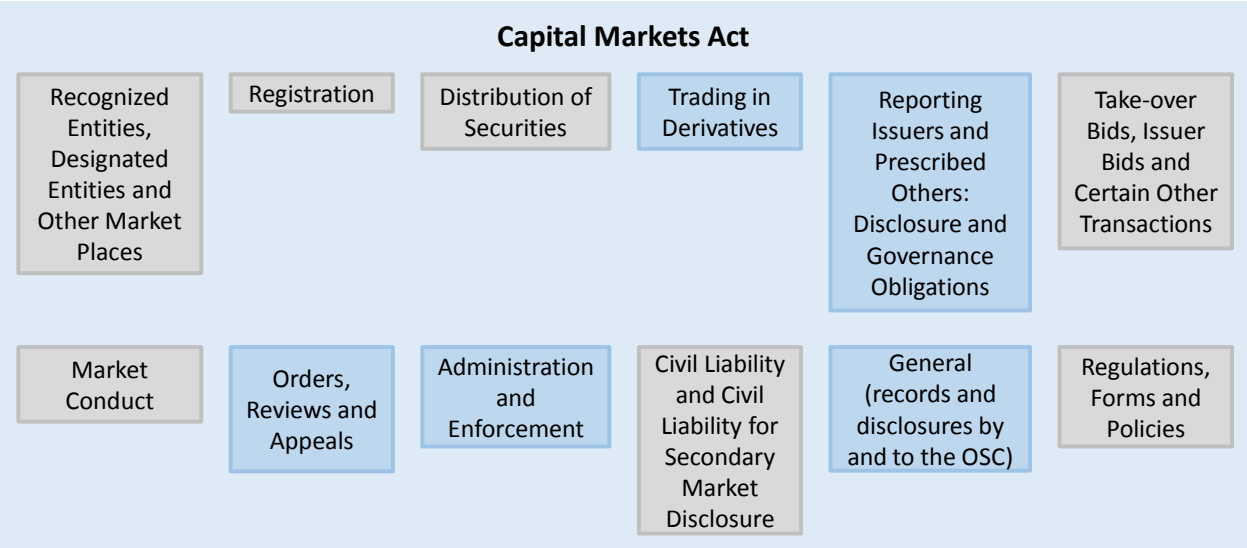
It should be noted that the draft CMA is only intended for stakeholder consultation purposes at this stage, and comments received during the consultation will be considered prior to determining next steps.

Modernizing Ontario's capital markets through the introduction of the CMA was the first recommendation of the final report of the Capital Markets Modernization Taskforce (Taskforce), whose final report was publicly released in January 2021, with 74 recommendations. A number of Taskforce recommendations have been incorporated into the CMA.

This commentary, including the specific consultation questions, has been prepared to accompany the draft CMA which is being published for public consultation. It outlines the framework and structure of the draft CMA; the major changes from the current framework in Ontario; specific Taskforce recommendations that have been adopted within the draft CMA; complementary Ontario Securities Commission (OSC) rule implications; an initial analysis of anticipated costs-and benefits; and guided questions for commenters to consider and address. See section 8.0 for further information regarding the feedback process.

The CMA would set out the regulatory framework for capital markets participants, the OSC's regulatory and enforcement powers, including the authority to make rules, and the Capital Markets Tribunal's (Tribunal) adjudicative powers.

The draft CMA is structured as follows:



The CMA would modernize Ontario's current capital markets legislation, retaining key components while introducing new elements to promote flexibility within a modern regulatory framework. This approach to legislation aligns with the government's regulatory principles of responding to a clearly identified need for streamlined regulation, developing and implementing legislation in a transparent manner, creating greater harmonization among jurisdictions, and ensuring that legislation is easily accessible and written in language that can be easily understood by the public and business.

One difference from current legislation is the extent to which the CMA takes a platform approach to regulation. It sets out the fundamental provisions of capital markets law while leaving detailed requirements, including some requirements that are currently contained in legislation, to be addressed in the rules. This approach promotes regulatory flexibility, allowing the OSC to respond to market developments in a timely manner and appropriately tailor its regulatory treatment of various entities and activities. The structure and content are also more similar to legislation in other Canadian Securities Administrators (CSA) jurisdictions.

To the extent possible, the government's goal is to minimize the impact of transition on market participants and their businesses. The government will look to ensure that the transition is carried out with the goal of having minimal impact on market participants. Adaption, transition and gap-filling rule implications are outlined below in section 5.0. The OSC and the government will ensure stakeholders have the opportunity to familiarize and adapt to any changes resulting from the CMA and new and existing rules, while ensuring that this important work moves forward in a timely manner.

2.0 Context

In the 2021 Ontario Budget, the Ontario government announced that it would publish the draft CMA for stakeholder consultation.

An earlier version of the CMA was developed as part of the Cooperative Capital Markets Regulatory System (CCMR) initiative as uniform legislation to be enacted in each participating province and territory. It was published for public comment in 2014 and 2015 and has since been updated to incorporate stakeholder feedback and changes in participating jurisdictions' capital markets legislation.

As its first recommendation in its final report, the Taskforce recommended introducing the CMA in Ontario as the legislative vehicle to implement its recommendations as the new changes would fit better within a modern statute than within the *Securities Act* and *CFA*. The government is now publishing a draft Ontario version of the CMA for public comment. This version incorporates Ontario policy approaches and some of the Taskforce's recommendations, which were informed by extensive stakeholder feedback, that would require legislation to implement.

The provisions included in this commentary and the draft CMA are intended to facilitate stakeholder comments. The government wishes to note that the CMA will not become law unless a bill is passed by the Legislative Assembly of Ontario. Should the decision be made to introduce a bill in the Legislative Assembly, the comments received through this consultation will be considered during the preparation of the bill. The content, structure, form and wording of both language versions of the consultation draft CMA are subject to change following the consultation process.

Securities Commission Act, 2021

The *Securities Commission Act, 2021* (*SCA*) outlines the governance and accountability of the OSC, including the board of directors, Chief Executive Officer and Tribunal. The *SCA* was introduced in March 2021 to implement the following OSC governance changes recommended by the Taskforce:

- Separate the regulatory and adjudicative functions at the OSC; and
- Separate the current Chair and Chief Executive Officer position into two distinct positions.

Members of the OSC currently serve as the board of directors of the OSC, exercise adjudicative functions and are responsible for policy and regulatory decisions. The Chair and Chief Executive Officer is a combined position and appointed by the Lieutenant Governor in Council.

The *SCA* continues the OSC as a corporation without share capital and establishes a new specialized Tribunal as a separate division of the OSC. The Tribunal's adjudicators are appointed by the Lieutenant Governor in Council and are different individuals from the OSC's board of directors. The Tribunal is independent from the rest of the OSC except for administrative matters, and the Chief Adjudicator is responsible for supervising and directing the Tribunal's operations. Under the CMA, the Tribunal makes adjudicative decisions, such as orders in the public interest and reviews of decisions of the Chief Regulator.

Under the *SCA*, members of the OSC's board of directors are appointed by the Lieutenant Governor in Council and the board is responsible for managing or supervising the management of the OSC's affairs, other than matters relating to the Tribunal's adjudicative functions. The Lieutenant Governor in Council will appoint the Chief Executive Officer of the OSC for the first two years. The board of directors will appoint subsequent Chief Executive Officers of the OSC. The Chief Executive Officer is responsible for the management and administration of the OSC, other than matters relating to the Tribunal's adjudicative functions. The CMA assigns regulatory responsibilities to the OSC, to be exercised by the board of directors, or to the Chief Regulator, who is the Chief Executive Officer appointed under the *SCA*. The Chief Executive Officer of the OSC will be responsible for most of the regulatory duties and powers in the CMA, either assigned directly to them by the CMA or delegated by the OSC's board of directors.

The *SCA* has been introduced and is expected to be proclaimed into force in the coming months.

3.0 The Capital Markets Act

3.1 Overview of the Capital Markets Act

Part I – Interpretation

Part I includes the purposes of the CMA, the fundamental principles the OSC should follow in pursuing the purposes of the CMA, definitions and exceptions from complying with the CMA for the Crown and Crown agents. The purposes of the CMA include the changes to the OSC's mandate introduced in spring 2021 to include fostering capital formation and competition in capital markets.

Part II – Recognized Entities

Part II outlines the requirements for recognized entities, including self-regulatory organizations, exchanges, clearing agencies, trade repositories or persons engaged in activities prescribed in the rules. Recognized entities, as well as entities exempt from recognition must comply with conditions, restrictions and requirements prescribed in the rules.

A recognized entity has a duty to provide information to the Chief Regulator. Recognized self-regulatory organizations and exchanges must regulate the operations, standards of practice and business conduct of its members with a view to pursuing the public interest.

The Chief Regulator can make recognition orders and decisions related to recognized entities in the public interest. The Chief Regulator may impose conditions, restrictions and requirements in the recognition order which provides the OSC with the ability to exercise accountability over recognized entities.

Part III – Designated Entities and Other Marketplaces

Part III outlines the requirements for designated entities, including credit rating organizations, investor compensation funds, information processors, marketplaces or persons engaged in activities prescribed in the rules. Designated entities, entities exempt from designation, and marketplaces that are not recognized exchanges or designated marketplaces must comply with conditions, restrictions and requirements prescribed in the rules.

Similar to recognized entities, a designated entity has a duty to provide information to the Chief Regulator.

The Chief Regulator can make designation orders and decisions related to designated entities and marketplaces that are neither a recognized exchange nor a designated marketplace in the public interest.

Benchmarks

Part III also outlines the regulatory regime for benchmarks. The Chief Regulator can designate a benchmark or benchmark administrator in the public interest. Designated benchmark administrators, benchmark contributors and benchmark users must comply with prescribed conditions, restrictions and requirements and provide information to the Chief Regulator or another person or class of persons or the public in

accordance with the rules. The Chief Regulator can also order a person to provide information to a designated benchmark administrator.

Part IV – Registration

Part IV outlines the registration requirements for registrants, which include dealers, advisers and investment fund managers. Registrants, their directors, officers and auditors are required to comply with the conditions, restrictions and requirements in the rules.

The Chief Regulator can impose conditions, restrictions or requirements on a registrant and require information to be submitted by applicants or registrants. The Chief Regulator can also require a registrant to direct its auditor to conduct an audit or financial review and deliver a report.

Certain financial institutions are exempt from the requirement to be registered to act as a dealer, adviser or investment fund manager. The exemptions are subject to conditions, restrictions and requirements prescribed in the regulations.

Part V – Distribution of Securities

Part V outlines requirements for issuers, registrants, purchasers and other prescribed persons with respect to activities related to a distribution of securities.

A prospectus must provide full, true and plain disclosure of all material facts related to the securities offered or proposed to be offered. A person must comply with the requirements in the rules about the contents, filing with the Chief Regulator and sending of a preliminary prospectus, prospectus or prescribed offering document to a purchaser.

The Chief Regulator must issue a receipt if the prospectus or document is filed according to the rules unless the Chief Regulator considers that it would not be in the public interest to do so.

The Chief Regulator may order an issuer to give a person any information or records that the Chief Regulator considers necessary if the person is proposing to distribute an issuer's previously issued securities and is unable to obtain the information or records necessary to comply with this Part or related rules. The Chief Regulator may order that trading activities cease if they consider a preliminary prospectus does not comply with the requirements.

