

Intelligence MEMOS



From: Harvey Naglie
To: Central Bank Observers
Date: December 20, 2021
Re: **HIT PAUSE ON ONTARIO'S PROPOSED CAPITAL MARKETS ACT**

In October, the Ontario Government issued a consultation draft for a revised Capital Markets Act, intended to become Ontario's new securities legislation. This is a rewarmed version of a decade-old proposal, a wasted once-in-a-generation opportunity for intelligent reform, and would not be a good outcome for the following reasons:

It is premature and untimely

Ontario has already altered its approach to securities regulation in recent years, changing both the culture and structure of the Ontario Securities Commission. A focus on regulatory burden reduction, the establishment of a new Office of Economic Growth and Innovation within the Commission, and the recent inclusion of fostering capital formation in the OSC mandate have all been added.

It would be only prudent to let these fundamental changes, with all their new opportunities and challenges for market participants work out.

Prudence also would suggest allowing time to evaluate the implications of the new mandate and structure, and only then consider introducing new securities legislation. Even ignoring prudence, there should be more than the mere 100 days, running over the busy holiday period, that the public has been given to digest and review this 200-page proposal.

It will create disharmony

The primary justification offered for enacting a new Capital Markets Act is that it will facilitate regulatory flexibility. This ignores that, even if the CMA is enacted, the OSC will remain part of the Canadian Securities Administrators umbrella group and will as a result be limited in its ability to regulate either quickly or unilaterally.

It makes more sense to incorporate the proposed changes through amendments to the existing Securities Act. Given that the CMA does not change the basic structure of existing provincial securities legislation, this approach would promote harmonization across the CSA and maintain the OSC's ability to play a leadership role in a more fundamental modernization of securities regulation across all CSA jurisdictions in the future.

It is modernized but not forward looking

The enactment of the CMA at this time would see Ontario jeopardize a once in a generation opportunity to implement a bona fide forward-looking securities act. The CMA is repurposed legislation, initially developed in 2014 to integrate the individual securities legislation of all provinces then participating in the single national regulator initiative.

It was never intended to constitute a fundamental re-imagining of securities legislation designed for the 21st century.

Consequently, the proposed CMA adheres to the classic securities legislation model. It promotes fair and efficient markets primarily by regulating sales practices and it protects investors primarily by requiring full and continuous disclosure.

This legacy regulatory model does not align well with modern day capital market realities. This model is not fundamentally designed to effectively regulate a capital markets environment where fintech and regtech are redefining the boundaries among financial services and products; where the regulatory flashpoint is advice delivery rather than a securities transaction; where salespeople and portfolio management are being supplanted by robo-advisors and artificial intelligence; where advisor compensation and motivation is more fee-based than commission based; where ESG and diversity are redefining the calculation of financial risk and return; and where investors need more and better financial awareness and regulatory safeguards.

The proposed CMA was not purpose built for these new opportunities and challenges and enacting it at this time would represent a lost opportunity.

Instead of introducing new legislation, Ontario should make the necessary amendments to the existing Securities Act and then consider, more strategically, what type of securities legislation will be in the longer-term best interest of the province.

The key strategic decision is whether Ontario will be better served by working more or less collaboratively with other provincial securities regulators. If the choice is more collaboration, the province should join the [Passport](#) securities reform framework, subject to securing a commitment from the other jurisdictions to undertake a wholesale renewal to streamline decision making and update regulations.

If the choice is less collaboration, Ontario should be bold and develop a more integrated legislative framework to regulate all financial services within the province. This legislative approach would allow all provincially regulated financial services and financial products to be treated more consistently by an integrated regulator combining the OSC and Financial Services Regulatory Authority. This approach would allow Ontario to go it alone and enact a 21st century statute appropriate for a jurisdiction that aspires to be a world class financial centre with fair, efficient and competitive capital markets.

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