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The cooperative capital markets regulatory system: Publication oF the legislative Drafts – a new stage is reached

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On September 8, the Canadian Department of Finance announced the signature of a memorandum of agreement (the "**Agreement**") between the provinces of British Columbia, Ontario, Saskatchewan and New Brunswick, and the federal government (the "**Participating Jurisdictions**") formalizing the terms and conditions of the Cooperative Capital Markets Regulatory System (the "**Cooperative System**"), a project to set up a national regulator for the Canadian securities industry.

At the same time, the Participating Jurisdictions published the drafts of the proposed federal and provincial legislation to implement the Cooperative System. The plan is for the uniform provincial legislation, known as the provincial *Capital Markets Act* **(PCMA)**, to be tabled for adoption in each of the participating provinces and territories. The complementary federal legislation, entitled the *Capital Markets Stability Act* **(CMSA)**, should be submitted for approval to the House of Commons.

We would remind you that, on September 13, 2013, the governments of British Columbia and Ontario, and the federal government, for the first time, announced the conclusion of an agreement in principle to jointly establish the Cooperative System. On July 9, 2014, Saskatchewan and New Brunswick agreed to join the project by signing an amended agreement in principle.

The publication of these statutory proposals certainly marks an important stage in the project to implement the Cooperative System. Moreover, the Participating Jurisdictions have indicated that they are actively pursuing the work on setting up the Cooperative System so that it will be functional by the fall of 2015.

Thus, it is clear that the transition to the Cooperative System is actively underway and that the possibility of seeing it in operation in the not-too-distant future is increasingly likely.

We provide you below with an overview of the proposed regulatory scheme.

THE MEMORANDUM OF AGREEMENT

The Memorandum of Agreement defines the structure, governance and accountability of the capital Markets regulatory authority **(CMRA)**, the common regulator that will be set up for the Cooperative System.

The CMRA will administer the CMSA, the PCMA and a set of regulations adopted pursuant to the powers delegated by each participating province and territory.

The CMRA will, in particular, have a “regulatory Division” that will be responsible for the policy,

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regulatory operations, advisory services and regulatory enforcement functions, as well as a division consisting of an independent tribunal charged with conducting the proceedings on the enforcement of the regulations.

In addition, the Memorandum of Agreement provides as follows:

> The Cooperative System will be supervised by a Council of Ministers consisting of the ministers responsible for the securities regulation of each participating provincial and territorial jurisdiction, as well as the federal Finance Minister.
>
> The CMRA's board of directors will be comprised of at least nine and no more than twelve experts appointed as independent directors by the Council of Ministers on the recommendation of a nominating committee, and who will be broadly representative of the regions of Canada.
>
> A Chief Regulator will serve as the chief executive officer of the Regulatory Division while Deputy Chief Regulators will be appointed for those of the participating provinces that have a particular importance for the capital markets nationally, i.e. British Columbia and Ontario, to date.
>
> The CMRA will have a regulatory office in each participating province and territory.
>
> Service agreements will be entered into to integrate existing securities regulatory entities currently charged with securities regulation in the participating provinces and territories into the CMRA.
>
> A single, simplified fee structure will be designed to allow for the self-funding of the CMRA.
>
> The federal government will provide transitional funding to those provinces and territories that will forego net revenue as a result of transitioning to the Cooperative System.

THE CMSA

The CMSA deals with issues relating to criminal law, data collection on a national scale, and systemic risk in the national capital markets.

In criminal matters, the CMSA integrates and modernizes certain existing criminal code offences and also provides for a few new offences. Some of the offences contained in the CMSA include fraud, fraudulently affecting value or market price, market manipulation, insider trading, misrepresentation, criminal breach of trust, forgery and benchmark manipulation.

The CMRA will be equipped with national powers of data collection for purposes of monitoring activity in capital markets with the goal of detecting systemic risks related thereto. The CMRA will be able to enact national regulations not only on the collection of information and records, but also the keeping thereof and disclosure to the statutory authorities.

The role given to the CMRA as a new systemic risk oversight and control body is probably one of the most significant changes that will be introduced under the Cooperative System. Thus, the CMRA will be granted regulatory powers over market infrastructure entities that are considered to have systemic importance, such as trading systems, credit rating organizations, market intermediaries and even clearing houses, subject, in this last case, to the authorization of the Bank of Canada.

In addition, the CMRA will have special powers to take extraordinary measures throughout Canada to counter threats to financial stability. For example, it will be able to issue an urgent order to address a serious and immediate systemic risk by prohibiting a person from engaging in a practice or activity related to the risk, suspend or restrict trading in a security or derivative, or suspend or restrict trading on an exchange.

Finally, the CMRA will cooperate and coordinate its actions with other regulatory bodies in the federal, provincial and foreign financial sectors in order, among other things, to ease the burden imposed on market actors. it will also have the mandate of representing canada internationally on issues relating to the regulation of capital markets.

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THE PCMA

The PCMA deals with all issues of provincial and territorial jurisdiction. It includes various provisions concerning recognized entities (such as exchanges, self-regulatory organizations, auditor oversight organizations and clearing agencies), registration of market intermediaries, requirements governing initial public offerings, the derivatives regime, continuous disclosure and proxy solicitation, take-over bids and issuer bids, business practices and civil liability.

According to the Participating Jurisdictions, the PCMA is a product of the updating and harmonization of the provincial securities acts currently in force. The current capital markets regulatory framework will therefore essentially remain unchanged.

We should nevertheless mention that the Participating Jurisdictions have chosen to adopt a modernized approach toward certain areas of regulation known as the “platform approach”. Thus, the PCMA sets out the fundamental provisions of capital markets law, leaving it up to the forthcoming regulations that will be adopted by the CMRA to enact the specific requirements, a method which promotes regulatory flexibility.

In addition, the PCMA gives the CMRA several tools for ensuring the compliance with and enforcement of the law, particularly with respect to inspections, investigations, evidence gathering and searches. It provides for higher fines than those currently in force among the Participating Jurisdictions for regulatory offences relating to insider trading, share price manipulation, benchmark manipulation and fraud.

The PCMA makes some small changes to the scheme of civil liability of the Participating Jurisdictions as compared with the current law, particularly concerning the burden of proof, the limitation period, and a private right of action.

NEXT STAGES

The Participating Jurisdictions will be receiving comments from the public on the drafts of the CMSA and the PCMA until november 7, 2014. Comments can be submitted via the Cooperative System’s website at www.ccmr-ocrmc.ca.

In addition to the publication of the legislative drafts, the Participating Jurisdictions have indicated that they have been working on developing the initial regulations and would be publishing the first draft regulations for comments by December 19, 2014. Furthermore, they intend to submit the PCMA and CMSA for adoption by the respective competent legislative assemblies by June 30, 2015, so that the CMRA will be able to start operations by the fall of 2015.

Finally, the Participating Jurisdictions have taken advantage of the publication of the PCMA, the CMSA and the agreement to renew their invitation to the governments of the other provinces and territories, including Quebec, to join the Cooperative System.

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