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Delivered By Email: CMA.Consultation@ontario.ca

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

Dear Sirs and Mesdames:

RE: Capital Markets Act Consultation

The Investment Funds Institute of Canada (**IFIC**) appreciates the opportunity to comment on the draft Capital Markets Act (**Draft Act**).

IFIC is the voice of Canada's investment funds industry. IFIC brings together approximately 150 organizations, including fund managers, distributors and industry service organizations to foster a strong, stable investment sector where investors can realize their financial goals. IFIC operates on a governance framework that gathers member input through working committees. The recommendations of the working committees are submitted to the IFIC Board or board-level committees for direction and approval. This process results in a submission that reflects the input and direction of a broad range of IFIC members.

In this letter, we provide our comments on aspects of the Draft Act that raise high-level themes applicable to Ontario's capital markets. We also reiterate a suggestion we made in a letter to the Ministry of Finance and to the Ontario Securities Commission (**OSC**) in May of 2021. Our detailed responses to certain of the questions posed by the Capital Markets Act Consultation Commentary (**Consultation**) are set out in Appendix A. Because the majority of securities legislation applicable to the investment funds industry is found in existing national instruments, we will restrict our comments to the portions of the Draft Act that would directly affect the investment funds industry.

Purpose of the Introduction of the Draft Act

IFIC's central concern is the introduction of the Draft Act at this time. The Consultation does not indicate any investor protection objectives that would be better addressed by the introduction of the Draft Act. From an industry perspective, there does not appear to be any measurable benefit to replacing the current *Securities Act (Ontario)* (**Securities Act**) and *Commodity Futures Act (Ontario)* (**CFA**) with the Draft Act. Significant costs and unnecessary regulatory burden would instead be introduced. Every participant in Ontario's capital markets would be required to expend costs, time and resources familiarizing themselves with the new Draft Act, and in updating policies and procedures, precedents, processes and a myriad of other supporting documents to conform to the new Draft Act, its new section references and any new wording and/or substantive obligations.

The move to "platform legislation" renders the Draft Act even less familiar to Ontario capital markets participants. It is difficult for our members to provide meaningful comments on many aspects of the proposed Draft Act, because important sections of the current Securities Act (for example, the registration requirements) would be moved to local rules, which are currently not available for review. It is not possible to understand the implications of the move to platform legislation without being able to read the Draft Act concurrently with the proposed local rules. We would note that having to familiarize themselves with the new Draft Act, as well as all the supporting local rules, would enhance, not reduce, the regulatory burden reduction for Ontario's capital markets participants.

Finally, IFIC is concerned with the possible drift from national regulatory harmonization by the introduction of a number of local rules with substantive content. If the content would not vary from what is currently in the Securities Act, then we don't understand the purpose of this undertaking; if it does vary from what is in the current Securities Act, then we have significant concerns about both regulatory burden and a move away from national regulatory harmonization.

Rule-Making Authority

In moving to a "platform legislation" approach, the Draft Act proposes to significantly revise the current approach to rule making authority in the Securities Act. The current approach, recommended by the *Final Report of the Ontario Task Force on Securities Regulation*[1] (**Daniels Report**), balances the need for regulatory flexibility and responsiveness with the requirement for legislative oversight of securities legislation:

> *Our recognition of the value of independent, non-partisan securities regulation should not be interpreted to detract from the legitimate role of the Minister, Cabinet and the Legislature in the securities regulatory system, especially on matters which are related to broader public policy questions. Our view is that the quality and integrity of the securities regulatory regime is strengthened by strong, but restrained, public policy oversight. When appropriately applied, such oversight complements the technical expertise of the OSC, and ensures that securities policy is compatible with a broader range of public policies and priorities for which the Government is responsible.* (page 9)

As a consequence, the Daniels Report recommended granting the OSC rule-making authority under the Securities Act by enumerating the heads of authority under which rules could be made. These heads of authority were explicitly designed to conform to the purposes of the Securities Act as enumerated in section 1.1. There are currently 69 heads of rule-making authority found in section 143.(1) of the Securities Act.