The prospectus requirement does not apply to distributions of certain government debt securities, securities of certain financial institutions and government incentive securities.

Part VI – Trading in Derivatives

Part VI outlines requirements for a dealer, adviser, counterparty to a trade or other prescribed persons related to derivatives transactions.

Requirements for trading in designated derivatives include filing a prescribed disclosure document that complies with the prescribed requirements and a receipt issued by the Chief Regulator if required by the rules.

Every person who trades in or provides a marketplace for trading in derivatives, every trade depository and other prescribed persons are required to provide information relating to derivatives transactions to the Chief Regulator and other prescribed persons.

A derivatives trade is not void, voidable or unenforceable and a counterparty is not entitled to rescind the trade solely because the trade failed to comply with capital markets law, unless the terms of the derivative provide otherwise.

Derivatives can be prescribed as securities for the purposes of any of the provisions in the CMA and the rules.

Part VII – Reporting Issuers and Prescribed Others – Disclosure and Governance Obligations

Part VII outlines disclosure, governance and other requirements for issuers and investment funds.

For issuers, these requirements include composition of the board, board committees, code of conduct, procedures to regulate conflicts of interest and meeting requirements for its security holders. For investment funds, these requirements include distribution and trading of its securities and the conduct of its operations.

An issuer, auditor of an issuer or other prescribed persons must comply with prescribed requirements with respect to accounting, reporting, auditing, internal controls and disclosure controls.

The board of directors of an issuer or the investment fund manager of an investment fund must obtain approval or solicit input of prescribed classes of security holders for prescribed matters in prescribed circumstances. OSC rules may also require them to obtain the approval or solicit the Chief Regulator's input before proceeding with a prescribed transaction.

The Chief Regulator may require a director, officer, promoter or control person of an issuer to provide information to the Chief Regulator. The OSC may set a limit on the amount that a person charges for compiling or distributing records relating to an issuer.

Part VIII – Take-over Bids, Issuer Bids and Certain Other Transactions

Part VIII outlines requirements for early warning of acquisitions or dispositions of securities of a reporting issuer, take-over bids, issuer bids, insider bids, going-private transactions, related party transactions, business combinations or similar transactions.

A person must not make a take-over bid or issuer bid except in accordance with the rules, and issuers whose securities are the subject of a take-over bid or an issuer bid, and their directors or officers, must comply with conditions, restrictions and requirements in anticipation of or during a bid, transaction or business combination. A person must comply with the conditions, restrictions and requirements as may be

prescribed for going-private transactions, related party transactions and business combinations or other similar transactions.

If a take-over bid has been made, the board of directors of the issuer must determine whether to recommend acceptance or rejection of a bid and prepare a circular that sets out their recommendation. A director or officer may also individually recommend acceptance or rejection of the bid in accordance with the rules.

The rules may prescribe duties and requirements to disclose or manage conflicts of interest for an offeror, offeree issuer, issuer and its directors and officers. The rules may also prescribe requirements when a person can and cannot acquire or trade in a security before, during or after a transaction.

On application by an interested person, the Chief Regulator may vary the time period in the rules related to this Part if it would not be prejudicial to the public interest. The Tribunal and the Superior Court of Justice may make interim or final orders if a person has acted or is acting contrary to the public interest or has not complied with or is not complying with this Part or the rules related to it. If the Chief Regulator is not the applicant, they must be given notice of these applications and is entitled to appear as a party to the application.

Part IX – Market Conduct

Part IX outlines conduct requirements for market participants and other persons participating in capital markets.

Records necessary for the proper recording of their business transactions and financial affairs, and records that are reasonably required to demonstrate compliance with capital markets law, are required to be kept by market participants for seven years. The Chief Regulator may require a person to provide these records.

Registrants have a duty to deal fairly, honestly and in good faith with their clients and meet such other standards as are prescribed.

Investment fund managers have a duty to exercise their powers and perform their duties honestly, in good faith and in the best interests of the investment fund and exercise the degree of care, diligence and skill of a reasonably prudent person in the circumstances.

Registrants and investment funds shall identify, manage and disclose conflicts of interest in accordance with the rules.

Certain persons shall comply with prescribed requirements relating to trading, clearing and settlement of trades in securities or derivatives. A person engaging in promotional activities shall comply with prescribed requirements.

Persons shall not make statements that are materially false or misleading and would reasonably be expected to have a significant effect on the market price or value of a security, a derivative or the underlying interest of a derivative. Persons engaged in promotional activities shall not make false or misleading

statements, or provide false or misleading information, about a reporting issuer or an issuer whose securities are publicly traded.

Persons are prohibited from making certain representations in relation to a trade of a security, including representing that they will resell or repurchase a security or refund the purchase price of a security, give an assurance relating to the future value or price of a security, or that a security will be listed on an exchange unless the exchange has approved the listing or consented to the representation, that an application has been made or will be made to list on an exchange unless the exchange has consented to the representation.

Persons are prohibited from making certain representations in relation to a trade of a derivative, including representations that they will refund an amount paid, assume all or part of the obligations under the derivative, give an assurance relating to the future value or price, or that the derivative will be traded on a marketplace unless the marketplace has consented to the representation.

Other prohibited activities include market manipulation, fraud, providing false or misleading information for the purpose of determining a benchmark, benchmark manipulation, insider trading, tipping and front running. This Part also outlines defences that provide circumstances where there was not a contravention of these prohibited activities.

Unfair practices, using the name of another registrant, representing that a person is registered under the CMA if untrue or without the person's category of registration, making false or misleading statements that are important for an investor to decide whether to enter into or maintain a trading or advising relationship, and representing that the OSC or Chief Regulator has made certain approvals are also prohibited.

A person and their agent who is placing an order for the sale of a security must declare to the dealer if they do not own the security at the time the order is placed.

Obstructing a hearing, opportunity to be heard, review or investigation and making false or misleading statements to the Chief Regulator, Tribunal or any person acting under the authority of the OSC or Chief Regulator are also prohibited.

A person also must not take a reprisal against an employee for seeking advice, expressing an intention to provide or providing information about a contravention of capital markets law to a regulator.

A person must not convert another person's assets held in trust or any part of them to a use that is not authorized. Aiding, abetting or counselling a contravention of capital markets law or conspiring with another person to contravene capital markets law are also prohibited.

Part X – Orders, Reviews and Appeals

Part X outlines the orders that the Tribunal, Chief Regulator and Superior Court of Justice can make and how their decisions are reviewed and appealed.

Tribunal orders

After a hearing, the Tribunal can make orders in the public interest and the Chief Regulator can make these orders without a hearing where the person subject to the order consents. The Tribunal can also make orders without giving the person subject to the order an opportunity to be heard where the person has had a prior capital markets-related conviction, or is subject to a prior order of, or has entered into a settlement agreement with, certain regulators (including international capital markets regulators and Canadian self-regulatory organizations (SROs) and exchanges). The Chief Regulator can make certain orders without giving an opportunity to be heard if they consider that a delay in making the order could be prejudicial to the public interest; these orders expire within 15 days.

Most enforcement orders and settlement agreements by other capital markets regulators in Canada have automatic effect in Ontario and will apply without the OSC making an order to reciprocate these orders and agreements. The Chief Regulator or a person who is subject to these orders can apply to the Tribunal for clarification of the application of the order. See Taskforce recommendation 73 in section 3.4.4 for more details.

The Tribunal can also make orders for a person to pay an administrative penalty up to a maximum of $5 million, to disgorge amounts obtained or payments or loss avoided for contravening capital markets law and orders providing for settlement of a proceeding or potential proceeding. The Chief Regulator may apply to the Superior Court of Justice to appoint an administrator to administer and distribute the disgorged amounts received by the OSC. The OSC can also administer and distribute the disgorged amount in accordance with the rules. Once proclaimed, the *SCA* would address how the OSC uses amounts received from these orders.

The Tribunal can make temporary freeze orders that must be continued by the Superior Court of Justice after ten days.

Chief Regulator orders

The Chief Regulator may make cease trade orders. Cease trade orders may be made in extraordinary circumstances and in such circumstances must be confirmed by the OSC board of directors within three days. The Chief Regulator may also make cease-trade orders for failing to file required documents. The Chief Regulator may make compliance orders for non-compliance with capital markets law. Persons who are directly affected by such orders must be given an opportunity to be heard.

The Chief Regulator may make exemption orders and designation orders, including recognizing an exchange or clearing agency or designating a marketplace for the purposes of a rule. Designation orders may only be made after giving the persons directly affected an opportunity to be heard. The Chief Regulator may also make orders to extend periods in Parts II to IX of the CMA or the rules, to determine whether a distribution has been concluded, or exempt a person from a requirement related to filings or records.

Court orders

The Chief Regulator may apply to the Superior Court of Justice for a declaration that a person has not complied with or is not complying with capital markets law and such court order as the court considers appropriate. The Chief Regulator may also apply to the Superior Court of Justice to appoint a receiver, receiver-manager, trustee or liquidator for a person's property.

Appeals and Reviews

Decisions of the Tribunal can be appealed to the Divisional Court. In most cases, a person directly affected by a decision of the Chief Regulator may apply to the Tribunal for a hearing and review of the decision. However, some Chief Regulator decisions are only subject to judicial review, such as decisions regarding recognition and designation orders, orders to provide information to designated benchmark administrators, cease trade orders in extraordinary circumstances, exemption orders and orders when a distribution is concluded.

The Chief Regulator, a recognized entity or a person directly affected by a decision of a recognized entity may apply to the Tribunal for a hearing and review of the decision.

OSC decisions that are final and not subject to appeal or review by the Tribunal are subject to judicial review by a court. Decisions of the Tribunal, Chief Regulator or a recognized entity that can be appealed or reviewed are not subject to judicial review.

Part XI – Administration and Enforcement

Part XI outlines the OSC's powers to administer and enforce compliance with capital markets law.

The Tribunal can order a person to pay the OSC's investigation or hearing costs after conducting a hearing.

Reviews and Investigations

The Chief Regulator can make an order requiring market participants and other persons to provide information in the form and within the time specified in the order, designate a person or class of persons to review their business and conduct, and enter their business premises for their review during business hours.

The Chief Regulator can designate a person or class of persons to review the business and conduct of market participants, control persons of a reporting issuer, persons providing record-keeping services, and certain persons involved in exempt distributions for purposes of the administration or enforcement of capital markets law or the regulation of the capital markets. The reviewer can require certain persons to provide information. The Chief Regulator can make an order authorizing a person or class of persons to investigate any matter for the administration or enforcement of capital markets law or regulation of capital markets in Ontario, or to assist with these matters in another jurisdiction. The investigator can compel any person to preserve information, testify on oath, produce information or summon attendance of any person.

The Chief Regulator can apply to the Superior Court of Justice for a person to be committed for contempt where they have failed or refused to comply when compelled. A court order is required to search both a business premises and a place that is not a business premises (i.e., a dwelling house). An owner or person in charge of a place entered pursuant to a review or investigation has a duty to assist. The occupant's consent is required if a reviewer or investigator is entering into a dwelling house, except if there is a warrant. A reviewer or investigator may enter on and pass through private property for the purpose of gaining entry into a place.

