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CMA Consultation@Ontario.ca

Re: Consultation Capital Markets Act - Comment Letter

As part of its Capital Markets Modernization Review, the Ontario government has developed a draft Capital Markets Act (CMA) that aims to support a modern capital markets regulatory system. The CMA is new draft legislation intended to replace the *Securities Act* and the *Commodity Futures Act* (*CFA*) in Ontario. We commend the efforts to review the current legislation in light of ongoing changes in the capital markets. This initiative is very important to ensuring that Ontario remains relevant as well as a leader in how to address issues facing the capital markets.

tFOSE Exchange Inc. welcomes the opportunity to provide comments on the draft Capital Markets Act (CMA).

Toronto Futures Options Swaps Exchange Inc. ("tFOSE") is a new derivatives exchange and clearinghouse (subject to regulatory approval) based out of Toronto, Ontario.

Canada is home to some of the most sophisticated trading participants on the globe, spanning retail and institutional investors, active in products traded in North America, Europe, and Asia. While the demand and prowess of Canadian investors remains high, its monopolistic derivatives market continues to underperform globally, resulting in high trading costs, a lack of product innovation and inefficient capital usage. This constrained growth in Canadian derivatives forces options & futures order flow outside of the country into evolved, customer-focused markets.

tFOSE was established to disrupt the monopoly and bring competition to Canada's derivatives market. As part of its application, tFOSE is developing innovative products designed to unlock global liquidity and enhance price discovery for derivatives investors active in Canada. Through its team of experienced capital markets professionals, state-of-the-art technology and key partners, tFOSE will offer globally recognized solutions to enhance resilience while driving costs and capital requirements down. These innovations will inspire and greater competition and introduce growth to Canada's derivatives markets, like that observed on a global scale.

This comment letter will set out some general comments and then answers to some of the questions that were specifically asked.

We feel there are essential and interrelated foundational elements that underly modern, stable and robust capital markets:

1. **Market Integrity** – creating fair and orderly markets to enhance access to capital.

2. **Competition** – supporting and attracting multiple marketplaces and market participants to encourage innovation and growth.

3. **Efficient capital markets** – enabling solutions where securities and derivatives can be issued, traded, and cleared in the most efficient way possible.

4. **Transparent and Effective Regulatory Processes** – establishing a consistent and transparent process for setting out regulatory requirements for current and new products/business models. Processes and timeframes should consider the impact of regulatory uncertainty as well as the demand for access to those products and services.

In the context of the draft CMA, tFOSE believes that generally the platform approach to legislation is best able to achieve the first three elements stated above, but only if the last element is provided. A platform approach uses broad powers to provide the flexibility to address changes and market failures. However, it also creates the risk of creating uncertainty and unnecessary costs if those powers are not used in a manner limited to the objectives of the legislation and constrained by appropriate processes and accountability.

The following sets out tFOSE's response to specific questions that have been asked.

Q1. Are there concerns with changing the definition of "market participant" 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?

Response: Removing these additional categories will reduce regulatory uncertainty without harming investor protection since most of these parties can be covered indirectly through a regulated entity. For example, relevant requirements for a control person of a reporting issuer can be managed by the regulator through regulation of the reporting issuer.

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?

Response: Most jurisdictions do not create separate types of registration categories for specific products. Instead, additional requirements are imposed on the firm and the employees involved in the activity. tFOSE believes that segmentation of dealer and adviser registration limits the availability of such advice and is a barrier to developing the Canadian derivatives market. Those in the business of dealing or advising in securities or derivatives should be registered in one trading or advising category with relevant additional requirements; or, exempted from registration, if appropriate.

Also, consolidated registration that requires dealer/adviser base knowledge of all major investment types would allow for increased proficiency and enable a more comprehensive analysis of investment alternatives. For example, the basic requirements for proficiency for a dealer representative should include a basic knowledge of options and futures rather than require it as a separate qualification. The dealer representative would be more informed about the best strategy for executing the investor's/client's objectives when he/she is familiar with both cash and derivatives markets.

Exemptions from registration may be appropriate based on whether the entity is sophisticated, trading for its own account, and business practices

Q7. Are the Chief Regulator policy decisions that cannot be appealed to the Tribunal but are subject to judicial review appropriate?

Response: The Tribunal will have expertise and efficiencies that may not exist within the general court system. Either the appeal should go to the Tribunal first, or a choice should be given to either party to choose where to appeal.

For example, appeals regarding the designation of benchmarks and benchmark administrators would likely be better addressed as part of the Tribunal appeals process. Benchmarks are an important part of the capital markets infrastructure and are better suited to being dealt with by those with knowledge and experience of how benchmarks are created and used. Requiring a judicial appeal directly for these processes would likely involve an undue cost of time and financial resources for marketplaces and benchmark administrators.

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?

Response: The OSC should have the ability to be consistent with other jurisdictions and determine when it is appropriate to have longer or shorter periods of time. Factors to consider could include complexity and nature of the impact of the changes (who and how).

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

Response: It is not clear why the current practice of using terms and conditions to ensure compliance has not been working. Taking actions through orders may have unintended consequences for reporting and breaches of commercial contracts.

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

Response: No, it is not appropriate because it adds unnecessary burdens which may create barriers for companies which need to raise capital outside of the public markets. Most exemptions from public company requirements take into consideration the nature of the transactions and investors. Since the relationships are closer and access to the issuer is much easier in the private markets, the additional civil liability protection is not necessary. The application of general fraud provisions should be sufficient.

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?

Response: tFOSE believes it is appropriate for crypto assets and related products (e.g., indices) that are investment-like contracts to be classified as securities and/or derivatives under the draft CMA. It is also useful that that the securities regulator can designate what is not a security or derivative. This is true because certainty around regulatory authority is important as new types of assets are being created.

However, it is important that market participants, including those proposing new crypto products, have direct input into their classification as securities/derivatives categories This should include the ability to appeal classification decisions to the Tribunal.

There also needs to be clarity and co-ordination regarding the status and treatment of crypto assets in other jurisdictions globally. Crypto is currently traded in a variety of markets and it will be critical for market participants to understand the CMA approach in Canada and how it compares to other jurisdictions.

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

Response: There are different ways of managing conflicts: structures, disclosure and restrictions. Often the correct way depends upon the specific facts. Allowing regulated entities to determine the best approach subject to oversight through compliance reviews would enable the regulated entity to determine the correct response subject to accountability. Imposing prescriptive requirements may interfere with cheaper and more efficient solutions. For example, imposing additional prescriptive requirements on independent directors may make it harder to find and more expensive to compensate those directors.

Conflicts has been regulated through setting out principle-based requirements and reviewing the results through compliance reviews. We support relying on this approach except for circumstances where the behavior should in all circumstances be prohibited.

Respectfully submitted,

s/James Beattie, President & CEO
tFOSE

s/Randee Pavalow, General Counsel
tFOSE