The Draft Act contains a general statement that confers rule-making authority to the OSC in section 266(1), which grants the OSC the general power to "make rules for carrying out the purposes and provisions of the Act." The Consultation acknowledges that this section gives the OSC "broad scope to make rules to further the purposes described in section 1 of the CMA."

The Securities Act was recently amended to add "and competitive" to the purposes section (subsection 1.1(b)) and to add a new subsection 1.1(b.1): to foster capital formation. Thus, at the same time that the purposes of the Securities Act have been expanded, the Draft Act proposes to grant a general and broad rule-making authority to the OSC to make rules "for carrying out the purposes and provisions of the Act." We would suggest that, when proposing a draft rule for comment, the OSC should, at a minimum, be required to explicitly explain how the rule is necessary for carrying out the purposes and provisions of the Act and to explicitly demonstrate (other than by a general statement) the linkage of the proposed rule to a specific purpose and/or provisions of the Draft Act.

Additionally, the Draft Act states at section 2(6) that in implementing the Draft Act the OSC must ensure that its actions are reasonable and proportionate to the Draft Act's objectives. IFIC suggests that the process of rule-making should be subject to this same standard. As currently structured, provided the

[1] Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation (June 1994). Digitalized by the Internet Archive 2018:
https://archive.org/details/responsibilityre00dani/page/n1/mode/2up

appropriate process is followed in making a rule, there is no requirement that the resulting rule be reasonable and proportionate to the Draft Act's objectives; we believe there should be.

Finally, we note the current Securities Act contains an extensive definition of "policy" at subsection 143.8(1), including, importantly, the fact that a policy "is not of a legislative nature." This is a direct result of the Daniels Report, which contemplated the distinction between rules that have legislative effect and policy statements that do not. In moving to a platform structure, and in adopting a broad grant of rule-making authority to the OSC, the Draft Act does not carry forward this very important distinction. It is possible it will be addressed in a local rule, but we would prefer it be included in the Draft Act. Further, section 275(1) of the Draft Act contemplates a number of instruments other than just rules and policies, but unless these instruments have gone through the rule-making process and meet the tests for legislation set out in the Daniels Report, they cannot have legislative effect. Our members have been concerned over the years as Staff Notices, Practitioners and branch Annual Reports are published which are not subject to any policy making oversight and which, although they do not have the force of law, appear to be treated as mandatory by some OSC staff. We strongly urge the Draft Act to be revised to include a definition of "policy" and to be explicit that policies, as well as the other subordinate guidance publications contemplated by section 275, do not have legislative effect.

Comment Period for Draft Rules

Without consultation, the Capital Markets Modernization Task Force (**CMMTF**) recommended, in its final report[2], that the minimum consultation period for rule-making be reduced from 90 days to 60 days, reportedly to reduce delays in the rule-making process. IFIC wrote to the Ministry of Finance and to the OSC to express our serious concern with this recommendation. A copy of the letter is attached as Appendix B. Our concerns are founded in the importance of public input to the rule-making process and the difficulty for industry organizations, such as IFIC, which provide comments reflecting the consensus views of our members. IFIC gathers its members' comments through a committee process; the comments are then reflected in a draft comment letter, which is circulated to members of the committee struck for the purposes of reviewing the draft rule and providing comments as well as to appropriate working groups and committees of the Board of Directors for their approval. The time required to have meaningful committee discussions, gather comments and obtain consensus from our members, who are doing this work in addition to their regular work commitments, is further exacerbated when rules are published for comment over the summer, over holiday periods, or during particularly busy times for our members, such as year end and RRSP season.