The Chief Regulator can make an order requiring that all information related to an investigation be kept confidential. There are exceptions for disclosure to a person's lawyer, insurer or insurance broker or persons or entities prescribed by regulation. The OSC generally cannot disclose compelled evidence, with exceptions for disclosures in connection with the examination of a witness, a proceeding or proposed proceeding under the CMA, or a proceeding in which the OSC or Chief Regulator is a party. The Tribunal can make an order authorizing disclosure to a law enforcement agency or another regulator in the public interest. The Chief Regulator may authorize disclosure in the public interest after giving the person from whom the evidence was compelled notice and an opportunity to be heard.

The Chief Regulator can apply to the court for a warrant authorizing a reviewer or investigator to enter a place or dwelling house. In executing a warrant, the reviewer or investigator may use force that is reasonably necessary.

An investigator investigating an offence under the CMA may make preservation demands and can apply to court for an order without notice that a person preserve information in their possession or for an order to produce information. These production order provisions are based on the *Criminal Code* production order provisions. See Taskforce recommendation 59 in section 3.4.4 for further details.

Offences and Penalties

A person found guilty of an offence is liable to a maximum fine of $10 million or imprisonment of up to five years less a day, or to both. For some offences, the maximum fine can be greater than $10 million if triple the amount of profit made or loss avoided is greater than $10 million. A court can also order a person to pay compensation or make restitution to another person or to pay the OSC any amount obtained or the amount of payment or loss avoided as a result of the offence.

Directors, officers, employees or agents can be liable for an offence if they authorized, permitted or acquiesced in the commission of the offence. An investment fund manager is a party to and guilty of an offence committed by an investment fund.

Part XII – Civil Liability

Part XII outlines the rights of civil action for damages or rescission related to the purchasing and selling of securities for misrepresentation, if certain documents or other disclosures do not comply with statutory requirements, or a person has participated in insider trading or front running.

There are defences available for persons with no knowledge of the misrepresentation or who were relying on an expert's authority or report or if the misrepresentation is in forward-looking information.

A person may apply for a court order requiring the Chief Regulator or authorizing an applicant to commence or continue an action on behalf of an issuer to enforce payment of benefits from insider trading, front-running or improper use of information.

A person bringing a class proceeding or a plaintiff in an action to enforce a right or obligation created by Part XII must send certain documents and notices to the Chief Regulator. The Chief Regulator may intervene in a proceeding under Part XII.

The process for calculating damages and the limitation periods for an action for rescission and other remedies in Part XII are also provided for.

Part XIII – Civil Liability for Secondary Market Disclosure

Part XIII outlines the right of civil action for damages or rescission related to the secondary market for misrepresentation and failure to make timely disclosure.

A plaintiff has to meet certain conditions to establish liability for these actions. There are also defences available for making reasonable investigations, forward-looking information, relying on the authority of an expert, unanticipated release of a document, if the plaintiff knew of the misrepresentation or material change, if the misrepresentation was corrected or the person immediately notified relevant persons of the failure to make timely disclosure and other circumstances. The court must consider all relevant circumstances in determining whether a person committed gross misconduct or whether a reasonable investigation was conducted.

The process for calculating damages and the limitation periods for an action for rescission and other remedies in Part XIII are also provided for.

The leave of the court is required to commence actions under this Part. The plaintiff must send the Chief Regulator certain documents and notices and issue a news release disclosing that leave of the court has been granted. The Chief Regulator may intervene in a proceeding under Part XIII.

Part XIV – General

Part XIV outlines additional powers and duties of the Tribunal, the OSC and the Chief Regulator to administer and enforce capital markets law.

The Tribunal, OSC's board of directors and Chief Regulator or their delegates may impose conditions, restrictions or requirements in their decisions or revoke or vary their decisions. In certain circumstances, the Chief Regulator must provide an opportunity to be heard before revoking or varying a decision.

The OSC's board of directors can delegate powers or duties to the Chief Regulator, other than the power to make rules. The Chief Regulator may delegate their powers or duties to an OSC employee or to a

recognized entity. The Chief Regulator may also refer a material question affecting the public interest or a novel question of interpretation to the OSC's board of directors for determination.

The Chief Regulator may apply to court for an order to take evidence of a witness in another jurisdiction. A court may endorse a warrant issued by a court of another province or territory in Canada for the arrest of a person on a charge of contravening an act or rules that are similar to provisions in Ontario capital markets law if that person is or is suspected to be in Ontario.

Decisions by the Tribunal and by a recognized self-regulatory organization may be filed with the court and enforced as if they were court orders.

A person has a duty to comply with an undertaking they give to the OSC, Chief Regulator or Tribunal.

The limitation period for proceedings under the CMA is six years but can be extended by agreement of the parties.

Records and Disclosure of Information

Records must be filed, provided, delivered, or sent in accordance with the rules. The rules may prescribe record-keeping requirements for monitoring activity in capital markets, including systemic risk, and conducting policy analysis related to the OSC's mandate and the purposes of the CMA. The Chief Regulator may also require a market participant or other persons to provide this information.

There are protections from liability for disclosing information to the OSC that the person reasonably believes is true, related to a review, investigation or an offence, or in good faith in compliance with capital markets law.

The identity of whistle-blowers is protected from disclosure. The Chief Regulator must make records filed with them available during business hours for public inspection, with exceptions. The Chief Regulator may publish a list of persons not in compliance with capital markets law and exchange information with law enforcement agencies, other regulators or a person providing services to the OSC.

Part XV – Rules, Forms and Policies

Part XV outlines the process and requirements for the OSC to make rules, forms and policies.

The Lieutenant Governor in Council may make regulations for any matter for which the OSC may make rules, and the regulation prevails over the rule if there is a conflict. The Lieutenant Governor in Council and the OSC may make a regulation or a rule respectively in extraordinary circumstances.

The OSC must publish its rules in the Ontario Gazette and its bulletin. Before making a rule, the OSC must publish a proposed rule for public comment for at least 60 days, with exceptions. The OSC must submit rules to the Minister for approval. The Minister can approve, reject or return a rule for consideration. The Minister may also request that the OSC consult on a matter and consider making a rule.

The OSC may also specify forms and issue policy statements.

Part XVI – Transitional Matters

The CMA provides the OSC with the authority to make rules to ensure a smooth transition for market participants. Please see section 5.0 Complementary Rules and Rule-Making for additional information about rule-making related to the transition.

CMA Consultation Questions:

	Question	Relevant CMA Part/Section
Q1.	Are there concerns with changing the definition of "market participant"[1] 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?	3 Definitions
Q2.	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"?	3 Definitions
Q3.	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?	35 Requirement to be registered 36 Exemptions for certain financial institutions
Q4.	Do the changes to narrow the scope of the obstruction offence address concerns about creating positive obligations to provide information to the OSC?[2]	110 Obstruction
Q5.	Should the protection against reprisals be expanded to include independent contractors?	111(1), No reprisal by employer
Q6.	Are there other measures that should be added to the list of reprisals to reflect the relationship between an employer and an independent contractor?	111(2) No reprisal by employer, same

[1] 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.

[2] The obstruction offence has been modified from the 2015 CMA Draft to remove the prohibition against withholding any information, record or thing and to remove the prohibition against obstructing a director, officer, employee, agent of the OSC or any member of the Tribunal in the performance of his or her powers or duties under the CMA.

	Question	Relevant CMA Part/Section
Q7.	Are the Chief Regulator policy decisions that cannot be appealed to the Tribunal but are subject to judicial review appropriate?	137(1.1) Review of Chief Regulator's decision, Exceptions
Q8.	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"?	148 (2) Disclosure in investigation or proceeding 148 (3) Same

3.2 Key Differences Between the Capital Markets Act and the *Securities Act* and the *Commodity Futures Act*

A significant difference from the *Securities Act* and the *CFA* is the extent to which the CMA adopts a platform approach to capital markets regulation, in that the CMA is designed to set out the fundamental provisions of capital markets law while leaving detailed requirements to be addressed in the rules. In some cases, authority to make rules replaces some areas that are currently contained in the *Securities Act*. This approach was developed in the context of the CCMR initiative and has been continued in the CMA in order 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. The platform approach to regulation is also largely consistent with the current securities legislation in other provinces and territories.

The CMA also differs from the *Securities Act* with respect to the allocation of decision-making authority. Under the CMA, regulatory decision-making and decisions of the "Director" and "Executive Director" under the *Securities Act* have been assigned to the Chief Regulator. Under the *Securities Act*, the OSC's board of directors is responsible for key policy decisions, such as recognition and designation orders and certain cease trade orders. The Chief Regulator has, among other things, been assigned responsibility for recognition and designation orders under the CMA and will have authority to make cease trade orders in extraordinary circumstances, subject to confirmation by the OSC's board of directors. As noted above, these and other specified decisions of the Chief Regulator would only be subject to judicial review. Regulatory decisions made by the Chief Regulator, however, would be appealable to the Tribunal.

The CMA provides new information gathering tools, expanding the persons and companies from whom the OSC may require information. It also augments investigation powers and adds prohibitions to address existing issues in capital markets.

In Ontario, commodity futures contracts and commodity futures options are regulated under the *CFA*. Any person or company that trades in or acts as an adviser with respect to "commodity futures contracts" or "commodity futures options" is required to register under the *CFA* or to qualify for an exemption. The *CFA* provides statutory exemptions from the dealer and adviser registration requirements in respect of

commodity futures contracts and commodity futures options. It is proposed that, if the CMA is enacted, the *CFA* would be repealed and commodity futures contracts and commodity futures options currently regulated under the *CFA* would be regulated as derivatives under the CMA. The registration exemptions under the *CFA* that apply to commodity futures contracts and commodity futures options would no longer be available. However, the "trade trigger" for registration under the *CFA* would be replaced with the CMA's "business trigger". Therefore, market participants who previously relied on exemptions under the *CFA* for trading in exchange contracts would be subject to the dealer registration requirement under the CMA only if they are in the business of trading. Furthermore, market participants currently relying on *CFA* exemptions may be able to rely on registration exemptions in NI 31-103 that apply to exchange contracts.

Unlike in the *Securities Act*, the CMA allows the OSC to make a rule imposing registration requirements on over-the-counter (OTC) derivatives dealers and derivatives advisers not otherwise subject to registration exemptions in the CMA.

3.3 New Approach to Rule-Making Authority

Under the proposed new approach to rule-making authority, a general statement conferring rule-making authority would be set out in section 266, which would contain the operative rule-making authority for the entire CMA. Instead of the detailed list of heads of rule-making authority included in the 2015 consultation draft developed as part of the CCMR initiative (2015 CMA Draft), additional substantive provisions would be included throughout the CMA. These additional substantive provisions would support the general rule-making authority contained in section 266.

This approach is intended to be flexible and would permit the OSC to make rules covering items that are not contemplated at the time the CMA comes into force, enabling it to respond to the ever-changing capital markets. Subsection 266(1) sets out a general power to "make rules for carrying out the purposes and provisions of this Act," giving the OSC broad scope to make rules to further the purposes described in section 1 of the CMA. The reference to "carrying out the provisions of the Act" empowers the OSC to make rules for specific provisions throughout the CMA that specify matters that are "prescribed" or otherwise refer to the rules.

Subsections 266(2) to (9) include heads of authority usually required by the common law. For instance, specific authority is necessary in order to, among other things, impose different requirements on different classes; define words or expressions used in the CMA or a rule that have not been expressly defined in the CMA; regulate or prohibit conduct; establish exemptions from the application of the CMA; prescribe defences and the availability of any defences; authorize sub-delegation; and impose fees and charges.

The proposed new approach to rule-making represents a modern approach to rule-making in contrast to the more prescriptive approach currently used in the *Securities Act*, which contains an itemized list of each and every head of rule-making that requires amendment whenever it is necessary to make a rule not covered in the list. As noted above in section 3.2, this approach is intended to promote regulatory flexibility and would allow the OSC to respond to market developments in a more timely manner.

3.4 Taskforce Recommendations Included in the Capital Markets Act

The government is utilizing the CMA as a legislative vehicle to implement a number of Taskforce recommendations, which are described below. Some of the recommendations described will also require OSC rules to be effective. Any additional future rules to implement other Taskforce recommendations would be subject to the applicable OSC rule consultation process.

The government notes that the Taskforce made additional recommendations that are not profiled in the section below. Many of the Taskforce's recommendations are not expected to require explicit legislative provisions and could be implemented through OSC rules or otherwise. There are currently a number of OSC initiatives planned or underway that may partially or fully implement recommendations by the Taskforce. For example, related to Taskforce recommendation 41 and as committed to in the 2021 Ontario Budget, the OSC is considering developing a rule for public comment that addresses climate-related disclosure for public companies. The OSC is also working on initiatives that could further Taskforce recommendations relating to burden reduction initiatives and streamlining disclosure, among other things. Any new rules or rule changes would require approval by the Minister of Finance, as per the regular process of government approvals.

3.4.1 Improving Regulatory Structure

Recommendation 5. Ensure the securities regulatory framework and OSC's regulatory functions are reviewed periodically

The CMA includes a provision requiring a periodic review every five years of the capital markets legislation and OSC rules. A periodic review requirement would ensure that Ontario's capital markets legislation and OSC rules remain aligned with developments in the sector.

The government is considering the introduction of amendments to the *SCA* to ensure that the OSC's structure and mandate is also reviewed periodically and remains adapted to an evolving capital markets industry.

Proposed CMA Sections: At section 276 Periodic review of Act, the CMA requires the Minister to appoint one or more persons to review the operation of the CMA, regulations and rules and make recommendations to the Minister. The Minister is also required to appoint one or more persons to conduct a subsequent review no later than five years after the most recent appointment. The appointees are required to solicit the public's input and the Minister is required to make the appointees' recommendations available to the public.

Q9. Is the scope of periodic reviews appropriate? Should the proposed draft legislation include further details about how the review would be conducted?

Recommendation 7. Reduce the minimum consultation period for rule-making from 90 days to 60 days for consistency with provisions in other jurisdictions and to reduce delays

The CMA includes a minimum consultation period of 60 days for proposed OSC rules to allow the OSC (and, by extension, all CSA members in cases where changes are to multilateral or national instruments) to enact timelier rules that would respond to market changes and stakeholder feedback. 60 days is the minimum consultation period and the OSC would continue to set out longer consultation periods for rules where warranted.

This change would also align Ontario's public consultation period for proposed rules with the public consultation period of other CSA jurisdictions.

Proposed CMA Sections: At section 268 (3) Content of notice, the CMA requires that, in the public notice with respect to a proposed rule, the OSC must invite interested persons to make written comments about the proposed rule within a period of at least 60 days after the publication.

Q10.	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?

3.4.2 Regulation as a competitive advantage

Recommendation 13. Provide OSC with additional tools for continuous disclosure and exemption compliance

The CMA allows the Chief Regulator to make compliance orders to address specific situations where an issuer is non-compliant with requirements. These compliance order powers are meant to help resolve compliance issues quickly, including issues that relate to continuous disclosure requirements and adherence to the terms of the prospectus exemptions.

This power to make compliance orders would not be appropriate for serious breaches of capital markets law, which would continue to be addressed through enforcement processes.

The compliance order power could be delegated to the staff of the OSC's Corporate Finance Branch.

Proposed CMA Sections: At section 125 Various orders — non-compliance, in the event that an issuer has not complied with capital markets law, the Chief Regulator may make an order or orders listed in the provision which includes the following orders:

- Orders that relate to the dissemination of information to the public or to a fee required to be paid by capital markets law;
- Orders that any or all of the exemptions under capital markets law do not apply to the issuer or to a prescribed person; and
- Cease trade orders.

For cease trade orders of general application, the issuer would have an opportunity to be heard. For the other compliance orders, the issuer and persons directly affected by the order would have an opportunity to be heard.

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

Recommendation 17. Develop a well-known seasoned issuer model

The CMA includes the rule-making authority to allow for the automatic issuance of prospectus receipts for issuers that meet certain requirements to be set out in OSC rules. Such requirements, which would be the subject of further consultation, may include that the issuers have a certain public float or have issued debt securities above a set amount in a specified time period and have established an appropriate disclosure record.

Proposed CMA Sections: At section 45(3) Automatic receipts, the CMA provides that in such circumstances as may be prescribed, the rules may provide for the automatic issuance of a receipt for a preliminary prospectus, a prospectus or a prescribed offering document. Such a receipt is deemed to have been issued by the Chief Regulator.

Recommendation 23. Introduce additional accredited investor categories

The CMA includes rule-making authority that would allow the OSC to introduce additional categories under the accredited investor prospectus exemption. The approach under the CMA is different from that in the current *Securities Act* which contains the accredited investor prospectus exemption in the legislation with rule-making authority to prescribe additional categories.

The CMA approach is consistent with the legislation of other CSA jurisdictions and will promote harmonization by relocating accredited investor provisions currently found in the *Securities Act* into National Instrument 45-106 (as recommended in the OSC's 2019 report: Reducing Regulatory Burden in Ontario's Capital Markets at Recommendation A-2).

By moving all of the accredited investor categories to the OSC rules, the OSC would have more flexibility to tailor them and ensure they remain adapted to evolving capital markets. This would include conducting work on developing additional accredited investor categories that would be published for consultation as proposed OSC rules.

Proposed CMA Sections:

At section 266(5) Exempt, the CMA provides that the OSC may make rules providing exemptions and may impose conditions, restrictions and requirements relating to an exemption, including the accredited investor prospectus exemption.

At section 127(2)(n) Designation orders, the CMA provides that if the Chief Regulator considers that it would be in the public interest to do so, the Chief Regulator may make an order designating a person to be an accredited investor.

Recommendation 30. Expand the civil liability for offering memorandum misrepresentation to extend to parties other than the issuer

The CMA includes broader civil liability recourse for investors in the exempt market. Currently, the rights of action for misrepresentations in an offering memorandum are more limited in Ontario than in other CSA jurisdictions. For example, in Ontario, claims may only be made against the issuer, not directors or promoters of the issuer.

The Taskforce also recommended introducing an alternative offering model for reporting issuers and that offerings under this new prospectus exemption be designated as having the same liability as under a prospectus offering (recommendation 16).

Proposed CMA Sections: At section 183 Actions relating to prescribed disclosure documents, the CMA provides that investors purchasing securities would have recourse for damages when there is a misrepresentation in a prescribed disclosure document against (i) the issuer, (ii) the directors of the issuer, (iii) promoters of the issuer, (iv) influential persons, (v) experts and (vi) every person who signed the prescribed disclosure document. These investors would also have a right of rescission against the issuer. Subject to OSC rules, it is expected that the disclosure documents prescribed for the purposes of subsection 183(1) would be the offering memorandum required to be delivered to a purchaser of a security under section 2.9 of National Instrument 45-106 *Prospectus Exemptions*, or other equivalent documents under future prospectus exemptions.

Subsection 183(2) seeks to carry forward the status quo for certain other prescribed disclosure documents that are currently subject to the statutory rights of action in section 130.1 of the *Securities Act*. Investors purchasing securities would have a recourse for damages when there is a misrepresentation in those documents against the issuer or selling security holder on whose behalf the distribution is made. These investors would also have a right of rescission against the issuer or selling security holder on whose behalf the distribution is made. Subject to OSC rules, these other prescribed documents may include certain documents that provide information and that have been prepared primarily for review by a prospective purchaser.

Q12.	Is the scope of the broader civil liability provisions for disclosure documents in the exempt market appropriate?

Recommendation 31. Provide the OSC with rulemaking authority to adapt prospectus liability to address regulatory gaps resulting from new and evolving financing structures

The CMA includes provisions to address the absence of statutory civil liability recourse for investors in specific circumstances, such as when convertible or exchangeable securities are distributed under a prospectus, in multi-stage financings, in financing transactions involving plans or arrangements or other restructuring transactions or in more complicated financing structures involving multiple related issuers.

The CMA also broadens civil liability recourse for investors who purchase a security under a prospectus or a prescribed offering document that contains a misrepresentation and provides additional rule-making authority to expand the scope of liability to certain influential persons.

Proposed CMA Sections: At section 177 Actions relating to prospectus or prescribed offering document, the CMA provides that an investor who, during the period of distribution, purchases securities offered by a prospectus or a prescribed offering document that contains a misrepresentation has a recourse for damages against the persons set out in this section, which includes promoters of the issuer and prescribed influential persons.

At section 178 Actions relating to prospectus or prescribed offering document – after conversion, etc., the CMA provides recourse for damages or rescission rights for investors who subsequently automatically acquire, purchase or otherwise acquire securities under a prescribed offering document that was filed to distribute a security that is convertible into, or that carries the right of the holder to purchase or otherwise acquire or the right of the issuer to cause the purchase or acquisition of, a security of the same issuer. An investor has a right of action for damages against a number of persons, now including promoters of the issuer and prescribed influential persons.

At section 179 Actions relating to prospectus or prescribed offering document – prescribed converting securities, the CMA provides recourse for damages or rescission rights for investors who acquired an underlying security as a result of a conversion where the prospectus or prescribed offering document that is filed for the purpose of the distribution of an underlying security related to the conversion contains a misrepresentation. An investor has a right of action for damages against a number of persons, now including promoters of the issuer and prescribed influential persons.

Q13.	Would the scope of the broader civil liability provisions for disclosure under a prospectus address the identified gaps?

Recommendation 32. Give the OSC additional designation powers

The OSC, in partnership with other capital markets regulators across Canada, is addressing issues relating to crypto asset trading platforms' compliance with capital markets law. In March 2021, as a follow-up to previous publications, the CSA and the Investment Industry Regulatory Organization of Canada (IIROC) published a notice providing guidance on the requirements that apply to crypto asset trading platforms. The OSC also issued a notice for all crypto asset trading platforms to begin discussions on bringing their operations into compliance. Since then, the OSC has initiated enforcement proceedings against non-compliant platforms. Providing the OSC with designation powers and rule-making authority for crypto assets that are not already securities or derivatives would allow the OSC to tailor requirements to new platforms and assets.

The CMA includes broader designation powers and rule-making authority for the OSC intended to provide regulatory clarity to businesses with unique offerings and appropriate protection to investors. These powers would need to be exercised selectively. While there may be a benefit from OSC regulatory oversight of certain financial assets such as crypto assets that are not already securities or derivatives, there could be other assets or business models that raise fewer investor protection concerns and would not warrant regulatory oversight by the OSC.