The *Value-for-Money Audit: Ontario Securities Commission*[3] notes that the recently-codified requirement for Ministry of Finance pre-clearance of rules and other regulatory initiatives of the OSC "has required additional time, averaging 93 days for rules before public consultation, 91 days for rules after public consultation but before sending the rules to the Minister for final approval, and 54 days for staff notices" for rule-making. We respectfully submit that removing 30 days from the time period for capital markets participants to review and comment on proposed rules, providing valuable input on regulatory initiatives, will not make the rule-making process more effective. There are many other parts of the rule-making process that could be streamlined without impacting the ability of capital markets participants to participate meaningfully in rule-making. As SEC Commissioner Hester Peirce observed recently:

> *Essential to facilitating substantive input from a wide variety of interested parties is giving people enough time to comment.*
>
> *The notice and comment process is intended to be a dialogue. The regulatory conversation flows only when the Commission affords the commenting public sufficient time both to review and analyze proposals thoroughly and to formulate fully articulated opinions and suggestions….*

[2] Capital Markets Modernization Taskforce *Final Report* (January 2021): https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf

[3] Office of the Auditor General of Ontario *Value-for-Money Audit: Ontario Securities Commission* (December 2021): https://auditor.on.ca/en/content/annualreports/arreports/en21/AR_OSC_en21.pdf

> *Public commenters help the Commission to look at rules in light of their unique experiences. They bring a broad range of perspectives, technical expertise, and deep, personal experience to their comments. In so doing, they help us to see things we otherwise would not. Sometimes they identify better ways to tackle a problem or point out flaws with rules that we might not have found on our own.*[4]

IFIC therefore strongly urges that the Draft Act retain the 90-day comment period for all rule-making initiatives in the current Securities Act. While other provinces have a 60-day comment period, the fact that the Securities Act has a 90-day comment period means the de facto comment period across Canada for rule-making is 90 days. Reducing it to 60 days will not meaningfully increase the efficiency of rule-making, but it will significantly impair the ability of capital markets participants to provide important input on regulatory initiatives.

Distribution of Exchange Traded Funds — Statutory Civil Liability

The Consultation includes a request for feedback on whether changes to the civil liability provisions of the Draft Act should be made to include a statutory cause of action for civil liability for purchasers of exchange traded funds (**ETF**). These changes are contemplated in response to the recent Ontario Superior Court decision in Wright vs. Horizons.

ETFs are, in effect, hybrid securities that share attributes of common shares, in that they are primarily traded in the secondary market on an exchange, and mutual funds, in that they are continuously offered unitized forms of investment. As a result, they do not fit easily into all aspects of the current securities regulatory framework. For example, the prospectus disclosure requirements for ETFs are based primarily on the form of disclosure required for corporate issuers, with certain amendments to reflect their different structure. The Canadian Securities Administrators (**CSA**) have recently published welcome amendments to the disclosure regime for conventional mutual funds, but have not undertaken a similar review of ETF disclosure requirements.[5]

Similarly, the *Wright vs. Horizons* decision highlights possible challenges in applying the current civil liability regime in the Securities Act to ETFs.

The initial view of our members concerning the potential civil liability regime for ETFs is that it would be appropriate to apply the secondary market liability regime to all persons or companies who purchased ETF units on an exchange. These purchases bear important hallmarks of a secondary market trade, including:

- The purchases are made between a purchaser and a seller on the exchange at the prevailing market price and not at the ETF's net asset value per unit,
- The purchase price is paid to the seller of the securities and not to the ETF, and
- Purchasers do not interact directly with the ETF while making their purchases (i.e. there is no subscription for units directly from the ETF).

For purchasers who purchase directly from the ETF at the net asset value per unit (ie. authorized dealers), the primary market regime should apply.

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[4] Rat Farms and Rule Comments—Statement on Comment Period Lengths (Dec. 10, 2021): https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021?utm_medium=email&utm_source=govdelivery

[5] We note, however, the CSA consultation published on January 27, 2022 which is consulting on moving to a base shelf prospectus regime for all investment funds in continuous disclosure: https://www.osc.ca/sites/default/files/2022-01/ni_20220127_41-101_modernization-investment-funds.pdf

IFIC is pleased to have had this opportunity to provide our comments on the Consultation. Please feel free to contact me by email at pbourque@ific.ca, I would be pleased to provide further information or answer any questions you may have.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

By: Paul C. Bourque, Q.C., ICD.D
President and CEO

Enclosed:

Appendix A - IFIC Responses to Questions Posed in the Capital Markets Act Consultation Commentary

Appendix B – IFIC Letter to the Ministry of Finance and the Ontario Securities Commission