These designation powers and rule-making authority include the power to designate crypto assets as securities and/or derivatives and the power to prescribe crypto assets to be securities and/or derivatives. As technology evolves, variations to the features of crypto assets may give rise to uncertainty around the classification of these assets. Some of these assets or related business models may raise investor protection concerns (or other concerns that engage the purposes of the CMA) that are not addressed (or otherwise adequately addressed) under the existing regulatory framework.

The broader designation powers also include clarifying designation powers, based on the British Columbia *Securities Act*, that would provide the Chief Regulator with the authority to make designation orders to determine how to regulate certain securities or derivatives. The CMA also provides the OSC with rule-making authority to prescribe derivatives to be securities and to prescribe securities to be derivatives.

It is important to note that there are many crypto assets that are securities, derivatives, or both. These three definitions are not mutually exclusive, as an instrument can be a security, derivative and a crypto asset, even without an order or rule to that effect.

Proposed CMA Sections: At section 3 Definitions, the definitions of "derivative" and "security" include a crypto asset that is within a class of crypto assets that are prescribed to be derivatives and securities respectively.

At section 127 Designation orders, the CMA also provides clarifying designation powers to the Chief Regulator, if it considers that it would not be prejudicial to the public interest to do so, to make designation orders including that:

- a contract or instrument, or a class of contracts or instruments, is not a derivative; and
- a security, or a class of securities, is not a security.

It also provides clarifying designation powers to the Chief Regulator, if it considers that it would be in the public interest to do so, to make designation orders including that:

- a derivative, or class of derivatives, is a security; and
- a security, or class of securities, is a derivative.

Q14.	Is the definition of crypto asset appropriate? Is the scope of the broader designation powers and rule-making powers appropriately defined? Will these powers negatively impact innovative business models? Are investor protection considerations appropriately addressed?

3.4.3 Proxy system, corporate governance and mergers and acquisitions

Recommendation 40. Require all publicly listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation

The CMA includes the rule-making 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.

Proposed CMA Sections: At section 74 Issuer's meetings with security holders, the CMA provides that issuers must comply with such requirements as may be prescribed in OSC rules for meetings of issuers with security holders.

Recommendation 43. Amend securities law to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions

The CMA includes the rule-making authority to allow for requirements to be placed on independent directors of issuers in the context of material conflict of interest transactions. For example, the rules may mandate the formation of independent committees to oversee material conflict of interest transactions. These transactions include insider bids, business combinations in which insiders are eliminating public shareholders, and significant related-party transactions with the issuer that could result in the transfer of value from minority shareholders to insiders.

Proposed CMA Sections: At section 82 Conflicts of interest — offeror, etc., the CMA provides that the OSC rules may set out the duties of an offeror, offeree issuer and issuer as well as its directors and officers to identify, disclose and manage conflicts of interest that may arise among the security holders in connection with a take-over bid, issuer bid, going-private transaction, related party transaction, business combination or similar transaction.

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

Recommendation 44. Provide the OSC with a broader range of remedies in relation to mergers and acquisitions (M&A) matters and modernize the private issuer take-over bid exemption

The CMA includes new Tribunal order powers related to M&A matters that may be exercised by the Tribunal upon an application by an interested person. Providing the Tribunal with these powers would provide market participants with an alternative to initiating a court proceeding for these remedies.

These new powers are similar in scope to the new powers given to the British Columbia Securities Commission in 2019.

Proposed CMA Sections: The following Tribunal powers have been added to section 85(1) Application to the Tribunal – orders re public interest, etc.:

- Requiring the distribution of any record relating to a take-over bid, issuer bid, going-private transaction, related party transaction, business combination or similar transaction that the Tribunal considers must be distributed;
- Rescinding a transaction with any interested person, including the issuance of a security or an acquisition and sale of a security;

- Requiring any person to dispose of any securities acquired in connection with a take-over bid, issuer bid, going-private transaction, related party transaction, business combination or similar transaction,
- Prohibiting any person from exercising a voting right attaching to a security at a meeting specified in the order,
- Prohibiting any person from exercising a right attaching to a derivative,
- Requiring that all persons, the person or persons named in the order, or one or more classes of persons cease trading in, or are prohibited from purchasing, any securities or derivatives relating to a take-over bid, issuer bid, going-private transaction, related party transaction, business combination or similar transaction.

The Tribunal may also make these orders if a person has acted or is acting contrary to the public interest, not only if they have not complied or are not complying with Part VIII or the related rules.

Q16.	Would applicants apply to the Tribunal for these remedies instead of applying to the courts? If so, when and under what circumstances? Should guidance or a policy be provided by the OSC as to when they would exercise these powers? Should recourse to any of these remedies be limited to either the courts or the Tribunal? What, if any, would be the impact of changing the criteria for making an order to "in the public interest"? Are there additional remedies that the Tribunal should be able to order in M&A matters?

3.4.4 Modernizing enforcement and enhancing investor protection

Recommendation 57. Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements

The CMA provides that the OSC may prescribe requirements and restrictions for persons engaging in promotional activities, which are defined to include communications that encourage or reasonably could be expected to encourage purchasing and trading securities and derivatives. It also specifically prohibits false or misleading statements about public companies in connection with promotional activity and attempts to make such statements.

Proposed CMA section: Section 94(1) False or misleading statements, information about reporting issuers, etc. prohibits a person engaged in a promotional activity from making a statement or providing information about an issuer that the person knows or reasonably ought to know is false or misleading and would be considered to be important by a reasonable investor in determining whether to purchase or trade a security of the issuer or related financial instrument. Section 94(2) prohibits attempts to make these statements. Section 94(3) allows the OSC to prescribe exceptions from this prohibition.

Q17.	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?

Recommendation 58. Increase the maximum for administrative monetary penalties to $5 million and increase the maximum fine for offences to $10 million

The CMA increases the maximum administrative monetary penalties that can be imposed by the Tribunal and the maximum fine for offences that can be imposed by the court. These amounts have not been adjusted since 2003.

Proposed CMA Sections:

At subsection 119(2) Maximum amount, the CMA provides that an administrative monetary penalty cannot exceed $5 million for each contravention.

At section 171 Offences and penalties, the CMA provides that every person who contravenes capital markets law is guilty of an offence and, on conviction, is liable to a fine of not more than $10 million or to imprisonment for a term of not more than five years less a day, or to both.

At section 174 Increased fines for specified contraventions, the CMA provides a higher fine maximum that would apply, despite section 171, for persons convicted of an offence for a contravention of specific offences or for aiding, abetting or counselling such a contravention.

Q18.	Should the maximum amounts increase based on inflation or another factor? If so, how often should the maximum amounts increase?

Recommendation 59. Modernize investigative tools by empowering the provincial Court to issue capital markets production orders

The *Provincial Offences Act* search warrant power only provides a power to search for "things" such as paper records and objects. Therefore, to search for data within computer systems, enforcement investigators appointed by the OSC would have to take the invasive, disruptive and often impractical step of entering premises and seizing computers or servers themselves.

The CMA modernizes quasi-criminal investigations by allowing the OSC to apply to a judge or justice of the provincial court (justice) to obtain a production order. Production orders would require firms and individuals that are not under investigation, and who have possession or control of the relevant information or data, to gather or prepare the applicable documents, records, or electronic data to deliver to an investigator. A production order may require the record holder to gather or prepare the records, even if they are in off-site paper or stored electronically, and provide them to an investigator, within a certain period of time specified by the justice.

For example, a justice would have the power to order financial entities to provide financial data requested by the OSC as part of investigating a potential quasi-criminal violation of capital markets law.

These new investigation powers also include related preservation powers to ensure the preservation of evidence. The production orders and related preservation powers are modelled on the production order provisions of the 2015 CMA Draft, the British Columbia *Securities Act* and the *Criminal Code*.

Proposed CMA Sections:

At section 154 Preservation demand, the CMA provides that a peace officer or a person investigating an offence under the CMA may make a demand to a person in writing requiring them to preserve computer data that is in their possession or control when the demand is made. The use of this power is subject to conditions, including that preservation would assist with the investigation of an offence.

At section 155 Preservation order – computer data, the CMA provides that on application without notice made by a peace officer or a person investigating an offence, a justice may order a person to preserve computer data that is in their possession or control when they receive the order. The use of this power is subject to conditions, including that a peace officer or a person investigating an offence intends to apply or has applied for a warrant or an order in connection with the investigation to obtain a document that contains the computer data.

At section 156 General production order and the following sections 157 to 162, the CMA provides that a justice may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time. The availability of the general production order power is subject to whether the information that would be prepared or produced would fall under one of the following specific production order powers found in the CMA:

- Production order - records, etc. (section 157) that may require a dealer who is not an individual, a party to a derivative who is not an individual, a registrant who is not an individual or an issuer whose securities are publicly traded to produce a true copy of a record or to prepare or produce information
- Production order – names, etc. (section 158) that may require a clearing agency, marketplace, self-regulatory organization, trade repository or a dealer, other than one who is an individual, to prepare and produce a document containing names of individuals who traded a specified security or derivative during a specified period
- Production order to trace specified communication (section 159) that may require, for the purpose of identifying a device or person involved in the transmission of a communication, a person to prepare and produce a document containing transmission data
- Production order – transmission data (section 160) that may require a person to prepare and produce a document containing transmission data
- Production order – tracking data (section 161) that may require a person to prepare and produce a document containing tracking data
- Production order – financial data (section 162) that may require a financial institution, a registrant, the Ontario Lottery and Gaming Corporation, or a person operating a lottery scheme as defined by section 207(4) of the *Criminal Code* to prepare and produce a document setting out information about accounts and account holders

The use of any of the production orders by the OSC is also subject to specific conditions.

At section 164 Order prohibiting disclosure, the CMA provides that a justice may make an order prohibiting a person from disclosing the existence of some or all of the contents of a preservation demand or a preservation or production order.

At section 166 Application for review of production order, the CMA provides that, before they are required by an order to produce a document, a person (including a financial institution or entity) may apply to the justice who made the order or to another justice of the same court to revoke or vary the order.

At section 169 Self-incrimination, the CMA provides that no one is excused from complying with a production order on the ground that the document that they are required to produce may tend to incriminate them or subject them to a proceeding or penalty. However, no document that an individual is required to prepare may be used or received in evidence against them in a prosecution that is subsequently instituted against them, other than a prosecution under section 113 (False or misleading statements to the Chief Regulator, etc.), for perjury in giving such evidence, for a witness giving contradictory evidence or for fabricating evidence.

At section 170 Assistance order, the justice who issues the order may order a person to provide assistance if it is required to give effect to the preservation or production order.

At section 171 Offences and penalties, new offences have been added for contravening a preservation demand, preservation order or production order.

Q19.	Is the scope of entities subject to these orders appropriate? Are there additional entities that would be able to produce information that would assist in an OSC investigation? Are the circumstances in which the OSC can apply to court for these orders appropriate?

Recommendation 60. Amend legislation to permit substituted and broader service provisions and remove the search exemption for private residences such that they can be searched during daylight hours with a warrant

The CMA includes changes that modernize the OSC's enforcement powers and give it more flexibility. They include removing the personal service requirement and giving the OSC the rule-making authority to set the service requirements that would include electronic service. They also include a new power for the OSC to obtain a warrant to search a dwelling-house during daylight hours.

Proposed CMA Sections:

At section 151 Entry to dwelling-house, the CMA provides that, with respect to a dwelling-house, the designated reviewer or authorized investigator shall not enter it without the occupant's consent except under the authority of a warrant issued by a judge under section 153.

At section 257 Service of documents by the Chief Regulator or an authorized investigator, the CMA provides that service of a document by the Chief Regulator may be effected in accordance with the rules made by the OSC.

Recommendation 61. Codify certain OSC requirements relating to data delivery standards to ensure the preservation of evidence and address assertions of privilege

The CMA allows an authorized investigator to compel a summons recipient to preserve evidence for the purpose of an investigation. This power allows the OSC to enforce non-compliance with a request or demand to preserve evidence and help to ensure that evidence is not destroyed or altered in response to an OSC summons. This power would increase the effectiveness of OSC investigations and aligns with similar investigation tools in other provinces.

Proposed CMA sections: Subsection 146(4) Power to compel, etc. provides an authorized investigator with the power to compel evidence, including the power to compel any person to preserve information, records or things in the person's possession or under their control.

Recommendation 63. Allow tolling agreements to enable the OSC and respondents to mutually agree to extend the limitation period to commence proceedings, and expand the limitation period for collections-related actions

The CMA includes a provision that allows the OSC and respondents to mutually agree to extend the limitation period to commence proceedings.

In Ontario, specific legislation (in particular, the *Limitations Act* and the *Real Property Limitations Act*) guides limitation periods, including those pertaining to OSC collections-related actions (e.g. actions in which the OSC is advancing fraudulent conveyance claims or beneficial ownership interest claims). Under the legislative framework, there is no limitation period for OSC collections-related actions concerning chattels and money and there is a sixty-year limitation period for OSC collections-related actions concerning real property. Together with this legislation, the CMA supports the goal of OSC collections relating to its sanctions, including where assets may be intentionally hidden.

The CMA allows information sharing to support its collections-related actions.

Proposed CMA Sections:

At subsection 263 (2) Extension by agreement, the CMA provides that the six-year limitation period to begin proceedings may be extended by express agreement of the parties.

At subsections 148 (2) and (3) Disclosure in investigation or proceeding, the CMA allows the OSC to disclose compelled evidence in connection with a proceeding or a proposed proceeding under the CMA or in which the OSC or the Chief Regulator is a party.

Q20.	Are there potential circumstances where the above-mentioned limitation periods would not apply to OSC collections actions or would be inadequate?

Recommendation 65. Confirm that persons or companies who comply with a summons will not be in breach of any contracts they are a party to and that compliance with an OSC summons will not be a basis of contractual liability against them by third parties

Like section 154 of the *Securities Act*, the CMA includes a provision that clarifies that there is no contractual liability for disclosures to the OSC of information to comply with capital markets law. As such, if a person provides information to the OSC pursuant to a summons, this provision clarifies that this person is not subject to contractual liability for complying with the summons.

Proposed CMA Sections:

At subsection 248 (2) Effect of disclosure, the CMA provides that the disclosure of information to the OSC that is made in good faith by a person in compliance or intended compliance with capital markets law:

(a) does not constitute a breach of any contractual provision to which the person or any other person is subject; and
(b) does not constitute any other basis of liability, and no action lies or may be commenced, against the person or any other person in respect of the person's disclosure.

Q21.	Does this provide sufficient clarity that compliance with a summons would not be the basis of contractual liability?

Recommendation 66. Create prohibitions to effectively prosecute those who facilitate contraventions of Ontario securities law

The CMA prohibits aiding, abetting or counselling a contravention of capital markets law and conspiring with any other person to contravene capital markets law.

These prohibitions would allow the OSC to take enforcement action against those who facilitate or assist in contravening capital markets law and provide the OSC with additional tools to enforce capital markets law and improve investor protection. Other CSA jurisdictions have similar prohibitions in their securities acts.

Proposed CMA Sections: Sections 114 and 115 of the CMA include prohibitions from doing anything for the purpose of aiding, abetting or counselling a contravention of capital markets law and from conspiring with any other person to contravene capital markets law.

Q22.	Do these new prohibitions raise concerns for market participants? Are there additional prohibitions that should be included in the CMA?

Recommendation 67. Create a prohibition to prosecute front-running effectively

The CMA includes a prohibition against front-running: acting on knowledge of an order of a client or connected investor that would disadvantage the client or connected investor. The relevant defences, partially based on IIROC's Universal Market Integrity Rules, are also included and additional criteria for the defences may be prescribed in the rules.

Prohibiting front-running allows the OSC to take enforcement action against this activity, enhancing confidence in the integrity of the capital markets and improving protection for clients, connected investors and other market participants.

Proposed CMA Sections: Dealing with content similar to IIROC's Universal Market Integrity Rules, section 103 Front-running prohibits front-running by a person who is connected to an investor and knows of material order information relating to the investor; such persons are prohibited from purchasing or trading in a security that is the subject of that information, entering into a transaction involving a related financial instrument, trading a derivative that is the subject of that information or trading a derivative that has an underlying interest that is the subject of that information. A person also is prohibited from recommending any of these purchases and trades and from informing another person of material order information unless it is necessary in the course of the connected person's business or the investor's business.

Section 104 Defences outlines the defences available for front-running, including:

- If the person reasonably believed the material change or the material fact had been generally disclosed;
- If the person reasonably believed that the other party knew of the material change or material fact;
- If the trade was under a written automatic plan agreed to or because of a written legal obligation entered into before acquiring knowledge of the material information;
- If the person is acting as an agent or trustee under specific instructions, a written automatic plan or in order to fulfill a written legal obligation;
- If the person is not an individual, if no individual involved in making the decision on the person's behalf had material information;
- If the person informed the other person of the material information or reasonably believed that the other person knew it;
- If the person reasonably believed that the investor had consent to the purchase, trade or transaction and the other party knew of the material order information;
- If the person entered into the transaction for the benefit of the investor or to facilitate the execution of the investor's order;
- To hedge a position that the person had assumed or agreed to assume before having knowledge of the material order information; and
- To fulfil a legally binding obligation entered into by the person before having knowledge of the material order information.

Q23.	Are the defences to front-running described in section 104 appropriate? Is there any other legitimate activity that appears to be inadvertently restricted in the front-running offence?

Recommendation 69. Broaden the confidentiality exceptions available for disclosing an investigation and examination order or a summons

The CMA does not include a provision equivalent to section 16 of the *Securities Act* requiring confidentiality of any information obtained pursuant to a summons, including information about the OSC's investigations. Instead of a broad prohibition against disclosing any information related to a summons, the CMA takes a different approach and provides that the Chief Regulator may make orders with respect to the confidentiality of investigations. This approach gives flexibility to the OSC when imposing confidentiality obligations with respect to investigations.

There are certain limitations in the CMA on the confidentiality order power, including that it may not prevent disclosures to a person's counsel or insurer. Additional limitations are not necessary at this time given that the OSC may tailor its approach to confidentiality orders to address concerns raised by stakeholders. In the future, in the event that additional limitations become necessary, the CMA includes the possibility for the government to adopt regulations that would add limitations to the OSC's confidentiality order power.

Proposed CMA Sections: At section 147 Order prohibiting disclosure of investigation, the CMA provides that, for the purpose of protecting the integrity of an investigation, the Chief Regulator may make an order prohibiting a person from disclosing to any person certain matters related to an investigation, such as the existence of an investigation, the inquiries made by persons as part of the investigation and the name of any witness examined or sought to be examined in the course of the investigation. There are limitations that ensure that this confidentiality order would not apply to prevent a disclosure to the person's lawyer, to the person's insurer or insurance broker if the applicable conditions are satisfied or to persons and entities and in such circumstances as may be prescribed in a regulation by the Lieutenant Governor in Council.

Q24.	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?

Recommendation 70. Clarify that the OSC may not require production of privileged documentation

The CMA includes a provision that reflects that the OSC may not require production of privileged documents. Under common law, respondents always have the right to not produce privileged documents, and the Supreme Court of Canada has made this a quasi-constitutional right.

Proposed CMA Sections: At section 254 Privileged information, the CMA provides that nothing in the CMA is to be construed to affect the privilege that exists between a lawyer and the lawyer's client in relation to information or records that are subject to that privilege.

Recommendation 72. Require, in cases where there is sufficient evidence to establish that investors suffered direct financial losses, that amounts collected by the OSC pursuant to disgorgement orders be distributed to harmed investors through a Court-supervised process

The CMA includes provisions allowing the Tribunal to make disgorgement orders and allowing the Chief Regulator to apply to the court to appoint one or more persons to administer and distribute the disgorged amounts received by the OSC.

OSC rules would specify matters such as the persons eligible for payments from the disgorged amounts and how the administrator will distribute the disgorged amounts.

The OSC would be able to share compelled testimony with a court-appointed receiver to facilitate returning funds to harmed investors through a more efficient notice and claims process.

This process would support efforts to return funds to harmed investors, especially when it would be difficult for individual investors to recover from a respondent. An administrator appointed by the court would have the expertise to identify harmed investors and administer payments more efficiently and effectively than if investors individually brought civil actions against a respondent.

Proposed CMA Sections: Section 120 Disgorgement order and compensation payments, allows the Tribunal to order a person who has contravened capital markets law to disgorge an amount obtained or payment or loss avoided to the OSC. The disgorged amounts received by the OSC shall be distributed to persons who incurred direct financial losses and satisfy the conditions, restrictions and requirements in the rules. The Chief Regulator may apply to the Superior Court of Justice for an order appointing an administrator for the disgorged amounts received. The court order would specify the administrator's powers and duties, the process for distributing the disgorged amount and could include terms that the court considers just and expedient. The order may be varied or revoked by the court on application by the Chief Regulator or by the court-appointed administrator. If there is no court-appointed administrator, the OSC shall administer and distribute the disgorged amount in accordance with the rules. Eligible persons may apply for a payment from the disgorged amount and the OSC or the administrator may make payments in accordance with the rules or with the court order.

The OSC can recover reasonable costs from administering the applications and payments. Any disgorged amounts remaining after payments are made to eligible persons and administrative costs are paid to the OSC belong to the OSC.

A person is not entitled to participate in a disgorgement order proceeding solely on the basis that they may be eligible to receive a payment.

Recommendation 73. Provide for automatically reciprocating sanction orders, cease trade orders and settlements from other Canadian securities regulators and granting the OSC a streamlined power to make reciprocation orders in response to criminal Court, foreign regulator, SRO, and exchange orders

The CMA includes automatic and streamlined reciprocation provisions similar to provisions that have already been enacted in most CSA jurisdictions other than Ontario.

These provisions would support a unified, streamlined and consistent approach to enforcement of orders and settlements across the country, enhance investor protection, and increase confidence in capital markets.

The provisions contain various safeguards to protect market participants who may be adversely impacted by automatic reciprocation of orders of other CSA jurisdictions.

With respect to streamlined reciprocation, the Tribunal would make an assessment when making a streamlined order and, if circumstances warrant, it would grant a respondent an opportunity to be heard.