APPENDIX A

IFIC Responses to Questions Posed in the Capital Markets Act Consultation Commentary

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?	Please see our accompanying comment letter's discussion of this issue. Our members do not believe a 60-day comment period is ever adequate; comment periods should remain at 90 days for the reasons set out in the accompanying comment letter.
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?	As discussed in the accompanying comment letter, IFIC believes there will be significant costs to Ontario capital markets participants by replacing the *Securities Act* and *CFA* with the CMA, with no apparent benefits. Members have expressed concern that if the CFA is repealed without most of its provisions being included in the CMA there will be significant implications, for example for foreign firms which currently rely on an international advisor exemption from the CFA if such exemption is not carried forward in the CMA. In addition, the CMA will allow the OSC to impose registration rules for OTC derivatives and derivatives advisors and, again, it is unclear if these would be in addition to the CSA requirements, which would be a concern to our members if there are additional or different requirements related to OTC derivatives than in other provinces and territories.

APPENDIX B
(Sent May 27, 2021)

PAUL C. BOURQUE, Q.C., ICD.D / c.r. IAS.A
President and CEO *Président et chef de la direction*
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Delivered By Email:

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Naizam Kanji
General Counsel
Ontario Securities Commission
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Dear Mr. Rabdi and Mr. Kanji:

RE: Capital Markets Modernization Taskforce Recommendation #7

The Investment Funds Institute of Canada (IFIC or we) are writing to address recommendation #7 of the Capital Markets Modernization Taskforce (the Taskforce), which recommends "reducing the minimum consultation period for rule-making from 90 days to 60 days for consistency with provisions in other jurisdictions and to reduce delays." We are providing our comments at this time as this recommendation was not included in the Taskforce's draft report.

IFIC is the voice of Canada's investment funds industry. IFIC brings together approximately 150 organizations, including fund managers, distributors and industry service organizations, to foster a strong, stable investment sector where investors can realize their financial goals.

We support the timely development of rules for our industry. However, we are deeply concerned that, while shortening the minimum consultation period for all rule-making from 90 days to 60 days would seem to be a reasonable suggestion to expedite rule-making, the unintended consequence of a shortened minimum time period for all consultations will be reduced effective industry input on certain proposed rules. This could result in ineffective or significantly flawed rules and/or rules that unnecessarily, although unintentionally, increase regulatory burden. We believe that the minimum consultation period should afford IFIC the opportunity to provide its most meaningful input on any policy published for consideration.

When we review a proposed rule for comment, IFIC aims to ensure constructive, accurate and relevant feedback that is then drafted as a submission that has IFIC member support. A number of committees are consulted for input and approval including the Board of Directors. Sometimes differing views need to be reconciled or additional research or member surveys are required. This all takes time but results in a submission that reflects the input and direction of a broad range of IFIC members and their respective subject matter experts and senior representatives.

CSA rule-making consultations are increasingly complex and lengthy, and require a significant commitment of time to review, analyze and respond. We also note that IFIC members who participate in rule-making

consultations are doing this in addition to their other job responsibilities. Further, they may also be participating in deliberations by other member organizations on the same rule proposal.

IFIC and its members appreciate the opportunity to provide input to the CSA rule making consultation process. We believe the CSA values our input however our ability to respond effectively, thoughtfully and thoroughly will be compromised by an attenuated minimum comment period for all rule-making.

We agree that it may be appropriate to reduce the minimum comment period for non-substantive "housekeeping" type rule-making. Unfortunately, the Taskforce's recommendation does not distinguish "housekeeping" and substantive rule-making, leaving open the prospect that comments on substantive, complex rule-making may be due within 60 days. We therefore urge you to consider the possible consequences of the Taskforce's recommended minimum period for all rule-making against the very modest improvement in efficiency to the overall rule-making process a reduced minimum comment period would provide.

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Thank you for your consideration. We would welcome the opportunity to discuss this matter with you at your convenience.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

By: Paul C. Bourque, Q.C., ICD.D
President and CEO

cc: Walied Soliman, Chair, Capital Markets ModernizationTaskforce
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