The government and the OSC are considering how to make notice of these orders accessible to the public, while not unduly increasing administrative burden on the OSC.

Proposed CMA Sections:

Automatic Reciprocal Orders

At section 117 Automatic effect of certain orders of other provinces and territories, the CMA provides that orders made by other Canadian capital markets regulators that are orders that the OSC can make under section 116 will be automatically reciprocated and apply in Ontario without the OSC making an order. This section does not apply to monetary sanctions.

- The OSC will be required to promptly make accessible notice of any order that has automatic effect in Ontario indicating substantive modifications made to the order.
- The Chief Regulator and any person directly affected by an order that has automatic effect in Ontario will have the right to apply to the Tribunal for clarification.
- There will be a defence if a person who does not comply with an order that has automatic effect in Ontario did not know, and in the exercise of reasonable diligence would not have known, they were non-compliant.

At section 118 Automatic effect of certain settlement agreements of other provinces and territories, the CMA provides that settlement agreements entered into between a person and another Canadian capital markets regulator will automatically apply in Ontario. This only applies if the OSC could also have entered into a settlement agreement under the same circumstances in Ontario. This section does not apply to monetary sanctions or voluntary payments.

- The OSC will be required to promptly make accessible notice of the sanctions, conditions, restrictions or requirements that have effect in Ontario.
- The Chief Regulator and any person who is subject to the sanctions, conditions, restrictions or requirements under a settlement agreement that has automatic effect in Ontario will have the right to apply to the Tribunal for clarification.
- There will be a defence if a person who does not comply with a settlement agreement that has automatic effect in Ontario did not know, and in the exercise of reasonable diligence would not have known, they were non-compliant.

Q25.	Should the CMA include additional procedural fairness requirements for automatic reciprocal orders and settlements? How should the OSC make notice of automatic reciprocal orders and settlements accessible to the public?

Streamlined Reciprocal Orders

At section 116 (3) No hearing if prior conviction, etc. and following subsections, the CMA contains the following provisions relating to the streamlined reciprocation of orders in response to criminal court, foreign regulator, recognized SRO, and exchange orders where the Tribunal has the power to make the order under section 116 (1) without providing a hearing:

- 116 (3) No hearing if prior conviction, etc.: This would allow for a streamlined reciprocation order by the Tribunal where a person has been found in contravention or has been convicted of an offence under the laws of any jurisdictions relating to securities or derivatives.
- 116 (4) No hearing if prior order of certain regulators: This would allow for a streamlined reciprocation order by the Tribunal where a person is subject to an order made by a capital markets regulator outside Canada, a capital markets regulator of another province or territory in Canada, a recognized SRO in Canada or an exchange in Canada imposing sanctions, conditions, restrictions or requirements.
- 116 (5) No hearing if prior settlement agreement with certain regulators: This would allow for a streamlined reciprocation order by the Tribunal where a person has entered into a settlement agreement that includes sanctions, conditions, restrictions or requirements with a capital markets regulator outside Canada, a capital markets regulator of another province or territory in Canada, a recognized SRO in Canada or an exchange in Canada.

Reciprocated orders would be published by the OSC, as is the case for all other Tribunal orders.

Q26.	Should any further procedural fairness safeguards be added to the legislation with respect to streamlined reciprocation of orders and settlements?

Recommendation 74. Explicit exemption from freedom of information disclosures for whistleblower-identifying information

The CMA includes a statutory protection against the OSC disclosing information that would identify a whistle-blower. Currently, the OSC would rely on the disclosure exemptions in the *Freedom of Information and Protection of Privacy Act* (FIPPA) to withhold this information.

This explicit protection would provide potential whistle-blowers with greater certainty that their identity will not be disclosed in response to a freedom of information request and encourage whistle-blowers to come forward, supporting the OSC's enforcement activities.

Proposed CMA sections: Section 249 Whistle-blower protection provides that the OSC shall not disclose the identity of a whistle-blower, or any information or record that may reasonably be expected to reveal the identity of a whistle-blower, unless the Chief Regulator and the whistle-blower consent to the disclosure or the Chief Regulator has reasonable grounds to believe that the whistle-blower has committed an offence under the CMA or the *Criminal Code* that is related to the information the whistle-blower disclosed to the OSC.

A person also shall not disclose the identity or information that may reveal the identity of a whistle-blower if this information has been disclosed to them.

A whistle-blower is still a compellable witness. However, no witness in a proceeding under the CMA may be examined as to their knowledge or belief about the existence or identity of a whistle-blower.

Section 67(2) of FIPPA would also be amended to list section 249 of the CMA so that this new confidentiality provision prevails over FIPPA.

Q27.	Does this new provision provide adequate protection from disclosure of information related to a whistle-blower's identity?

4.0 Distribution of Exchange Traded Funds – Statutory Civil Liability

Addressing emerging developments in capital markets that affect investors and market participants could further support a modern capital markets regulatory system in Ontario. The recent Ontario Superior Court decision in *Wright v. Horizons*[3] has raised potential issues that may warrant review by the regulator and the government. The issues raised are outlined below, followed by some consultation questions.

In its recent decision, the Ontario Superior Court declined to certify a claim under section 130 of the *Securities Act* because the claim did not meet the criterion in the *Class Proceedings Act, 1992* that there be an identifiable class of plaintiffs. The court held that there was no basis to certify a class because units of an exchange traded fund (ETF) purchased on an exchange are not identifiable as either creation units (brand new units, created by the ETF manager) qualified by a prospectus or previously circulated units (purchased in the secondary market). The court expressed the view that the statutory causes of action in the *Securities Act* as applied to the distribution of ETFs are "in a problematic and uncertain state", and that "[t]he problems may require legislative initiative to resolve". Measures to address this uncertainty may be warranted, particularly in light of the Taskforce's observations about the significant increase in the number of ETFs in Canada as well as their steady growth in assets under management.

While the CMA does not currently include changes to address this court decision, stakeholder feedback is invited on whether any changes are required or appropriate. In particular, feedback is sought on two potential options that might address these concerns: (i) deem that all persons or companies who purchased ETF units on an exchange have secondary market civil liability rights (Secondary Market Rights) under Part XIII of the CMA; or (ii) deem that all persons or companies who purchased ETF units on an exchange have Secondary Market Rights supplemented by certain civil liability rights (Prospectus Rights) under Part XII of the CMA (for example, increasing the limit on damages in section 226 of the CMA).

Q28.	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.
Q29.	Of the two options identified above, please identify which option you think would be more appropriate for Ontario capital markets and explain why.
Q30.	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.
Q31.	Should any amendments apply to at-the-market distributions (as defined in section 1.1 of National Instrument 44-102 *Shelf Distributions*)? If so, please explain.

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

5.0 Complementary Rules and Rule-Making

Further to the description in section 3.1 – Overview of the Capital Markets Act, the CMA sets out the fundamental regulatory provisions for the capital markets, the powers and duties of the OSC, Tribunal, and Chief Regulator as well as offences and civil remedies, while leaving the more detailed regulatory requirements to be set by OSC rule. To ensure consistent and coherent language, maintain continuity and minimize disruption for market participants during any transition from the *Securities Act* to the CMA, changes would be expected to existing local, multilateral and national rules, forms and policies, as well as the introduction of new rules.

The OSC and government would ensure stakeholders have the opportunity to familiarize and adapt to any changes to existing rules and new rules introduced as part of the transition process, while ensuring that this important work could move forward in a timely manner.

5.1 Adaptation, Transition and Gap-Filling

5.1.1 Adaptation of Existing Rules, Forms and Policies

Market participants should expect that, if the CMA is eventually introduced as legislation, local rules, forms and policies would be adapted, as needed, to reflect the new or revised language used in the CMA, and account for any changes to its legal requirements, structure and format. To the extent necessary, local amendments to multilateral and national instruments, forms and policies would also be made.

In general, any adaptations would be non-substantive in nature and would seek to carry forward the status quo. Multilateral and national instruments, forms and policies would continue to be substantially harmonized with those of other provincial and territorial regulators.

5.1.2 Transition Rules

As discussed in section 3.1 – Overview of the Capital Markets Act, Part XVI of the CMA would provide the legal authority to transition matters effected under the *Securities Act* to the regime governed by the CMA.

The primary goal of any associated transitional rule-making would be to address legal continuity issues so as to minimize the impact of the transition to the CMA on market participants and their businesses. It is the intention that market participants would not have to take any action to continue their reporting issuer, registration, recognition, designation or other status or activities under the new legislative scheme, and all orders and proceedings will be continued. Any necessary changes would happen by operation of law. It is anticipated that OSC regulatory staff would work with market participants to facilitate the transition, as may be necessary.

5.1.3 Gap-Filling Rules

As noted previously, beyond implementation of Taskforce recommendations that require legislation to implement, the CMA largely carries forward the status quo from the *Securities Act*. Importantly, though, the CMA does take a modern, 'platform' approach to the legislation, such that it leaves the detailed requirements, including some requirements that are currently contained in the *Securities Act*, to be addressed in rules. This approach is intended to promote regulatory flexibility, allow the OSC to respond to market developments in a timely manner, and appropriately tailor its regulatory treatment of various entities and activities.

As a result of the platform approach taken in the CMA, market participants can expect that new rules as well as rule changes would be necessary to ensure that no regulatory gaps are introduced into the securities regulatory regime, and so that the status quo is indeed carried forward.

Notably, market participants can expect that:

- prospectus and registration exemptions currently embedded in the *Securities Act* would be carried forward in rules;
- carve-outs from the definition of "clearing agency" in the *Securities Act* would be found in a rule. The investment fund insider trading/self-dealing requirements currently found in Part XXI of the *Securities Act* would also be moved into a rule;
- with respect to registration requirements in relation to derivatives (both exchange-traded and over-the-counter derivatives), the *CFA* would be repealed and replaced with a local rule that carries forward the registration regime in the *CFA* into a local rule that applies to exchange-traded derivatives under the CMA;
- in addition to the exemption from registration for specified financial institutions found in the CMA, the existing exemptions derivatives dealers currently rely on would be carried forward in rules, subject to a separate OTC derivatives business conduct rule that would apply to derivatives dealers and derivatives advisers, regardless of whether they are exempt from registration.

6.0 Initial Analysis of Anticipated Costs and Benefits

The CMA is considered an efficient and effective tool to implement numerous important Taskforce recommendations while reducing the need to amend existing legislation and consolidating existing capital markets legislation into one act. While there are significant benefits of introducing the CMA in Ontario, there are costs to consider as well.

The following is a high-level overview of costs and benefits the government expects could follow if the CMA were to come into force. Stakeholder feedback on expected costs and benefits would be helpful in developing a more fulsome assessment the impact of the draft CMA.

Costs

Costs to stakeholders who participate in Ontario's capital markets would include the costs of transitioning from the *Securities Act* and the *CFA* to the CMA. These costs could include those relating to administration, procedures and policies, compliance systems, and training and educational requirements. Depending on timing and other initiatives then underway, market participants could need to adapt to the new regime while also adjusting to other regulatory changes.

The OSC would also incur costs including administrative, operational, and educational costs as a result of the need to adapt staff knowledge and understanding, and update its processes, procedures and internal systems. There would be expected costs associated with amending existing national instruments, multilateral instruments, local rules, and new rules for gap-filling purposes and to implement new regulatory requirements to implement the CMA.

Costs to the government would include legislative and regulatory drafting work required to finalize an Ontario version of the CMA.

Benefits

There are significant benefits of introducing the CMA in Ontario. The CMA will be an effective tool in implementing the Taskforce's recommendations and modernizing Ontario's capital markets regulatory framework in a swift and timely manner.

Ontario market participants and investors would benefit from modernized and flexible platform legislation that would allow for more timely rules as a result of the reduced need to amend legislation for new issues that arise in dynamic capital markets. Modernization of the regulatory framework could also help to incubate innovative companies, encourage economic activity among incumbents, increase investment from both Canadian and international institutional investors, and contribute to economic recovery and growth.

The OSC would have flexible rule-making authority, allowing it to impose less onerous requirements in certain circumstances. Ontario would also have more flexibility to tailor the draft CMA and rules to Ontario's policy goals than it does through the CCMR initiative. Furthermore, the CMA also avoids the need to maintain two related pieces of capital markets legislation as future changes are required.

Q32.	What are the anticipated costs and benefits to market participants, stakeholders or the public of replacing the *Securities Act* and *CFA* with the CMA?

Regulatory Modernization Principles

The draft CMA was developed to consider and align with Ontario's regulatory modernization principles, as set out in the *Modernizing Ontario for People and Businesses Act, 2020*.

Principle	Explanation
1. Adopting recognized standards or international best practices	The CMA uses modern drafting language and provides broad rule-making authority for regulators. In addition, many of the updates to the regulatory framework are based on similar legislation in other comparable Canadian and international jurisdictions.
2. Less onerous compliance requirements should apply to small businesses than to larger businesses.	Flexible rule-making authority allows the regulator to impose less onerous requirements on small businesses where appropriate.
3. Digital services that are accessible to stakeholders should be provided.	Electronic filing will allow for accessible digital services to stakeholders, including market participants and investors.
4. Regulated entities that demonstrate excellent compliance should be recognized.	The CMA provides the regulator with new compliance tools to strengthen enforcement of non-compliance. This allows the regulator to more precisely target compliance efforts and not place undue burden on market participants through a more blunt approach. The CMA also streamlines regulatory approval processes for market participants that demonstrate sophistication and a strong compliance record, such as automatic prospectuses.
5. Unnecessary reporting should be reduced, and steps should be taken to avoid requiring stakeholders to provide the same information to government repeatedly.	The CMA provides broad rule-making authority to allow the OSC to tailor reporting requirements and address outdated duplicative reporting requirements.
6. An instrument should focus on the user by communicating clearly, providing for reasonable response timelines and creating a single point of contact.	The CMA's modern drafting approach is also more plain language. Regulatory responsibilities have been consolidated around the Chief Regulator as the regulatory head of the organization.

7.0 Summary of Consultation Questions

The Ministry of Finance is seeking feedback on the following questions:

	Question	Relevant CMA Part/Section
Q 1.	Are there concerns with changing the definition of "market participant"[4] 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?	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"?	3 Definitions
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?	35 Requirement to be registered 36 Exemptions for certain financial institutions
Q 4.	Do the changes to narrow the scope of the obstruction offence address concerns about creating positive obligations to provide information to the OSC?[5]	110 Obstruction
Q 5.	Should the protection against reprisals be expanded to include independent contractors?	111 (1), No reprisal by employer
Q 6.	Are there other measures that should be added to the list of reprisals to reflect the relationship between an employer and an independent contractor?	111 (2) No reprisal by employer, same
Q 7.	Are the Chief Regulator policy decisions that cannot be appealed to the Tribunal but are subject to judicial review appropriate?	137 (1.1) Review of Chief Regulator's decision, Exceptions

[4] 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.

[5] The obstruction offence has been modified from the 2015 CMA Draft to remove the prohibition against withholding any information, record or thing and to remove the prohibition against obstructing a director, officer, employee, agent of the OSC or any member of the Tribunal in the performance of his or her powers or duties under the CMA.

	Question	Relevant CMA Part/Section
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"?	148 (2) Disclosure in investigation or proceeding 148 (3) Same
Q 9.	Is the scope of periodic reviews appropriate? Should the proposed draft legislation include further details about how the review would be conducted?	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?	268 (3) Content of notice
Q 11.	Will these new tools allow the OSC to effectively encourage compliance without unduly burdening market participants?	125 Various orders — non-compliance
Q 12.	Is the scope of the broader civil liability provisions for disclosure documents in the exempt market appropriate?	183 Actions relating to prescribed disclosure documents
Q 13.	Would the scope of the broader civil liability provisions for disclosure under a prospectus address the identified gaps?	177 Actions relating to prospectus or prescribed offering document 178 Actions relating to prospectus or prescribed offering document – after conversion, etc. 179 Actions relating to prospectus or prescribed offering document – prescribed converting securities
Q 14.	Is the definition of crypto asset appropriate? Is the scope of the broader designation powers and rule-making powers appropriately defined? Will these powers negatively impact innovative business models? Are investor protection considerations appropriately addressed?	3 Definitions 127 Designation orders
Q 15.	What type of new requirements for managing conflicts of interest under this provision would be appropriate for capital markets law in Ontario?	82 Conflicts of interest — offeror, etc.

	Question	Relevant CMA Part/Section
Q 16.	Would applicants apply to the Tribunal for these remedies instead of applying to the courts? If so, when and under what circumstances? Should guidance or a policy be provided by the OSC as to when they would exercise these powers? Should recourse to any of these remedies be limited to either the courts or the Tribunal? What, if any, would be the impact of changing the criteria for making an order to "in the public interest"? Are there additional remedies that the Tribunal should be able to order in M&A matters?	85(1) Application to the Tribunal – orders re public interest, etc.
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?	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?	119 Maximum amount 171 Offences and penalties 174 Increased fines for specified contraventions
Q 19.	Is the scope of entities subject to these orders appropriate? Are there additional entities that would be able to produce information that would assist in an OSC investigation? Are the circumstances in which the OSC can apply to court for these orders appropriate?	157 Production order -- records, etc. 158 Production order – names, etc. 159 Production order to trace specified communication 160 Production order – transmission data 161 Production order – tracking data 162 Production order – financial data 164 Order prohibiting disclosure 166 Application for review of production order 169 Self-incrimination 170 Assistance order 171 Offences and penalties
Q 20.	Are there potential circumstances where the above-mentioned limitation periods would not apply to OSC collections actions or would be inadequate?	263 Limitation period
Q 21.	Does this provide sufficient clarity that compliance with a summons would not be the basis of contractual liability?	248 (2) Effect of disclosure

	Question	Relevant CMA Part/Section
Q 22.	Do these new prohibitions raise concerns for market participants? Are there additional prohibitions that should be included in the CMA?	114 Aiding and abetting, counselling 115 Conspiracy
Q 23.	Are the defences to front-running described in 104 appropriate? Is there any other legitimate activity that appears to be inadvertently restricted in the front-running offence?	103 Front-running 104(7) Defence to front-running
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?	147 Order prohibiting disclosure of investigation
Q 25.	Should the CMA include additional procedural fairness requirements for automatic reciprocal orders and settlements? How should the OSC make notice of automatic reciprocal orders and settlements accessible to the public?	117 Automatic effect of certain orders of other provinces and territories 118 Automatic effect of certain settlement agreements of other provinces and territories
Q 26.	Should any further procedural fairness safeguards be added to the legislation with respect to streamlined reciprocation of orders and settlements?	116 (3) No hearing if prior conviction, etc. 116 (4) No hearing if prior order of certain regulators 116 (5) No hearing if prior settlement agreement with certain regulators
Q 27.	Does this new provision provide adequate protection from disclosure of information related to a whistle-blower's identity?	249 Whistle-blower protection
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.	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.	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.	N/A

	Question	Relevant CMA Part/Section
Q 31.	Should any amendments apply to at-the-market distributions (as defined in section 1.1 of National Instrument 44-102 *Shelf Distributions*)? If so, please explain.	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?	N/A

8.0 Feedback Process

Written submissions addressing the draft CMA provisions and any or all of the questions in this consultation paper should be provided in electronic format (preferably Word or PDF) by email to CMA.Consultation@ontario.ca or through Ontario's Regulatory Registry.

Please use subject line: Consultation – Capital Markets Act.

Submissions must be received on or prior to January 21, 2022.

8.1 Privacy Statement

Please note that information submitted may be subject to disclosure under the *Freedom of Information and Protection of Privacy Act*. Please do not submit personal information or specific identifying details of individuals, companies or other entities unless the specific information is already publicly available. Please do not forward confidential information that you would not want to be made public.

The feedback received in response to this consultation will be considered prior to determining next steps relating to the draft CMA.

Appendix A – Key Differences from the 2015 draft of the Capital Markets Act

The draft of the CMA developed as part of the CCMR initiative was most recently published for public comment in 2015. The CMA updates the 2015 CMA Draft by incorporating stakeholder feedback and changes in participating jurisdictions' capital markets legislation that have occurred since the last publication. This version also incorporates Ontario policy approaches and some of the Taskforce's recommendations that require legislation to implement.

A number of changes have been made to facilitate transition and the implementation of the CMA in Ontario. For example, provisions that were intended to be addressed in the rules under the 2015 CMA Draft have been added back into the CMA, such as the exemptions from registration and prospectus requirements for financial institutions and certain provisions exempting the Crown from the application of the CMA. The CMA also no longer includes substantive provisions relating to auditor oversight organizations as the Canadian Public Accountability Board would still be governed by the *Canadian Public Accountability Board Act (Ontario), 2006* if the CMA is enacted.

The CMA also includes provisions in the *Securities Act* that were intended to be carried forward in other CCMR initiative legislation, such as the draft Capital Markets Regulatory Authority Act or implementation legislation. For example, the CMA prohibits using compelled testimony to prosecute the person who provided the testimony in a quasi-criminal proceeding, with exceptions.

Additional changes have been made to more closely align with existing provisions in the *Securities Act*. For example, fundamental principles are now included in section 2 of the CMA and amendments have been made to the definitions of "security," and "investment fund manager". The framework for benchmarks regulation set out in Part III also aligns with the *Securities Act*, with modifications to reflect the new approach to rule-making authority. In addition, certain conforming changes have been made with respect to orders and investigations, e.g., application would be required to the Superior Court of Justice to extend a freeze order, and investigative searches would be authorized by a justice instead of the Chief Regulator. Finally, changes to the notice and comment process for rules in Part XV have been made to ensure consistency with the *Securities Act*.

The CMA includes a number of drafting and organizational changes. Amendments, for example, have been made to reflect the governance structure set out in the *SCA* and to reflect the allocation of decision-making authority between the OSC, the Chief Regulator and the Tribunal. Drafting changes have also been made to reflect Ontario drafting convention, e.g., "shall" instead of "must" is used to express an obligation and references are made to "clauses" and "subclauses" instead of "paragraphs" and "subparagraphs". Finally, the CMA includes a number of new provisions that are intended to support the proposed approach to rule-making, which in some cases are based on the heads of regulation-making authority included in section 202 of the 2015 CMA Draft.

The CMA, as noted, also differs from the 2015 CMA Draft as it contains a number of Taskforce recommendations, which are described in section 3.4 of this commentary.